

POLITICS

Gorsuch Defended Illegal Immigrants in Criticism of Government Agencies

Supreme Court nominee expressed sentiments in cases that contrast with Trump Administration's immigration crackdown



Neil Gorsuch, center, President Donald Trump's nominee for the U.S. Supreme Court, has criticized federal agency power, but some of his best-known cases expressing such concerns have come in defense of illegal immigrants. *PHOTO: JIM WATSON/AGENCE FRANCE-PRESSE/GETTY IMAGES*

By **BRENT KENDALL**

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WASHINGTON—Supreme Court nominee Neil Gorsuch, whose confirmation hearing begins Monday, has been unusually forceful with his concerns that judges allow government agencies too much power to make policy, a red flag for liberals who worry that such views could weaken environmental, labor and health regulations.

But in a twist, especially for a nominee of President Donald Trump, some of Judge Gorsuch's best-known cases criticizing the power of the administrative state have come in defense of illegal immigrants, a sign that his approach could cut in unpredictable ideological directions.

The way a government panel treated one illegal immigrant left such an impression on Judge Gorsuch that he discussed it at length in a speech in April last year.

“Just describing what happened here might be enough to make James Madison's head spin,” the judge said at Case Western Reserve University School of Law. He retold the tale of Mexican immigrant Alfonzo De Niz Robles, who is married to a U.S. citizen, has four U.S. citizen children and spent about a decade trying to obtain permission to stay in the U.S., only to run up against a new policy interpretation from the Board of Immigration Appeals.

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Judge Gorsuch's concerns about agency power stem from a pivotal 33-year-old Supreme Court decision, *Chevron v. Natural Resources Defense Council*. The case established that courts should defer to the judgment of federal agencies when interpreting ambiguous laws.

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The case stemmed from a lawsuit by environmentalists challenging what they saw as industry-

friendly pollution rules from Environmental Protection Agency. The agency at the time was run by Judge Gorsuch's mother, Anne Gorsuch Burford. The EPA won.

The Chevron precedent initially benefitted Republican presidents seeking to lighten regulation, but has since boosted Obama administration efforts to use longtime laws to support new regulations on issues like climate change.

The Obama EPA, for example, cited Chevron in its defense of rules limiting carbon emissions from power plants. And the Federal Communications Commission relied upon the doctrine in defense of its net neutrality rules governing Internet traffic.

To Judge Gorsuch, who sits on the Denver-based 10th Circuit Court of Appeals, Chevron creates problems because it can give agencies room to enact policies better left to Congress, without a robust review by judges.

"Courts are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations," he wrote of the Chevron effect in a second immigration case last year.

In both immigration cases Judge Gorsuch took aim at the Board of Immigration Appeals for what he saw as playing bait-and-switch with illegal immigrants who were trying to navigate seemingly conflicting provisions on seeking U.S. residency.

Some courts had interpreted the conflict in a way that was more favorable to immigrants, letting them seek legal status even if they had previously entered the U.S. illegally and were again in the country without permission.

The BIA effectively overruled the courts, saying such immigrants needed to leave the U.S. for 10 years before being eligible for residency. The BIA then sought to apply that interpretation retroactively.

Judge Gorsuch, joined by two other judges, in both cases barred that effort. In one ruling he explicitly called for reconsideration of the Chevron precedent. And in a questionnaire submitted to the Senate Judiciary Committee, Judge Gorsuch placed the case first on his list of the most significant cases he had presided over.

His views on the issue make him much the opposite of Judge Merrick Garland, President Barack Obama's nominee for the current Supreme Court vacancy who was never considered by the Senate. Judge Garland is considered particularly deferential to agencies under the Chevron standard.

But many conservatives also strongly support Chevron deference, arguing that courts shouldn't readily second-guess the government's political branches, including the executive. Former Justice Antonin Scalia, whose death last year left an open seat on the high court, was a powerful defender of Chevron, even as he saw limits to it.

Judge Gorsuch has taken aim at some agency actions even under the deferential standard. He has said in dissents, for example, that he would have ruled against the National Labor Relations Board's interpretation of a rule on back pay.

Supporters of judicial deference say agencies know their areas of regulation better than judges do, and they are more accountable to the political process because they work for the president. "Chevron is particularly important where agencies have real expertise," as on complicated environmental matters, said Erwin Chemerinsky, dean of the University of California-Irvine School of Law.

Law professor Jonathan Adler, who teaches at Case Western, said people's views about Chevron can evolve depending on who holds the White House. Republicans were big fans when Reagan and Bush regulatory efforts were facing more liberal courts, he said; with Mr. Trump in office, Democrats may find they prefer Judge Gorsuch's approach, which could give the president less leeway to make wholesale changes.

As for Mr. De Niz Robles, he hadn't known of his unlikely appearance in a speech delivered by a man slated for the Supreme Court, said his lawyer, Laura Lichter of Denver.

And while much of the legal world will be paying attention to Judge Gorsuch's confirmation hearings next week, Mr. De Niz Robles will be focused elsewhere: There is a new immigration hearing scheduled next week on his residency bid.

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