Punted Immigration Cases Put Gorsuch In Tie-Breaker Role

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Law360, New York (June 26, 2017, 9:15 PM EDT) -- The Supreme Court's unusual decision on Monday to hold over two cases for reargument next term could put Justice Neil Gorsuch in a position to cast the deciding vote for a conservative majority on key immigration issues as the court considers President Donald Trump's controversial travel ban.

Chief Justice John G. Roberts rarely holds over cases for reargument, but his court did so in the matters of Jennings v. Rodriguez and Sessions v. Dimaya. These cases respectively deal with the availability of bond hearings for certain immigrants and whether the definition of a "crime of violence" is unconstitutionally vague under immigration law.

The high court gave no explanation as to why it ordered a new round of oral arguments, but experts offered two possible scenarios. One is that the justices may have been deadlocked along ideological lines in deciding the cases. Both matters were argued before Justice Gorsuch joined the bench in April, which may have left the court's four conservatives and four liberals at loggerheads and in need of a ninth justice to break the tie.

If that was the case, then it's anticipated that Justice Gorsuch, who succeeded the late Justice Antonin Scalia, likely will vote with the conservative wing led by the chief justice.

"The outcome will be whatever their preferred outcome was," said Brendan Beery, a professor at Western Michigan University's Cooley School of Law.

The second scenario is that the court instead chose to hold off on deciding the immigration cases knowing that it would soon have the Trump administration's revised travel ban on its plate. Given how high-profile this case is, the court may have wanted to be at full strength before rendering a decision on a hot-button issue of immigration.

“It’s possible that the vote isn’t 4-4,” said Timothy Johnson, a University of Minnesota political science and law professor who’s extensively studied Supreme Court rearguments. Maybe, he said, “the eight simply didn’t want to make these decisions without the nine.”

Either way, the eventual decisions will have a significant impact on the rights of immigrants facing a federal government action.

At the heart of the Jennings case, a class action, is a question of whether asylum seekers and immigrants who’ve been detained for more than six months are entitled to a bond hearing. Meanwhile, the Dimaya matter presents the court with an opportunity to resolve a circuit split and clarify what sorts of crimes can lead an immigrant, including a lawful permanent resident, to being detained and deported.

Oral arguments showed some split among the justices on these issues. During the Nov. 30 arguments in the Jennings case, the court’s liberal wing raised questions about the due process of holding immigrants without any certainty of a bond hearing. But Chief Justice Roberts raised a different line of questions, namely about why the Supreme Court should be deciding the constitutionality of an issue when the Ninth Circuit, the lower appeals court in the case, sidestepped this very question.

In Dimaya, the inquiry is over whether a “crime of violence” under immigration law — which can trigger deportation and detention of even immigrants who are lawful permanent residents — should be considered void for vagueness.

The case centers around a man from the Philippines whose burglary convictions were later found to be “crimes of violence” by an immigration board. The Ninth Circuit, however, overturned that decision on the grounds that the federal test for what counts as a crime of violence is unconstitutionally vague.

During oral arguments for Dimaya in January, some of the more liberal justices challenged the government to show how the language at issue was different from a clause in a criminal statute that the Supreme Court struck down in the 2015 decision of Johnson v. United States.

But Justice Samuel Alito and others expressed some misgivings with the idea of simply applying the void-for-vagueness doctrine for assessing criminal statutes to inherently civil proceedings as a deportation case.

Beery said Justice Gorsuch’s approach to statutory interpretation would probably incline him to accept the “crime of violence” language at issue.

“His history is to try to discern some concrete meaning in statutory language. He would be inclined to find a way to say it is not unconstitutionally vague,” he said.

Gorsuch's impact on Jennings and Dimaya is this: "The outcome from the perspective of the noncitizen is much less optimistic."

"He doesn't seem willing to go out on a limb to intervene in what the other branches of government have done," she said.

Holding cases for reargument is highly unusual for Chief Justice Roberts. Under him, the court may order reargument in one case per term — or typically none at all, according to Johnson.

Chief Justice Roberts' predecessors, however, were much more likely to want to rehear cases. The court under Chief Justice Fred Vinson, for example, ordered reargruments in about 6.6 percent of its cases, while under Chief Justices Earl Warren and Warren Burger, it sought reargruments for about 2.6 percent of the cases, according to research by Johnson and Valerie Hoekstra of Arizona State University.

Some of the court's most important opinions, the public school desegregation ruling in Brown v. Board of Education and the abortion ruling in Roe v. Wade, were written after rehearings were held.

Brown was first argued in December 1952, but then-Chief Justice Vinson would go on to order a new round of deliberations for the following term. The chief justice, however, died before those could take place, leaving the case to the new Chief Justice Warren, who helped bring about the unanimous decision to strike down school segregation in May 1954.

A similar delay took place in Roe v. Wade. The case originally was argued in December 1971, when the court found itself down to seven justices. It was reargued the following October after the court was back to its full complement of jurists, and the eventual landmark, 7-2 opinion was issued in January 1973.

A more recent example of a high-profile case held over for reargument was Citizens United v. Federal Election Commission. On June 29, 2009, the last day of the term, Chief Justice Roberts ordered a new round of arguments in the controversial political spending case with additional questions for the parties to consider. The court would hear the revised arguments the following September and issue its 5-4 ruling the following January to strike down limits on how much corporations and labor unions can spend on political ads and other campaign communications.

Whatever the court's reason for holding Jennings and Dimaya, the fact that it waited until the end of the terms to announce reargument may be a sign that the chief justice had tried to broker a deal between his colleagues, said Beery.

"If you read the tea leaves, in all likelihood, Chief Justice Roberts was trying to find some type of compromise," he said.

"He would have felt compelled to show the court can function even if there is a vacancy on the court," Beery also said. "But he failed in that effort."