

# Daily Journal

www.dailyjournal.com

TUESDAY, FEBRUARY 21, 2017

PERSPECTIVE

## Executive power and Neil Gorsuch

By Blaine H. Evanson and William F. Cole

In his first few weeks in office, President Donald J. Trump has issued executive orders on a whole host of issues, including immigration, financial regulation, the environment and health care. Several of these orders have been highly controversial, some have sparked nationwide protests, and one has been enjoined by multiple federal judges.

Enter Judge Neil M. Gorsuch, judge on the 10th U.S. Circuit Court of Appeals, and the president's nominee to fill the late Justice Antonin Scalia's seat on the U.S. Supreme Court. Much has and will be written about Gorsuch's legal philosophy and views across a wide spectrum of issues. But on the important question of presidential power, Gorsuch's opinions from the 10th Circuit evidence a deep respect for the separation of powers and a consequent vigilance for limiting executive overreach.

One strand of decisions in Gorsuch's record relates to the "non-delegation doctrine," which limits Congress' ability to delegate its lawmaking powers to executive branch agencies. Gorsuch recently dissented from the denial of rehearing en banc in a case involving registration requirements for sex offenders under the Sex Offender Registration and Notification Act. *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015). Though the case largely turned on an issue of statutory interpretation, Gorsuch devoted the lion's share of his opinion to a more fundamental, first-order question: whether Congress could constitutionally delegate to the attorney general the discretion to determine whether and to what extent sex offenders convicted before the enactment of the sex offender statute are subject to its registration requirements.

Gorsuch likened this delegation of authority to permitting a "prosecutor ... to define the crimes he gets to enforce," and observed that the framers of the Constitution strictly limited Congress' ability to delegate its lawmaking power to the executive branch by providing in Article I, Section 1 of the Constitution that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." For Gorsuch, the "[d]elegation doctrine teaches that Congress must set both the 'boundaries' of the Executive's discretion and supply an 'intelligible principle' for the exercise of that discretion within those boundaries." And confining the exercise of legislative powers to the Congress was not, in the view of the Constitution's framers, "just a tool of good government or



New York Times News Services

President Donald Trump introduces Judge Neil Gorsuch as his nominee to fill the vacancy on the Supreme Court, in the White House in Washington, Jan. 31, 2017.

necessary to protect the authority of Congress from encroachment by the Executive." Rather, this separation of powers was "essential to the preservation of the people's liberty" because it "thwarts the ability of an individual or group to exercise arbitrary or absolute powers."

Though Gorsuch acknowledged that the Supreme Court has not invalidated a law based on the non-delegation doctrine in many years, he viewed the statute at issue to be "a delegation run riot, a result inimical to the people's liberty and our constitutional design."

A second strand in Gorsuch's decisions from the 10th Circuit is a concern over the executive branch's encroachment on the judiciary's exercise of judicial review. Nowhere has this concern been more clearly articulated than in Gorsuch's recent concurrence to his own majority opinion in *Gutierrez-Brizuela v. Lynch*, where he questioned the constitutionality of *Chevron* deference, the administrative law doctrine requiring judges to defer to "reasonable interpretations" of ambiguous statutes by executive branch agencies.

*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), involved the attorney general's authority under the immigration laws to adjust the immigration status of those who have entered the country illegally. The case turned on whether the court should give retroactive effect to the Justice Department's interpretation of the immigration statute — an interpretation to which the court had previously deferred. Gorsuch declined to give retroactive effect to the attorney general's interpretation in the majority opinion for the court. And he wrote separately to take aim squarely at the doctrine of *Chevron* deference, characterizing it as "no less than a judge-made doctrine for the abdication of the judicial duty."

Gorsuch explained that *Chevron* deference

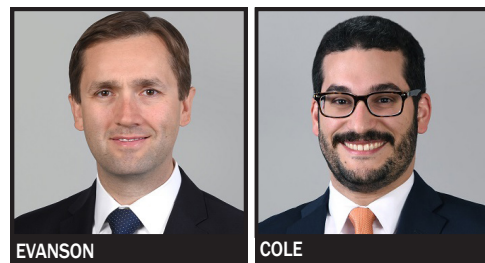
"invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law." The result is that courts "are not fulfilling their duty to interpret the law and declare invalid agency actions inconsistent with those interpretations in the cases and controversies that come before them." And such an investiture of power in the executive branch runs headlong into the Constitution's assignment of the resolution of "cases and controversies" to the judicial branch.

*Chevron* deference ultimately entrusts the protection of individual liberty to "an avowedly politicized administrative agent seeking to pursue whatever policy whim may rule the day" instead of an "independent decisionmaker seeking to declare the law's meaning as fairly as possible." And "[t]ransferring the job of saying what the law is from the judiciary to the executive unsurprisingly invites the very due process (fair notice) and equal protection concerns the framers knew would arise if the political branches intruded on judicial functions." Such a blurring of the executive and judicial functions — "add[ing] prodigious new powers to an already titanic administrative state" — "seems pretty hard to square with the Constitution of the founders' design."

Gorsuch's opinions reveal him to be an assiduous defender of the separation of powers, and a judge particularly concerned with reining in executive branch discretion by confining legislative, executive and judicial power to their constitutionally assigned spheres. For those concerned about the breadth of executive power in the Age of Trump, they may find an ally in the unlikelyst of places: the president's own Supreme Court nominee.

**Blaine H. Evanson** is a partner in the Orange County office of Gibson, Dunn & Crutcher LLP, and practices in the Appellate and Constitutional Law practice group.

**William F. Cole** is a litigation associate in the Los Angeles office of Gibson, Dunn & Crutcher LLP.



EVANSON

COLE