

Legal Sidebar

Neil Gorsuch's Nomination to the Supreme Court: Initial Observations

02/01/2017

On January 31, 2017, President Trump [nominated](#) Judge Neil Gorsuch of the federal Court of Appeals for the Tenth Circuit (Tenth Circuit) to fill the vacancy on the Supreme Court created by the death of Justice Antonin Scalia in February 2016. As noted in an earlier [Sidebar](#), this vacancy has significant implications for the Court, Congress, and the nation as a whole. Since Justice Scalia's death, an evenly divided Court had issued a number of [summary affirmances](#), upholding, by a vote of four to four, lower court decisions on [immigration law](#), [federalism](#), [freedom of speech](#), and other matters. (Summary affirmances are non-precedential and usually consist of a terse order that does not indicate the Court's voting alignment.) Moreover, even in cases where the Court did issue a ruling on the merits, its eight Members seemed closely divided on several issues where Justice Scalia had previously provided the [decisive vote](#). Thus, Judge Gorsuch would likely have a significant influence on the development of American law if he were to be confirmed.

This Sidebar provides some initial observations on Judge Gorsuch's nomination to the High Court. Future CRS products will discuss Judge Gorsuch's views on various areas of law in greater detail. [Existing CRS products](#) discuss Justice Scalia's jurisprudence and other aspects of the Court vacancy.

Who is Judge Gorsuch?

Nominated to the Tenth Circuit by [President George W. Bush](#), Judge Gorsuch has served on that court, which spans six western states—Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming (along with [those segments of Yellowstone National Park](#) spanning into Idaho and Montana)—since 2006. Unlike some circuit courts, whose dockets tend to feature a number of cases on specific issues due to either jurisdictional statutes or geography (e.g., the D.C. Circuit and administrative law; the Second Circuit and securities law), the Tenth Circuit has a relatively diverse caseload. As a result, Judge Gorsuch has [authored](#) hundreds of opinions exploring issues relevant to Congress's work, including thorny [civil procedure](#) questions, complex [antitrust](#) litigation, the interplay between [federal environmental and Indian law](#), and a host of appeals in federal criminal law cases.

Prior to his appointment to the federal bench, Judge Gorsuch [served](#) as the Principal Deputy to the [Associate Attorney General](#) in the Justice Department. Before that, he had spent a decade in [private practice](#) as an appellate litigator in Washington D.C. Originally from Denver, Colorado, Judge Gorsuch clerked for two Supreme Court Justices during the October 1993 term: newly retired Justice Byron White, a fellow Coloradoan, and Justice Anthony Kennedy, who could become Judge Gorsuch's future colleague on the Court. Prior to his Supreme Court clerkship, Judge Gorsuch served as a law clerk to Judge David B. Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit. As President Trump [noted](#) in his remarks on the nominee, Judge Gorsuch has well-respected academic credentials, with degrees from Columbia University (B.A.), Harvard Law School (J.D.), and the University of Oxford (D.Phil.). Judge Gorsuch pursued his doctoral studies, which focused on the legal and moral issues regarding assisted suicide and euthanasia, after receiving a Marshall Scholarship. He has since written about this subject in a [book](#) and in a number of [scholarly articles](#).

What Would Judge Gorsuch's Appointment to the Court Mean?

Predicting how a nominee to the Supreme Court could affect the Court's jurisprudence is notably difficult. For example,

Felix Frankfurter, who had a reputation as a “progressive” legal scholar prior to his appointment to the Court in 1939, [disappointed](#) some early supporters because he advocated judicial restraint and caution when the Court reviewed laws that restricted civil rights and civil liberties during [World War II](#) and the [early Cold War era](#). Similarly, Harry Blackmun, who had served on the U.S. Court of Appeals for the Eighth Circuit for more than a decade before his appointment to the Supreme Court in 1970, was [considered by](#) President Nixon to be a “strict constructionist” in that he viewed judges’ role as interpreting the law, rather than making new law. However, following his appointment, Justice Blackmun authored the majority opinion recognizing a constitutional right to terminate a pregnancy in [Roe v. Wade](#). He was generally [considered](#) one of the more liberal voices on the Court by the time of his retirement in 1993.

Notwithstanding the difficulty of predicting a nominee’s future votes, commentators often find a judge’s overarching approach or principles regarding the craft of judging to be a useful gauge of how that judge may evaluate particular matters. In his confirmation hearing for his seat on the Tenth Circuit, Judge Gorsuch declined to embrace a particular judicial philosophy when asked about the proper role of a federal judge. Instead, he [stated](#) that he “resist[ed] pigeon holes” and felt that “pigeon-holing” someone as having a specific philosophy was “not terribly helpful” given the “great many” “gray areas in the law.” At the same time, in his writings on and off the court, Judge Gorsuch can be seen to have provided some insights into the principles that guide him as a judge.

One particular theme for the nominee has been judicial restraint, with Judge Gorsuch repeatedly distinguishing between the roles of legislators and judges, with the latter being relatively restricted in Judge Gorsuch’s view. Indeed, [several commentators have](#) likened Judge Gorsuch’s views on the law to those of [Justice Scalia](#), who was a well-known proponent of textualism and originalism in legal interpretation. For example, in a [2005 article](#), the nominee criticized the perceived practice of using the “courtroom as the place to debate social policy,” “on everything from gay marriage to assisted suicide to the use of vouchers for private-school education,” on the grounds that such use undermined democratic institutions and diminished the “neutrality and independence” of judges. Similarly, in an [article](#) last year for a symposium honoring the legacy of Justice Scalia, Judge Gorsuch wrote that, unlike legislators who can “appeal to their own moral convictions and to claims about social utility to reshape the law,” judges should “strive . . . to apply the law as it is focusing backward, not forward, and looking to text, structure, and history to decide what a reasonable reader at the time of the events in question would have understood the law to be.” In this vein, Judge Gorsuch has, at times, espoused a relatively restrained view of constitutional interpreting, including in one [2014 concurring opinion](#) contending that the Constitution is not “some inkblot on which litigants may project their hopes and dreams . . . but a carefully drafted text judges are charged with applying according to its original public meaning.”

Beyond general approaches to judging, other similarities may be noted between Justice Scalia and the nominee with regard to particular areas of law. For example, Judge Gorsuch has authored several opinions regarding **religious freedom**, including [Hobby Lobby v. Sebelius](#). In this case, Judge Gorsuch voted with the majority in holding that the Religious Freedom Restoration Act invalidated regulations requiring closely held corporations to provide their employees with no-cost access to contraception. He separately wrote a [concurring opinion](#) in support of this view. On appeal to the Supreme Court, the Tenth Circuit’s ruling was [affirmed](#) by a five-Member majority, which included Justice Scalia. In the area of **criminal law**, Judge Gorsuch, [like](#) Justice Scalia, has at times interpreted constitutional protections for criminal defendants in a manner that departs from the government’s position and could be seen as at odds with characterizations of a traditional “law and order” conservative judicial philosophy. For instance, in [United States v. Carloss](#), Judge Gorsuch, in dissent, endorsed and expanded upon the views set forth in a 2013 [opinion](#) by Justice Scalia which held that the Fourth Amendment requires police to obtain a warrant before using a drug-sniffing dog on a home owner’s porch. Specifically, Judge Gorsuch’s dissent argued that the police could not enter the area around a home to knock on the door when several “No Trespassing” signs had been posted in the vicinity. In so doing, he rejected the government’s position on the grounds that it would confer an unfettered right to “knock and talk” even if there was a “medieval-style moat” or “razor wire and battlements and mantraps” surrounding the property.

Nonetheless, at least in one area of considerable congressional interest, Judge Gorsuch’s views on the law could be seen to be quite distinct from those of Justice Scalia: **administrative law**. For much of his career on the bench, Justice Scalia was a [proponent](#) of Chevron deference, the doctrine that when statutory language is ambiguous or silent on an issue, federal courts should defer to an agency’s reasonable interpretation of a statute it administers. He [argued](#) that the doctrine operated as a clear, bright-line rule against which Congress could legislate. In contrast, Judge Gorsuch, in a [concurring opinion](#) in *Gutierrez-Brizuela v. Lynch*, argued that *Chevron* and its progeny allow “executive bureaucracies

to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." In so writing, Judge Gorsuch suggested that the Supreme Court should reconsider *Chevron*, an action which, if taken by the Court, could upend decades of administrative law and potentially alter the role of Congress in drafting laws for implementation by administrative agencies.

Potential CRS Assistance Regarding the Nominee

CRS is in the process of preparing a report analyzing Judge Gorsuch's jurisprudence on particular areas of the law, as well as tabular listing of lower court decisions in which he authored opinions, similar to reports CRS has produced on other recent nominees. CRS personnel can also provide briefings and author confidential memoranda on specific legal issues related to the nomination of Judge Gorsuch upon request. The [author](#) of this Sidebar can be contacted directly to facilitate any request.

Posted at 02/01/2017 12:43 PM