Day 1: Is Justice Gorsuch Asking the Right Questions?

Yesterday, Associate Justice Neil Gorsuch and the Supreme Court heard arguments in three cases. Justice Gorsuch heard his first case only a week after he took the oath to join the court, and to the approval of many conservative observers, Gorsuch proved to be an aggressive questioner, and his questioning did not disappoint as he focused tightly on statutory wording and language.

Gorsuch was "enthusiastic" said Bloomberg's Greg Stohr and Katia Dmitrieva as he questioned Chris Landau, the lawyer representing a dismissed Census Bureau worker. Landau asked the court to let the man's entire suit go forward in a federal district court, rather than waiting for part of the case to be addressed first by a federal appeals court. When Landau said he wasn't asking the court to "break any new ground," Gorsuch gave a pointed response.

"No, just to continue to make it up," Gorsuch said.

Gorsuch's questions suggested he disagreed with previous Supreme Court decisions that had let federal district courts consider lawsuits that claim violations of federal discrimination laws as well as civil service laws.

According to Bloomberg's Stohr and Dmitrieva, his questions drew pushback from Obama appointee Justice Elena Kagan.

"This would be kind of a revolution—I mean, to the extent you can have a revolution in this kind of case," she said, drawing laughter.

If sticking to the plain language of the statute is a "revolution," it is a long-overdue revolution.

The third case the court heard will affect the deadlines for some investor fraud suits, and this case also involved the plain language of a statute.

The California Public Employees' Retirement System argued the deadline for its suit against Lehman Brothers underwriters should be extended because a similar class-action suit had been filed against the same defendants.

According to Storh and Dmitrieva Gorsuch directed all of his questions to the Calpers lawyer, Tom Goldstein. The justice said the "plain language" of the key statute favored the underwriters, suggesting he would vote to bar the Calpers lawsuit.

What is so important about Gorsuch's questioning is that he homed-in on the plain language of the statute, something that is indeed a revolution for today's federal courts.

Conservatives can be somewhat encouraged that, as the lawsuits regarding President Trump's Executive Orders on immigration move through the federal courts, the actual language of the Constitution and the statutes that the president relied upon will likely be the foremost issue in Justice Gorsuch's mind, rather than the feelings of some self-righteous District Court Judge.

However, Justice Gorsuch's fealty to the plain language of the statute as Congress wrote it may also put him at odds with Chief Justice John Roberts.

To validate ObamaCare, the majority, led by Chief Justice John Roberts, first had to uphold the constitutionality of the individual mandate.

The individual mandate, which is the essential component of ObamaCare, requires virtually all Americans to purchase health insurance or pay annual penalties, as Edward White writing for noted. The majority upheld the individual mandate by deciding

it was a tax, not a regulatory penalty. Congress has broad authority under its taxing power.

Prior to the Supreme Court's decision, no federal court to reach the merits had accepted the government's taxing power argument.

The taxing power argument, however, was the government's secondary argument to support the individual mandate. The government's primary argument was that the individual mandate was justified by Congress's power under the Commerce Clause, an argument that a combination of five other Justices had rejected. Thus, said White, since the government's main argument was rejected, the majority had to rely on the government's secondary taxing power argument to uphold ObamaCare.

The reason these other judges rejected the tax argument is because, to accept it, a court would have to rewrite the individual mandate into something different from what Congress had drafted and passed.

In drafting and passing the individual mandate, said White, Congress took the following steps to make it clear that the requirement to pay money to the government for failing to obtain health insurance was a penalty designed to force people into the insurance market, not a tax intended to raise revenue for the government.

Conservatives will recall the outrage that ensued when Justice Roberts rewrote the plain language of the Obamacare statute to find that the Obamacare "not a tax" was indeed a tax, and thus remained the law of the land.

Of course, asking the right questions doesn't mean that Justice Gorsuch will reach the right decisions in these or any future case before the Court. The Chief Justice can be a powerful persuader if he is seeking to build consensus around an outcome he favors, such as upholding Obamacare.

However, conservatives can take encouragement that Justice Gorsuch is starting from the plain language of the Constitution and the statues Congress has passed, not the whims and fantasies of other judges.

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