The Heritage Foundation

HOW NEIL GORSUCH CARRIES ON SCALIA'S LEGACY

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When Donald Trump asked me if The Heritage Foundation would give him advice on potential Supreme Court justices to fill the seat of the late Antonin Scalia, I pointed him to our published list of potential nominees complied by our best legal and constitutional scholars. You see, this is a once-in-a-generation opportunity—a chance to restore the original intent and meaning of the Constitution. For years the liberals have attempted to turn the high court into an activist court. They would have succeeded if it weren't for a concerted effort by conservatives to block a liberal nominee and put forward a conservative alternative.

That's why we were pleased when President Trump selected Neil Gorsuch as his Supreme Court nominee. Judge Gorsuch is an "originalist" in the mold of Antonin Scalia, and is dedicated to applying the law as written in the Constitution.

In this free eBook, you see how Judge Gorsuch carries on Justice Scalia's legacy; you'll get the scoop on three key cases he could rule on if confirmed; and you'll find out how he can restore the balance of power our Founders intended.

Thanks to your support for The Heritage Foundation, we will continue to advance your conservative principles, just as we have done for more than 40 years.

Jim DeMint
President
The Heritage Foundation

One Way Neil Gorsuch Will Carry Scalia's Legacy on the Supreme Court

President Donald Trump's pick for the Supreme Court—Neil M. Gorsuch—is a terrific choice to succeed the late Justice Antonin Scalia.

Heritage Foundation legal scholars and others have noted a number of similarities between the two great judges, and one of them is their sensitivity to issues of overcriminalization.

If confirmed to the bench, Gorsuch would carry on Scalia's legacy of respect for the rule of law and his keen awareness of how federal criminal law has been misused to punish Americans for minor mistakes that don't warrant federal prosecution.

Here is some direct evidence.

Undersized Fish, Oversized Federal Criminal Code

Most fishermen can spin a yarn, but in 2007, Florida fisherman John Yates probably never imagined that tossing undersized fish overboard to avoid a citation would bring him before the United States Supreme Court.

Much less, he never expected he would be fighting a maximum 20-year federal prison sentence for allegedly violating the Sarbanes-Oxley Act.

Congress enacted that statute after the Enron fiasco to prevent auditors from destroying corporate records that may contain evidence of crime, thereby obstructing federal investigations.

At oral argument, Scalia balked at the absurdity of Yates' predicament. He made clear that twisting fairly trivial misconduct already banned by state law into a major federal felony offense is unwise, to say the least.

"This captain is throwing a fish overboard," said Scalia. "He could have gotten 20 years … What kind of a mad prosecutor would try to send this guy up for 20 years?"

Scalia said that he would be cautious about "how much coverage I give to severe statutes" if prosecutors could stretch them beyond their breaking point.

Justice Elena Kagan wrote in her dissenting opinion that Yates' case spotlights "overcriminalization and excessive punishment in the U. S. Code," resulting from an excess of "bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion."

Kagan called the situation "not an outlier, but an emblem of a deeper pathology in the federal criminal code."

Gorsuch and Scalia in Lockstep

In one of Scalia's many pithy dissents—this one in Sykes v. United States (2011), ruling that Indiana's felony vehicle flight offense counts toward the Armed Career Criminal Act's sentencing scheme—he directly addressed the legislature's role in overcriminalization:

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt.

Gorsuch matches not only Scalia's respect for the principle that judges are not empowered to rewrite or repeal law as they see fit, but also Scalia's aversion to ramping relatively minor state offenses into major federal prosecutions, or otherwise turning innocent conduct into a crime.

And Gorsuch matches Scalia's wit, too, especially when it comes to issues of overcriminalization.

In a 2013 lecture titled "Law's Irony," published in the Harvard Journal of Law and Public Policy, Gorsuch wrote that today's criminal justice system "bears its share of ironies."

He noted that "today we have about 5,000 federal criminal statutes on the books, most of them added in the last few decades, and the spigot keeps pouring, with literally hundreds of new statutory crimes inked every single year."

And that does not "begin to count the thousands of additional regulatory crimes buried in the federal register," said Gorsuch. "There are so many crimes cowled in the numbing fine print of those pages that scholars have given up counting and are now debating their number."

He cited a few examples:

- While then-Sen. Joe Biden, D-Del., "worried that we have assumed a tendency to federalize 'everything that walks, talks, and moves,'" Gorsuch noted that "we should say 'hoots' too, because it's now a federal crime to misuse the likeness of Woodsy the Owl … "
- "Businessmen who import lobster tails in plastic bags rather than cardboard boxes can be brought up on charges."
- "Mattress sellers who remove that little tag? Yes, they're probably federal criminals too."

Gorsuch summed up the problem: "Whether because of public choice problems or otherwise there appears to be a ratchet, relentlessly clicking away, always in the direction of more, never fewer, federal criminal laws."

He asks, "What happens to individual freedom and equality when the criminal law comes to cover so many facets of daily life that prosecutors can almost choose their targets with impunity?"

Warnings From History

Digging into America's common law history, Gorsuch explained that the "excesses of executive authority invited by too few written laws led to the rebellion against King John and the sealing of the Magna Carta, one of the great advances in the rule of law."

Looking further into the history of criminal law, Gorsuch noted how "history bears warning that too much—and too much inaccessible—law can lead to executive excess as well. [The Roman emperor] Caligula sought to protect his authority by publishing the law in a hand so small and posted so high that no one could really be sure what was and wasn't forbidden."

The American framers were well aware of this history.

"[James] Madison warned that when laws become just a paper blizzard citizens are left unable to know 'what the law is' and to conform their conduct to it"—and Gorsuch warns today that either "too much or too little can impair liberty."

Scalia's forceful dissent in Sykes v. United States provides some insight into how today's bloated federal criminal code imperils liberty. Heritage legal scholars and many others have written extensively on the pitfalls, perils, and paths away from overcriminalization.

But as Gorsuch continues in his lecture, "The fact is, the law can be a messy, human business."

Like Scalia, however, Gorsuch would look to "careful application of the law's existing premises," rather than his view on what the law should be, to resolve contemporary social problems.

For that and many other reasons, Gorsuch and Scalia are of like minds.

Both demonstrated respect for the constitutional right to life and the death penalty as punishment for a capital offense, for example. Both are devoted textualists whose opinions reject legislating from the bench.

And Gorsuch would continue Scalia's legacy on many issues of criminal law—including a sharp, conservative skepticism of the federal government's ever-increasing expansion of criminal liability.

Neil Gorsuch Could Rule on These 3 Big Cases If He Joins Supreme Court Soon

President Donald Trump's nominee for the Supreme Court could have a say in rulings on religious freedom, transgender bathrooms in schools, and private property rights, if he is confirmed before April 16.

Judge Neil Gorsuch of the U.S. 10th Circuit Court of Appeals met with Senate Majority Leader Mitch McConnell, R-Ky., and other senators Wednesday at the Capitol less than 24 hours after Trump announced his nomination.

Senate Minority Leader Charles Schumer, D-N.Y., however, has vowed to filibuster the nomination.

"It's doable to get a swift confirmation. The average Supreme Court confirmation comes in 67 days. Justice [Ruth Bader] Ginsburg was confirmed in 50 days," Carrie Severino, chief counsel for the Judicial Crisis Network, told The Daily Signal. "Obviously, Democrats want to drag their heels."

Senate Judiciary Chairman Chuck Grassley, R-Iowa, told CNN he is planning to have confirmation hearings in six weeks for Gorsuch.
Authorities on the Supreme Court say the likely big-ticket items for the spring will be three cases.

One is regarding whether a Christian school in Missouri is entitled to compete for the same state dollars as nonreligious schools. The outcome could affect so-called Blaine amendments in states across the country.

The second case involves property rights in Wisconsin. The third is a transgender bathroom case out of a Virginia high school, and how broadly the federal government may interpret Title IX, a federal law that bars sexual discrimination in education.

Some Senate Democrats, such as Jeff Merkley of Oregon, have said the Supreme Court seat was "stolen" because Senate Republicans refused to hold a hearing on President Barack Obama's nomination of Merrick Garland to fill the seat of Justice Antonin Scalia.

But that's because McConnell and other GOP leaders wanted to allow the electorate to decide in the presidential election, Severino said. McConnell almost certainly would have made sure the Senate Judiciary Committee held a hearing on Hillary Clinton's nominee had the Democratic candidate been elected, she said.

"The Garland nomination was in the middle of an election," Severino said. "This is not an election year. We are more than three years away from an election."

On Wednesday, Trump told reporters he supported killing a Senate filibuster if necessary by using the so-called nuclear option—a rules change in which 51 rather than 60 votes are needed to bring a nomination to the floor.

"If we end up with that gridlock, I would say, 'If you can, Mitch, go nuclear,'" Trump said of McConnell. "Because that would be an absolute shame if a man of this quality was put up to that neglect. I would say it's up to Mitch, but I would say, 'Go for it.'"

Senate Rule XIX, the two-speech rule, empowers the majority to overcome a filibuster and confirm a nominee. This would require the Senate to remain in the same legislative day until filibustering senators exhaust their ability to speak about

the nominee, which would be after they give two floor speeches. Then, the Senate could proceed to vote.

One survey found that the public seems to favor quick action.

A Marist poll released Wednesday, sponsored by the Knights of Columbus, found that 56 percent agreed it should be an "immediate priority" to appoint a Supreme Court justice who will interpret the Constitution as it was originally written, while another 24 percent agreed it is an "important" priority.

Conservatives are hoping Gorsuch will be seated on the court by April 16, when its last session of arguments takes place for the current term, said John Malcolm, director of the Meese Center for Legal and Judicial Studies at The Heritage Foundation. If not, some of the most controversial cases could be reheard, he said.

"It is not the end of the world if he isn't confirmed by that time, because the court can hold over cases for reargument in the next term if it believes the case needs a full nine justices to decide," Malcolm told The Daily Signal.

Here's a look at the three key cases likely to be argued:

1. Trinity Lutheran Church of Columbia v. Pauley
The case involves whether states can withhold state grants based entirely on the recipient's being a religious institution.

Missouri's Blaine Amendment, on the books since 1875, outlaws the use of public funds to aid a church. Today, Missouri has a program that offers grants to nonprofit organizations to install rubber surfaces made from recycled tires to replace gravel as a way to make playgrounds safer.

However, the state denied Trinity Lutheran Church's application for the resurfacing even though it ranked ranked fifth out of 45 applications in meeting the government's criteria.

The case began in 2013. Trinity contends the grant wouldn't violate the Constitution's Establishment Clause. It argues that singling out a church for exclusion from the program violates the right to free expression of religion as well as the Equal Protection Clause.

2. Murr v. Wisconsin

In this property rights case involving the Takings Clause of the Constitution, four siblings in the Murr family owned two adjacent waterfront properties St. Croix, Wisconsin. One property included a cabin built by their parents.

In 2004, zoning regulations prevented the siblings from developing the second lot because the state declared both properties to be one lot.

The family contends the state effectively took the second property by regulating it to the point of having no value without providing just compensation.

3. Grimm v. Gloucester County School Board

This case out of Virginia involves the Obama administration order requiring public schools to allow transgender students to use the restroom that corresponds to their gender identity.

Gavin Grimm, 17, a transgender student who was born female, wanted to use the boys' restroom at a Gloucester County public high school. Grimm said school policy violated Title IX, the section of the federal code prohibiting discrimination on the basis of sex in any federally funded education program.

A District Court sided with the school system, but the 4th Circuit Court of Appeals ruled for Grimm.

Obama's Department of Education issued a directive suggesting noncomplying schools would lose federal money if they didn't allow transgender restroom choice. Texas and a dozen other states challenged the order.

The Supreme Court is expected to determine whether the department can make the final determination in broadly interpreting Title IX.

How Neil Gorsuch Could Help Courts Take Power From 'Unelected Bureaucrats'

The writings of Judge Neil Gorsuch, President Donald Trump's nominee for the Supreme Court, make clear his skepticism about government regulation and executive power.

If confirmed as a member of the Supreme Court, Gorsuch could push to limit or overturn a 33-year-old legal doctrine, known as Chevron, which says the courts should defer to executive branch agencies' interpretations of ambiguous laws passed by Congress.

Last year, Gorsuch explicitly questioned the wisdom of the Chevron doctrine, arguing that judges should decide the meaning of the law, not federal bureaucrats.

In a 22-page concurring opinion he issued in a case before the 10th Circuit Court of Appeals called Gutierrez-Brizuela v. Lynch, Gorsuch wrote:

The fact is Chevron … permit[s] 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.

He added, "[m]aybe the time has come to face the behemoth."

Gorsuch's stance on Chevron will please conservatives who argue the Obama administration relied on this precedent aggressively.

But conservative legal experts and thinkers, including the late Justice Antonin Scalia, had embraced the doctrine when the U.S. Supreme Court adopted it in a 1984 case, Chevron U.S.A., Inc. vs. Natural Resources Defense Council.

As a result of the Supreme Court's ruling, an agency such as the Department of Health and Human Services or the Environmental Protection Agency is able to

implement policy passed by Congress how it wants when there is doubt about what lawmakers meant to enact, as long as the agency's reading is "reasonable."

In the case, the Supreme Court ruled that President Ronald Reagan's Environmental Protection Agency could interpret the Clean Air Act in a way that allowed the Chevron oil company to emit more pollutants.

Indeed, Chevron has enjoyed bipartisan support in the past from those who believe it limits the power of activist judges and gives more authority to experts in their fields working for administrative agencies.

Yet today's debate about executive power has shifted, with both parties questioning the proper use of executive power.

"This is not a Republican or Democrat issue," said John Malcolm, director of The Heritage Foundation's Meese Center for Legal and Judicial Studies, in an interview with The Daily Signal. "There are people on the left who criticize conservative agencies run amok and the opposite is true. If you are not a fan of wide-ranging administrative discretion, then Gorsuch's views are music to your ears."

Rep. John Ratcliffe, R-Texas, feels exactly this way.

Ratcliffe is one of the authors of the legislation, which passed the House last month, that directs courts, not agencies, to interpret all questions of law, including both statutes and regulations. The House sent the legislation to the Senate for it to review.

"It's obvious from reading Judge Gorsuch's opinions that we have a shared belief in the importance of separation of powers, and he has an expressed objection to the explosion of the administrative bureaucracy," Ratcliffe told The Daily Signal in an interview. "That is music to my ears."

Ratcliffe says he feels this way despite the fact that weakening or overturning Chevron would take authority away from a Republican president.

"The president will change," Ratcliffe said. "It would be short-sighted and foolhardy for us as conservatives to be a cheerleader of Chevron just because a Republican occupies Pennsylvania Avenue. We will rue the day if the shoe is on the other foot again and Democrats are in power. What the American people should want and all members of Congress should want is Congress reasserting its authority and a judicial branch playing the role of interpreting laws rather than faceless unelected bureaucrats doing that."

Ratcliffe says he expects Gorsuch to take an independent view of the subject, even if that means the judiciary branch becomes an obstacle for Trump to enact his agenda. He even encourages Senate Democrats to embrace Gorsuch's views on executive power as a way to hold the Trump administration accountable.

"If you are afraid of an overreaching President Trump acting by executive order, ending Chevron deference is exactly the tool you want to restore your Article I legislative power to be that check and balance that our Founders intended and served us all well to 1984," Ratcliffe said.

Dan Goldberg, the legal director at Alliance for Justice, a progressive judicial advocacy group, is telling Senate Democrats not to bite.

In an interview with The Daily Signal, Goldberg said Democrats should not support Gorsuch because of his views on Chevron, even if overturning the doctrine might benefit progressives in the short term.

"This is not a question of who the president is right now," Goldberg said. "It's a question of who Neil Gorsuch is. What he wants to do is make it much more difficult for agencies to enforce laws that ensure food and water safety, protect worker rights, and safeguard consumers and investors. Not requiring courts to defer to agency expertise will make it harder for future federal agencies to address these matters."

Jeffrey Pojanowski, an administrative law expert at Notre Dame Law School, said the Chevron doctrine is likely to survive for now.

The professor, in an interview with The Daily Signal, said Gorsuch's appointment to the Supreme Court could make justices more likely to at least act to weaken Chevron. If that were to happen, the judges could perhaps modify the standard of deference to raise the bar on how persuasive the agency has to be in making the case for why its interpretation of a law or rule is appropriate.

"There is no coalition to overrule Chevron," Pojanowski said. "I don't see anything from their opinions that enough judges would want to outright junk it, although they may be interested in domesticating it or taming it. At the very least, Gorsuch would give more opportunity to dial it back where the justices find it to be inappropriate."