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JUDGE GORSUCH AND *JOHNSON* RESENTENCING (THIS IS NOT A JOKE)

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Jan Crawford has reported that President Donald Trump is strongly considering appointing Judge Neil Gorsuch of the United States Court of Appeals for the Tenth Circuit to the U.S. Supreme Court.[1] I do not know Judge Gorsuch, but I do know his opinion in *Prost v. Anderson*, which is a rather wonky case on a somewhat technical area of federal habeas law.[2] *Prost* provides an interesting insight into Judge Gorsuch's jurisprudence. The case concerns an issue on which the courts of appeals disagree, so it provides a nice glimpse into how Judge Gorsuch might address matters that are reasonably susceptible to different resolution, as many of the Supreme Court's cases are. *Prost* illustrates how Judge Gorsuch will balance competing considerations of fairness and administrability in criminal law. While there is much to like about *Prost*—it is well written, clearly reasoned, and adopts an administrable rule—the opinion also raises some concerns. The opinion overvalues proceduralism relative to substantive rights in a way that will have the effect of eroding litigants' access to courts.

I. THE ISSUE

Prost v. Anderson addressed when section 2255(e) allows a federal prisoner to file a petition for federal habeas corpus under the general habeas corpus statute, section 2241, instead of filing a motion for relief under section 2255.[3] Section 2255 is the congressionally created post-conviction remedy for federal prisoners—that is, how federal prisoners challenge their convictions and sentences after their conviction has become final.[4]

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1. Jonathan H. Adler, *Justice Gorsuch?*, NATIONAL REVIEW (Jan. 22, 2017, 1:20 PM), http://c9.nrostatic.com/bench-memos/444102/justice-gorsuch [https://perma.cc/88A8-67L2].

2. 636 F.3d 578 (10th Cir. 2011).

3. *Prost*, 636 F.3d at 584.

4. 28 U.S.C. § 2255 (2012). Prisoners' convictions become final when the Supreme Court denies their petition for certiorari from their appeal in the court of appeals, or when the time to file their petition for certiorari expires. Greene v. Fisher, 132 S. Ct. 38, 44 (2011).

Why would federal prisoners want to file petitions for habeas corpus under section 2241 rather than file motions under section 2255? The reason is that Congress imposed a litany of draconian conditions on prisoners' ability to challenge their convictions under section 2255.[5] For example, prisoners generally have one year from the time their conviction becomes final to file a motion under section 2255.[6] The restrictions on *successive* motions under section 2255 are especially severe.[7] If a prisoner has already filed one post-conviction motion, she may file another only in two circumstances—one, if newly discovered evidence "establishe[s] by clear and convincing evidence" that the defendant is not "guilty of the offense," and

5. *See generally* 28 U.S.C. § 2255; *id.* § 2244.

6. *Id.* § 2255(f).

7. Prisoners must obtain permission from a panel of the court of appeals that the would-be successive motion satisfies these requirements. 28 U.S.C. § 2244(b)(3)(A)–(B) (2012); *id.* § 2255(h). Section 2255 (like section 2244(b)) requires a prisoner, before filing a second or successive application, to obtain a ruling from a panel of the court of appeals that the conditions have been satisfied. *Id.* § 2255(h). It does not, however, explicitly say that the court of appeals' decision to grant or deny authorization to file a successive motion cannot be appealed by way of a petition for rehearing or for certiorari. *Id.*; *see* RICHARD H. FALLON, JR., ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1360 n.7 (Robert C. Clark et al. eds., 7th ed. 2015). *Contra* § 2244(b)(3)(E). But courts have either held or operated on the understanding that section 2255's prefatory clause incorporates section 2244(b)(3)(E)'s prohibition on petitions for certiorari or rehearing. *See, e.g.*, *In re* Clark, 837 F.3d 1080, 1082 (10th Cir. 2016); *In re* McCall, 826 F.3d 1308, 1311–12 (11th Cir. 2016) (Martin, J., concurring) (quoting 28 U.S.C. § 2244(b)(3)(E)) ("Most troubling, these orders 'shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.' Of course, when we grant an application, the prisoner can file his motion, and it will then be subject to adversarial presentation and the normal appeal process. But when we deny an application, that prisoner gets no further consideration of his sentence."); *In re* Fleur, 824 F.3d 1337, 1344 (11th Cir. 2016) (Martin, J., concurring) (same); Págan-San Miguel v. United States, 736 F.3d 44, 46 n.1 (1st Cir. 2013); *In re* Graham, 714 F.3d 1181, 1183 (10th Cir. 2013) (quoting 28 U.S.C. § 2244(b)(3)(E)) (citing Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012)) (denying authorization based on *Frye* and *Lafler* and stating, "This denial of authorization 'shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.' "); United States v. Wyatt, 672 F.3d 519, 524 (7th Cir. 2012) (citing 28 U.S.C. § 2244(b)(3)(E)) ("Our denial of leave to file a second or successive section 2255 is not appealable and the district courts lack jurisdiction to consider a section 2255 motion by Wyatt. Therefore, Wyatt will get nowhere filing a section 2255 motion or an application under section 2244(b) in the Seventh Circuit."); Paulino v. United States, 352 F.3d 1056, 1058 (6th Cir. 2003); United States v. Villa-Gonzalez, 208 F.3d 1160, 1164 (9th Cir. 2000); Triestman v. United States, 124 F.3d 361, 367 (2d Cir. 1997) ("[W]e now hold that § 2244(b)(3)(D) and § 2244(b)(3)(E) apply to § 2255.").

two, if she raises a claim that that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court."[8]

The latter restriction is especially difficult for prisoners to meet after the Supreme Court's decision in *Tyler v. Cain*.[9] In *Tyler*, the Court held that a rule has been made retroactive only if the Court has held the rule to be retroactive.[10] Thus, a prisoner can establish that a rule has been "made retroactive . . . by the Supreme Court" by showing that "the Supreme Court h[eld] [the rule] . . . to be retroactive"[11]—either by applying that rule to a case on collateral review, or by issuing a series of decisions whose holdings make that rule retroactive.[12] As a result, courts sometimes conclude that, even though a new rule *is* retroactive, a prisoner cannot rely on that rule to bring a successive motion under section 2255 because the Supreme Court has not yet *made* that rule retroactive.[13]

The restrictions on successive section 2255 motions prevent prisoners from being able to challenge convictions and sentences that everyone agrees are unlawful. A prisoner can have a winning claim, but if that claim has not been made retroactive by the Supreme Court, section 2255 does not provide the prisoner with a remedy.[14] For example, in *Johnson v. United States*, the Supreme Court held unconstitutional the Armed Career Criminal Act's (ACCA) residual clause.[15] ACCA subjected defendants who were convicted of being felons in possession of a firearm to a mandatory minimum term of fifteen years' imprisonment.[16] Without ACCA, these defendants were only eligible for up to ten years' imprisonment.[17] *Johnson*, therefore, meant that some defendants were sentenced to fifteen years' imprisonment when the statute under which they were convicted said they could be sentenced to no more than ten years.[18] Before April 2016, the Supreme Court had never applied *Johnson* to a case on collateral review (i.e., to a case that had become

8. 28 U.S.C. § 2244(b)(2). The requirements for federal prisoners are slightly different in that federal prisoners do not need to establish the newly discovered evidence could not have been obtained through diligence. *See* 28 U.S.C. § 2255(h)(1).

9. 533 U.S. 656 (2001).

10. *Tyler*, 533 U.S. at 666.

11. *Id.* at 663–64; Leah M. Litman, *Resentencing in the Shadow of* Johnson v. United States, 28 FED. SENT'G REP. 45, 48–49 (2015).

12. *Id.*

13. *See infra* note 20 (describing courts' treatment of *Johnson v. United States*, 135 S. Ct. 2551 (2015) claims).

14. *Id.*

15. 135 S. Ct. 2551 (2015).

16. *Johnson*, 135 S. Ct. at 2555–56.

17. *Id.* at 2574.

18. Welch v. United States, 136 S. Ct. 1257, 1265 (2016).

final).[19] Some courts, therefore, held that prisoners who had already filed one motion under section 2255 could not file a successive motion under section 2255, even though these prisoners' sentences were *at least* five years longer than they could lawfully be.[20]

Section 2241 does not contain any of the same limitations on challenging a conviction or sentence.[21] Hence, prisoners who are barred from challenging their conviction or sentence under section 2255 because of its restrictions may try to challenge their convictions or sentences under section 2241.[22]

Congress explicitly allowed some prisoners to do just that in section 2255. Section 2255(e) provides:

> An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.[23]

Section 2255(e) thus allows prisoners to challenge their convictions or sentences under section 2241 when the remedy provided by section 2255 is "inadequate or ineffective to test the legality of [their] detention[s]."[24]

What this language means was the question presented in *Prost*.[25] That is, when is section 2255 "inadequate or ineffective," and when can prisoners challenge their convictions or sentences under section 2241 if they cannot do so under section 2255?[26]

That question is *hard*. On the one hand, section 2255(e) cannot mean that every prisoner who is not allowed to challenge her conviction or sentence under section 2255 can do so under section 2241. Otherwise, all of the restrictions on section 2255 would be superfluous. On the other hand, Congress said that there would be some cases in which prisoners precluded from challenging their convictions or sentences under section 2255 could

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19. *See id.* at 1257.

20. *See, e.g.*, *In re* Williams, 806 F.3d 322 (5th Cir. 2015) (holding *Johnson* had not been made retroactive by the Supreme Court); *In re* Gieswein, 802 F.3d 1143 (10th Cir. 2015); *In re* Rivero, 797 F.3d 986 (11th Cir. 2015).

21. *See* 28 U.S.C. § 2241 (2012).

22. *Id.*; *id.* § 2255.

23. *Id.* § 2255(e).

24. *Id.*

25. Prost v. Anderson, 636 F.3d 578 (10th Cir. 2011).

26. 28 U.S.C. § 2255(e).

challenge their convictions or sentences under section 2241.[27] Determining which prisoners can resort to section 2241 is tricky. "Inadequate" and "ineffective" are open-ended terms, and there is no legislative history to suggest what these terms might mean.[28]

Unsurprisingly, the courts of appeals have come up with different interpretations of the scope of section 2255(e). The U.S. Court of Appeals for the Fourth Circuit has held that section 2255(e) allows prisoners to file motions under section 2241 when a subsequent decision has changed the relevant substantive criminal law.[29] That would occur when a court has interpreted the statute under which the defendant was convicted such that the defendant did not actually commit an act that the law made criminal. For example, say a defendant was convicted for "using a firearm," and the court later holds that "using a firearm" means firing it. If the defendant was convicted because he juggled the firearm, he would have been convicted for an act that the law did not actually make criminal. That defendant could not apply for relief under section 2255, because his claim relies on a decision of *statutory* interpretation, rather than a constitutional rule.[30] But the Fourth Circuit would allow him to challenge his conviction under section 2241.[31] The Seventh Circuit similarly allows defendants to challenge their sentences under section 2241 when a subsequent decision of statutory interpretation means that the defendant was wrongfully subject to a higher, mandatory sentence.[32] Prisoners who were wrongfully sentenced under ACCA could challenge their sentences under section 2241 because they would have been sentenced to at least fifteen years when the statute, properly interpreted, sentenced them to at most ten years. And the Fifth and Eleventh Circuits allow defendants to resort to section 2241 under similar circumstances, although they frame the test in somewhat different terms—prisoners can use section 2241 when they rely on a new, substantive claim that was previously foreclosed by circuit precedent.[33] Finally, the Second Circuit has suggested

27. *Id.*

28. *E.g.*, Wofford v. Scott, 177 F.3d 1236, 1241 (11th Cir. 1999) ("[W]e have found nothing in the legislative history explaining why the relevant language was changed or what the new language means."); *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998) ("Again, there is no helpful legislative history.").

29. *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000). The Third Circuit's test resembles this as well. *See In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

30. 28 U.S.C. § 2255 (2012).

31. *In re* Jones, 226 F.3d at 333–34.

32. Brown v. Caraway, 719 F.3d 583 (7th Cir. 2013).

33. *See* Bryant v. Warden, 738 F.3d 1253, 1257 (11th Cir. 2013); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001).

that section 2241 is available when the absence of a section 2255 remedy would raise serious constitutional questions.[34]

II. JUDGE GORSUCH'S TAKE

Judge Gorsuch's opinion in *Prost* rejected all of these approaches.[35] *Prost* held that section 2255(e) allows prisoners to challenge their convictions or sentences under section 2241 only if the prisoner's detention *could not* "have been tested in an initial § 2255 motion."[36] What does this mean? It means that section 2241 is available only when a prisoner literally could not get to court to file an initial section 2255 motion, such as where "the defendant's sentencing court had been abolished" when the prisoner sought to file the initial section 2255 motion.[37] Judge Gorsuch's approach would not allow any of the previously mentioned prisoners to challenge their convictions or sentences under section 2241—prisoners who were convicted of acts the law did not make criminal; prisoners who were sentenced above the statutory maximum for their offense; or prisoners whose convictions or sentences violated some substantive rule of constitutional law.[38] Ooph.

Judge Gorsuch gave several reasons for interpreting section 2255(e) this way. One, the statute's text described the prisoner's "remedy," which Judge Gorsuch thought referred to the process—not substance—of section 2255 proceedings, and included only the "*opportunity* to bring [an] argument," rather than to win it.[39] Two, when Congress enacted section 2255, "it was surely aware that prisoners might seek to pursue second or successive motions based on newly issued statutory interpretation decisions," but

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34. Triestman v. United States, 124 F.3d 361, 380 (2d Cir. 1997).

35. Another of President Trump's potential nominees, Judge William Pryor of the U.S. Court of Appeals for the Eleventh Circuit, has argued for an interpretation of section 2255(e) similar to Judge Gorsuch's. *See* Samak v. Warden, 766 F.3d 1271, 1295 (11th Cir. 2014) (Pryor, J., concurring) (noting that the only other circuit court to consider the ordinary meaning of section 2255 was the Tenth Circuit in the *Prost* case). The Eleventh Circuit is currently considering, en banc, whether to adopt Judge Pryor's interpretation. *See* Memorandum to Counsel or Parties at 1, McCarthan v. Warden, FCC Coleman-Medium, No. 12-14989 (11th Cir. June 6, 2016); Docket, *McCarthan*, No. 12-14989 (11th Cir. Jan. 28, 2017).

36. Prost v. Anderson, 636 F.3d 578, 584, 588 (10th Cir. 2011).

37. *Id.* at 588.

38. *See id.* at 588–94. *Prost* maintained that it was reserving for another day whether section 2255(e) allowed prisoners to resort to section 2241 where necessary to avoid a serious constitutional concern. But the tenor of the opinion, combined with the court's characterizations of the scope of the Suspension Clause, does not suggest the court was inclined to expand the availability of section 2241 much beyond what *Prost* had done. *Id.* at 583 n.4.

39. *Id.* at 584.

Congress did not allow those kinds of claims to be raised in successive motions.[40] Three, several surrounding provisions emphasize "providing a single opportunity to test arguments, rather than any guarantee of relief or results."[41] Four, section 2255 was enacted to allow federal prisoners to challenge their convictions and sentences in the district where they were sentenced, rather than only in the district where they were incarcerated.[42] It was not "adopted to expand or 'impinge upon prisoners' rights of collateral attack upon their convictions,' but only to address the 'difficulties that had arisen in administering' habeas corpus."[43]

I'll start with what I like about the opinion—it's a fun read. I also think Judge Gorsuch is right to think that Congress had to know, in some general sense, that prisoners would try to challenge their convictions by asserting new constitutional rules or new decisions of statutory interpretation in successive motions.[44] And the successive motions that Congress authorized do not include those kinds of claims.[45] So, the argument goes, Congress could not have meant to allow these prisoners to challenge their convictions or sentences via section 2241.[46]

Judge Gorsuch's interpretation of section 2255(e) also avoids "plenty of knotty . . . legal questions about" how to apply the other circuits' more open-ended standards for when prisoners can resort to section 2241.[47] Some circuits permit prisoners to challenge their convictions under section 2241 based on a new decision of statutory interpretation because Congress made no allowance for statutory claims in the provision authorizing successive motions under section 2255.[48] But does that mean Congress "forgot" about statutory claims, or that it did not want to authorize statutory claims at all? That same question comes up in any case where a prisoner is not permitted to file a successive motion under section 2255.[49] Did Congress merely forget about those prisoners, or did Congress intend to foreclose those prisoners' ability to rely on section 2241? Judge Gorsuch's was-there-an-actual-court-to-hear-your-initial-section-2255-claim rule is a lot more administrable than

40. *Id.* at 585.

41. *Id.* at 587.

42. *Id.* at 587–88.

43. *Id.* at 587–88 (quoting United States v. Hayman, 342 U.S. 205, 219 (1952)).

44. *Id.* at 585.

45. *Id.*

46. *Id.* at 586.

47. *Id.* at 596.

48. *See supra* note 29 and accompanying text.

49. *See, e.g.*, Bryant v. Warden, 738 F.3d 1253, 1257 (11th Cir. 2013); Reyes-Requena v. United States, 243 F.3d 893, 904 (5th Cir. 2001).

approaches that differentiate between different kinds of claims, and that is a big mark in its favor.[50]

My concern, however, is that a lot of tests would be administrable. It would be pretty easy to administer an interpretation of section 2255 that said defendants who filed Mondays through Thursdays couldn't resort to section 2241; it would also be pretty easy to administer a test that said no one could. But no one thinks that's what section 2255(e) means, and Judge Gorsuch's opinion does not expend a lot of effort to address some of what (I think) makes interpreting section 2255(e) a harder question than the opinion suggests, or to try and come up with an administrable rule that isn't quite so . . . draconian.

Start with the text: Judge Gorsuch's opinion says that section 2255(e) means a prisoner can resort to section 2241 when the sentencing court literally isn't there to hear a prisoner's initial section 2255 motion.[51] The problem is that section 2255(e) specifies that section 2255 may be inadequate or ineffective even where the sentencing court does hear a prisoner's initial section 2255 motion and rejects it.[52] The provision refers to when "the court which sentenced [the prisoner] . . . denied him relief"—in other words, where the sentencing court actually heard the prisoner's initial section 2255 motion.[53] I'm not sure those words mean his analysis is wrong, but it would have been nice if his opinion acknowledged them.

Judge Gorsuch maintained that section 2255(e)'s reference to the "remedy" referred to the process of challenging the prisoner's conviction, not the outcome of that process.[54] But the Court has used "remedy" to refer to the result a plaintiff obtained by filing suit, not just the process applicable to different kinds of lawsuits.[55] And as a verb, "remedy" means to set something right; as a noun, it can mean the fix for that something (e.g., the result).[56]

I'm also not that convinced by the more purposivist moves that Judge Gorsuch's opinion made, many of which sound in the idea that the relevant

50. Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011).

51. *Id.*

52. 28 U.S.C. § 2255(e) (2012).

53. *Id.*

54. *Prost*, 636 F.3d at 589.

55. *E.g.*, Carlson v. Green, 446 U.S. 14, 20–21 (1980) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy against the United States."); N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971) ("The prohibition is absolute, and it would inescapably operate to obstruct the remedies granted by the District Court in the *Swann* case.").

56. *Remedy*, OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/remedy [https://perma.cc/BMS4-5L48].

statute generally restricts prisoners' ability to file successive motions. He's right that, in light of the restrictions on successive motions, "[f]ederal prisoners seeking to take advantage of new rulings of *constitutional* magnitude that would render their convictions null and void are not always allowed to do so."[57] But so what? That just means they cannot *all* be allowed to challenge their convictions or sentences under section 2241; it does not mean that some of them can't be permitted to. The restrictions on federal courts' review of state criminal convictions are not especially relevant because they embody concerns about federal review of state judgments.[58] And the provision that says the ineffectiveness of post-conviction counsel shall not serve as a ground for relief, section 2254(i), likewise is limited to section 2254, which governs state prisoners, rather than section 2255, which governs federal prisoners.[59] In any case, the Supreme Court has held that the provision bars federal courts from relying on post-conviction counsel's performance as a basis to overturn the prisoner's conviction; it does not bar federal courts from relying on counsel's performance as a bypass to procedural restrictions on post-conviction review, including statutory ones.[60] Prisoners seeking to rely on section 2255(e) are trying to do just that—get around procedural restrictions using post-conviction counsel's performance.

It's also not clear that section 2255's restrictions on successive motions are evidence that section 2255(e) was not intended to provide a safe harbor for prisoners who are barred by the restrictions on successive motions. The restrictions on successive motions, codified at section 2255(h),[61] were enacted several decades after section 2255(e)[62]; they therefore do not say much about the scope of section 2255(e).[63] Even if Congress had in mind certain difficulties with habeas when it enacted section 2255(e), it used much broader language than something that might limit the provision to prisoners who had difficulty "comply[ing] with § 2255's new venue mandate."[64] And there's a decent argument that the savings clause could function as a

57. Prost v. Anderson, 636 F.3d 578, 587 (10th Cir. 2011).

58. 28 U.S.C. § 2254 (2012).

59. *Id.* § 2254(i); *id.* § 2255.

60. Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012) (holding post-conviction counsel's performance may excuse a procedural default); Holland v. Florida, 560 U.S. 631, 650–51 (2010) (holding post-conviction counsel's performance may toll the statute of limitations).

61. *See* 110 Stat. 1220 (1948).

62. *See* Pub. L. No. 104-32, § 105, 62 Stat. 967, 968 (1996).

63. Bilski v. Kappos, 561 U.S. 593, 645 (2010) ("When a later statute is offered as an expression of how the Congress interpreted a statute passed by another Congress a half century before, such interpretation has very little, if any, significance." (quoting Rainwater v. United States, 356 U.S. 590, 593 (1958)) (internal quotation marks and punctuation omitted)).

64. Prost v. Anderson, 636 F.3d 578, 588 (10th Cir. 2011).

backstop in the event that section 2255's restrictions on successive motions are declared invalid.[65]

Prost might just be limited to *Prost*. But, for me, it raises some broader concerns. The statutes governing post-conviction review are notoriously unclear and shoddily drafted, and they accordingly raise a lot of difficult interpretive questions.[66] I'm wary of any approach that gets fed up with these difficulties and relies instead on the intuition that the statutes were intended to restrict, rather than expand, post-conviction review. Even if that general claim is right, it does not follow that every interpretive uncertainty should be resolved *against* habeas petitioners, especially when the consequences are so severe, as they were in *Prost*.

Judge Gorsuch's concern about the limiting principle, or administrability of the other courts of appeals' interpretations of section 2255(e), also rings a bit hollow to me. Many issues that the Supreme Court addresses raise difficult questions about what limiting principle there is to the Court's doctrine—including what rights not specifically enumerated in the text of the Constitution are enforceable in court or what limits there are on Congress's power to regulate interstate commerce. The answer cannot be that all interpretations or doctrines that raise administrability concerns are necessarily suspect. Judge Gorsuch certainly does not believe this. In some of his recent writings, Judge Gorsuch has indicated that he is willing to revisit longstanding doctrines about judicial deference to administrative agencies based on constitutional principles like the separation of powers, which are amorphous and vague, and thus difficult to administer in a principled way.[67] If legal uncertainty is not a reason for judges to hold back in the separation of powers domain, why is it a reason to do so in criminal law, where so much is at stake?

Finally, it's worth noting what claim the petitioner in *Prost* was trying to raise. The petitioner in *Prost* was arguing that his money-laundering conviction was invalid in light of the Supreme Court's decision in *Santos v. United States*, which narrowly interpreted the federal money-laundering statute.[68] The plurality opinion in *Santos* was written by Justice Scalia, the Justice that Judge Gorsuch would replace. Justice Scalia used *Santos* to

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65. *See* Litman, *supra* note 11, at 52–53 (arguing for availability of savings clause where petitioners sentenced above statutory maximum); Leah M. Litman, *Legal Innocence and Federal Habeas* (Jan. 26, 2016) (unpublished manuscript) (on file with author).

66. *See, e.g.*, Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443 (2007).

67. *See* Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

68. *See* Santos v. United States, 553 U.S. 507 (2008).

reaffirm his view that ambiguities in criminal statutes should be resolved in favor the defendant.[69] That rule of interpretation applies only to substantive criminal statutes that define offenses and sentences, not remedial statutes that say when a conviction can be challenged. But *Prost* still makes one wonder about what a Justice Gorsuch would mean for criminal justice at the Supreme Court. Many of the Court's opinions that rule in favor of government officials on criminal justice issues do so by narrowing what remedies are available to raise criminal procedure claims, which is exactly what Judge Gorsuch did in *Prost*. And if the Court continues to chip away at these remedies, the underlying rights will start disappearing too.[70]

69. *Id.* at 514. Another example is *Johnson v. United States*, 135 S. Ct. 2551 (2015), which invalidated a statute as unconstitutionally vague. *Johnson* is one of my favorite decisions. *See, e.g.*, Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55 (2015).

70. *E.g.*, Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219 (2015). It's possible, of course, that this would be a concern with all of President Trump's potential nominees. *See, e.g.*, *supra* note 35. Judge Sykes, however, joined the Seventh Circuit's opinion in *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).