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OP-EDS

TUESDAY, FEBRUARY 21, 2017

Neil Gorsuch might stand up against abuse of power



XINYU LI/STAFF

BY DANIEL FARBER | SPECIAL TO THE DAILY CAL

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On Feb. 1, President Trump nominated Neil Gorsuch to the U.S. Supreme Court. Supreme Court justices serve for life, and Gorsuch is just about to turn 50. He will probably still be on the Supreme Court when this generation of college students sends their own kids off to college.

Normally, a Supreme Court nomination would have been a top story for days. But the nomination was quickly overshadowed by Trump's other actions, leaving many people unclear about the significance of the appointment. An especially pressing question is how Gorsuch might rule on the legality of Trump's actions.

In terms of the importance of the Supreme Court, consider that the Supreme Court decided all of these issues by 5-4 votes: It struck down a crucial part of the Voting Rights Act, opening the door to voter suppression efforts in many places. It upheld the right for corporations to fund election ads. On the other side of the equation, it also held in 5-4 votes that states must recognize same-sex marriages, upheld the constitutionality of most of the Affordable Care Act (Obamacare) and struck down a restrictive Texas abortion law.

The big constitutional decisions matter enormously, but they're only a small fraction of the Supreme Court's work. It also sets limits on law enforcement activities such as searches and interrogation, determines the boundaries between the power of the federal government and the power of states like California, determines whether government agencies like EPA have stayed within the law and interprets federal statutes large and small.

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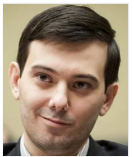
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So much for the importance of the Supreme Court. What do we know about Gorsuch and his qualities as a judge?

In terms of credentials, Gorsuch is impeccable — apart from not having gone to UC Berkeley, that is! He graduated from Columbia University, was a classmate of Obama’s at Harvard Law School, and received a D.Phil. (equivalent to a doctorate) in legal philosophy at the University of Oxford. He held several prestigious judicial clerkships and then was a practicing lawyer in Washington, D.C. for a decade before becoming a lower-court judge. Since 2006, he’s sat on a federal appeals court.

His opinions on the appeals court have impressed many observers for their clarity and legal analysis. Not all of the opinions adopt conventional conservative positions. He has voted to overturn criminal convictions based on illegal searches. He upheld a Colorado renewable energy law against a challenge by companies that generate electricity using fossil fuels. And he dissented when his colleagues threw out a civil rights suit against a police officer who arrested a high school student for being disruptive in class. Taking positions more popular with conservatives, he voted to allow religious employers to deny insurance funding for contraceptives to their employees, rejected a challenge against a state abortion restriction and attacked a doctrine giving agencies like EPA more leeway to interpret the law.

In the next few years, the single most important question about Gorsuch is how he would respond to Trump’s aggressive use of executive orders and his efforts to gut government regulation of business. This then breaks down into two questions: How would Gorsuch interpret the constitutional limits on the president’s powers? And how would he interpret congressional statutes that define the powers of administrative agencies?

We don’t have much specific information at this point about Gorsuch’s view of the president’s constitutional powers. This is something that Democrats should press Gorsuch on during the confirmation process. In terms of how much leeway he would give Trump’s appointees in applying statutes enacted by Congress, we do know that he has criticized the so-called “Chevron doctrine,” which expands the flexibility of government agencies to interpret law. That could translate into a more skeptical attitude toward efforts by Trump appointees like Scott Pruitt to roll back regulations.

There’s also a more fundamental question: Will Gorsuch be willing to stand up for the rule of law and against arbitrary executive orders or agency decisions? In terms of Gorsuch’s general temperament, he seems to care deeply about the importance of following the law, regardless of personal inclinations about the outcomes of cases. That respect for the law and for the role of judges is a good sign. In a conversation with one senator, he called Trump’s attacks on some federal judges demoralizing, which also seems a good sign. But his handlers walked that comment back, muddying his position. That, too, is something that Democrats must press Gorsuch on. I am left hopeful that Gorsuch would stand up to abuses of the law by Trump, but we can’t really be sure of that in advance.

Dan Farber is the Sho Sato professor of law at the UC Berkeley School of Law

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