SOME PRELIMINARY THOUGHTS

ON DIMA YA

By Gabniel J. Chin *

As much as I support the Dimaya decision, and think that it's a wonderful decision, at one level I doubt that it's going to make much difference.
The reason is, it's a procedural decision, and not a substantive decision.' It's not saying that people like Dimaya can't be deported, it's saying that Dimaya can't be deported under this statute.2 As President Trump's tweet suggests, all Congress has to do is pass another law that covers people like Dimaya and could cover Dimaya himself ' People in that situation could then be deported.
There is already on the books an indication of a possible workaround to Dimaya. We heard that in the Johnson case,4 the vague test at issue in Dimaya was invalidated with regard to a mandatory sentencing provision of the Armed Career Criminal Act.5 Dimaya involved this formulation with regard to the aggravated felony definition, which results in automatic deportation.6 In another Supreme Court case, called Beckles v. United States,7 this exact language was upheld by the Supreme Court, in a five-four decision, as part

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1. Sessionsv. Dimaya, 138 S. Ct. 1204, 1233 (2018).
2. 18 U.S.C. § 16(b) (2012) (defining "crime of violence" as "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.").
3. @realDonaldTrump, TWITTER (Apr. 17,

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of the U.S. sentencing guidelines.8 This definition of violent crime can be used as a discretionary factor in imposing sentence. The Supreme Court basically said "That's okay, because it's discretionary and not mandatory."9 If Congress passed a law saying that anyone convicted of any felony that's punishable by more than one year in

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more extravagant punishments. Today's "civil" penalties
include confiscatory rather than compensatory fines,
forfeiture provisions that allow homes to be taken, remedies
that strip persons of their professional licenses and
livelihoods, and the power to commit persons against their
will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes - and often harsher than punishment for felonies. And not only are "punitive civil sanctions... rapidly expanding," they are "sometimes more severely punitive than the parallel criminal sanctions for the same conduct." Given all of this, any suggestion that criminal
cases warrant a heightened standard of review does more to
persuade me that the criminal standard should be set above
our precedent's current threshold than to suggest that the
civil standard should be buried below it.15
Now, this language could have been written by Justice Brennan or Justice Marshall. I like it very much because I believe that in our law, we should see more serious proportionality review under the Eighth Amendment for so-called civil as well as criminal penalties. 6 I think we should have appointed counsel for serious civil deprivations.17 I think we should have ex post facto restrictions for serious civil deprivations. 8 I think this is true in the immigration context as well as in other important contexts, such as disenfranchisement or loss of public benefits, which are treated as civil. 19
I think it is conceivable that the words of the Gorsuch concurrence mean something different to me than

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set of injustices like a law that might retroactively prohibit an innocent corporation from polluting the air or water when it was legal up until now. "How can you change the law all of a sudden to make something illegal?" Maybe that's the set of problems that he is really concerned about.
But if we take him at his word, he really does seem to be concerned with the rights of ordinary individuals who are caught up in the civil regulatory system. Later in his concurrence, he wrote:
My colleagues suggest that the law before us should be
assessed under the fair notice standard because of the special
gravity of its civil deportation penalty. But, grave as that
penalty may be, I cannot see why we would single it out for
special treatment when (again) so many civil laws today impose so many similarly severe sanctions. Why, for example, would due process require Congress to speak more clearly when it seeks to deport a lawfully resident alien than
when it wishes to subject a citizen to indefinite civil
commitment, strip him of a business license essential to his
family's living, or confiscate his home? I can think of no
good answer.2

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Where might this go? One place to start, is another issue that was addressed by Professor Koh and it was also addressed in the dissenting
opinion of Justice Thomas, where he argued that vagueness isn't a thing. 22
Unconstitutional vagueness is not a cognizable category or concept. Instead, what courts should do when they encounter a law and they don't understand