

3 Gorsuch Opinions You Need To Read Right Now

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Law360, Boston (January 31, 2017, 9:36 PM EST) -- Tenth Circuit Judge Neil Gorsuch was nominated Tuesday by President Donald Trump to succeed Justice Antonin Scalia on the [U.S. Supreme Court](#). With more than 10 years on a federal appeals court, the Tenth Circuit judge has written hundreds of opinions that can be mined for hints as to what kind of Supreme Court justice he would be.

Trump described Judge Gorsuch [on Tuesday night](#) as one of the finest and most brilliant judges in the country, with stellar academic credentials.

"I have selected an individual whose qualities define what we're looking for. Judge Gorsuch has outstanding legal skills, tremendous discipline and bipartisan support," Trump said.

The 49-year-old Tenth Circuit judge, a former clerk to Justice Byron White and Justice Anthony Kennedy, is viewed as a solid conservative jurist [much in the mold of Justice Scalia](#), with a much-lauded ability to craft opinions that are both clear and engaging.

"If you look at his jurisprudence, it is very much like Justice Scalia's. Originalist, textualist, focused on limited powers of the judiciary," said Jonathan Meyer, partner at [Sheppard Mullin Richter & Hampton LLP](#), who worked on Supreme Court nominations at the Senate Judiciary Committee and the [U.S. Department of Justice](#). "The way that he is not like Scalia, though, is in his personality and in his writing. He is much less acerbic, much more deferential and less belligerent in his writings, all things that I think will serve him well in a confirmation hearing."

There's no doubt that Judge Gorsuch has a deep affinity for Justice Scalia and his work. In a lecture at Case Western University shortly after Justice Scalia's death, Judge Gorsuch described the late justice as a "lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles."

Judge Gorsuch has also proven his conservative bona fides in Tenth Circuit rulings that he either authored or joined covering the exercise of religion and the death penalty. Those opinions are likely to be the core of what will be contentious confirmation hearings, and Judge Gorsuch will also be pressed to discuss his views on other controversial issues at the center of the political divide, including abortion.

A look at some significant rulings Judge Gorsuch authored in business law cases — including a concurrence in the politically divisive decision in [Hobby Lobby v. Sebelius](#) — provides additional insight into how he might view, and vote, on some of the biggest cases that end up on the high court's docket.

Here are three opinions authored by Judge Gorsuch to read now.

Hobby Lobby Stores v. Sebelius

Judge Gorsuch penned a sharp concurrence to the Tenth Circuit's 2013 en banc decision in [Hobby Lobby v. Sebelius](#), which backed the craft store chain's arguments that its Christian beliefs would be violated by the Affordable Care Act's contraception mandate.

His concurrence stressed that courts must listen to a litigant's own views of the requirements of their faith — in this case, Hobby Lobby's owners, the Green family — and suggested that courts have no business questioning “the correctness or the consistency” of a particular religious faith. Courts should instead be in the business of protecting religious exercise, he wrote.

“No doubt, the Greens' religious convictions are contestable. Some may even find the Greens' beliefs offensive. But no one disputes that they are sincerely held religious beliefs,” Judge Gorsuch wrote. “And to know this much is to know the terms of the Religious Freedom Restoration Act apply. The Act doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance.”

The Supreme Court largely upheld the Tenth Circuit ruling and Judge Gorsuch's views when it reviewed the case in a controversial [2014 ruling authored by Justice Alito](#), finding that closely held for-profit corporations are entitled to religious freedom protections. Justice Alito's opinion also said that courts must only determine whether the faith at issue is “an honest conviction,” not whether it is a valid one, with language that echoed Judge Gorsuch's concurrence, suggesting that he and Justice Alito would be on the same side in similar cases involving religious liberty claims.

The Greens “sincerely believe that providing the insurance coverage demanded by the [\[Department of Health and Human Services\]](#) regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial,” Justice Alito wrote.

Legal battles over the free exercise of religion are likely to continue to entangle the Supreme Court and sharply divide the country, making the concurring opinion Judge Gorsuch crafted a likely key focus in confirmation hearings, according to Mark Kende, professor and director of the Constitutional Law Center at Drake University Law School.

“I think that's one of the big issues going into the next 10 or 15 years,” Kende said. “That opinion will certainly give senators some ammunition.”

Gutierrez-Brizuela v. Lynch

In Gutierrez-Brizuela v. Lynch, Judge Gorsuch seized an opportunity in an immigration case to launch a sharp attack on a core part of administrative law, suggesting that the longstanding judicial habit of giving deference to an agency's own legal interpretation of a statute should be

done away with entirely. So-called [Chevron](#) deference stems from a 1984 Supreme Court opinion in *Chevron v. Natural Resources Defense Council* that says courts should defer to an agency's own views of a potentially ambiguous law.

Judge Gorsuch wrote the opinion on behalf of the panel in the Tenth Circuit case, dispensing with a thorny immigration question by writing that brand new agency interpretations of a statute that conflict with a prior court ruling can't be wielded by the agency until a court has the opportunity to review the revised interpretation.

But in an additional 22-page concurrence he also authored in the case, Judge Gorsuch tackled Chevron deference head-on, saying it was the "elephant in the room" in the immigration case before the Tenth Circuit and that the habit of deferring to an agency's own legal interpretations allows "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."

"Maybe the time has come to face the behemoth," he added, suggesting a radical shift to a longstanding precedent that puts him certainly at odds with the views of Justice Antonin Scalia, who was in general fairly hands-off when it came to reviewing an agency's own interpretations of an ambiguous statute.

"We managed to live with the administrative state before Chevron. We could do it again," Judge Gorsuch wrote. "Put simply, it seems to me that in a world without Chevron very little would change — except perhaps the most important things."

Judge Gorsuch's paired writings in *Gutierrez-Brizuela v. Lynch* suggest at least one area where he would come to significantly different conclusions than Justice Scalia would have.

"Chevron deference has been broadly accepted for a long time," Meyer said. "People complain about the regulatory state but not necessarily the law that defers to agencies. But that may be coming in the future and Gorsuch may be in the vanguard of that movement."

There could certainly be some appetite for re-examining Chevron, particularly if Judge Gorsuch is on the court and the right case comes along, said Donald Falk, partner at [Mayer Brown LLP](#) and a member of the firm's Supreme Court and appellate practice.

"I don't know how much support there would be at this point for jettisoning the entire framework," Falk said. "But taking a hard look at the doctrine and re-examining the appropriate degree of deference — I think it could be a live issue."

Dudnikov v. Chalk & Vermilion Fine Arts Inc.

In one of Judge Gorsuch's most frequently cited cases, according to data compiled by Ravel Law, the Tenth Circuit dove into the intersection of personal jurisdiction and the internet in a complex copyright case over items sold on [eBay Inc.](#)

The 2008 case, which has been cited nearly 400 times, according to Ravel Law, involved two eBay “power sellers” who market a variety of fabrics from their home in Colorado on the company's site. They attempted to sell two printed fabrics that appeared to be a variation on famous images by artist Erté but substituted Betty Boop and her dog Pudgy in for Erté’s images of elegant women walking dogs.

The owners to the rights of the Erté images, and their U.S. agent Chalk & Vermilion Fine Arts Inc., saw the power sellers’ products and contacted eBay claiming that the fabrics infringed their copyrights and convinced the online auctioneer to suspend the auction. Chalk & Vermilion also threatened the eBay sellers with a copyright suit, but the husband-and-wife team responded by filing their own suit in Colorado federal court asking for a ruling that their printed fabrics do not infringe.

Chalk & Vermilion successfully argued that the Colorado court lacked personal jurisdiction over them and had the case dismissed. But when the sellers appealed, the Tenth Circuit disagreed, finding that Chalk & Vermilion had sent a notice of claimed infringement to eBay specifically intending to cancel an auction in Colorado, making the state an acceptable venue for the case.

Judge Gorsuch wielded a sports analogy to make his own mark in this modern question of personal jurisdiction, rejecting Chalk & Vermilion's argument that Colorado could not have jurisdiction over the case since the company sent its notice of claimed infringement to eBay in California rather than directly to the plaintiffs in Colorado.

“It is something like a bank shot in basketball,” Judge Gorsuch wrote. “A player who shoots the ball off of the backboard intends to hit the backboard, but he does so in the service of his further intention of putting the ball into the basket. Here, defendants intended to send the [notice] to eBay in California, but they did so with the ultimate purpose of cancelling plaintiffs' auction in Colorado ... in much the same way that a basketball player's express aim in shooting off of the backboard is not simply to hit the backboard but to make a basket.”

This Tenth Circuit case may not spark the same type of controversy that some of Judge Gorsuch's other rulings do, but its playful style and high citation rate reflects the judge's ability to craft a ruling that is influential, engaging and attractive to fellow judges, a quality that could prove useful on the Supreme Court.

“Gorsuch is much admired for his writing, including by judges who don’t agree with his jurisprudence. He’s a very smart thought leader,” Meyer said.

--Editing by Christine Chun and Kelly Duncan.