



Supreme Court Nominee Neil Gorsuch: *Expected by Big Business to be Another Reliable Vote on the Roberts Court*

By Judith E. Schaeffer

Acclaim for Gorsuch from Business Interests

When President Trump announced his nomination of Judge Neil Gorsuch to the Supreme Court on January 31, members of the business community could hardly have been more enthusiastic. A [“fantastic nomination,”](#) said Thomas J. Collamore, Senior Vice President of the U.S. Chamber of Commerce, whose Litigation Center [“fights for business at every level of the U.S. judicial system.”](#) The next morning, Collamore was part of a select group of private organizational representatives who met with Trump at the White House to discuss the nomination. Juanita Duggan, head of the National Federation of Independent Business, [was also at the meeting,](#) as were representatives of National Right to Life, the NRA, and the Federalist Society, among others. Describing the meeting later that day, White House Press Secretary Sean Spicer [said:](#)

[T]his morning, the President met in the Roosevelt Room with representatives of outside groups to discuss Judge Gorsuch’s nomination . . . The attendees thanked the President for making such an inspired choice and for delivering on what was, for many of them, their number one issue in the campaign. They committed vocally to supporting Judge Gorsuch throughout the confirmation process.

Advocates for business interests also weighed in to proclaim the Gorsuch nomination a big win for corporate America. For example, an article by [attorneys with the Orrick law firm](#) concluded,

After reviewing Judge Gorsuch’s background and record of judicial opinions, it appears that the prior relatively pro-business conservative trajectory of the Supreme Court [before Justice Scalia’s death] will now be restored. . . . If the Senate confirms Judge Gorsuch’s nomination, we expect the Court to return to its business-friendly leanings . . .

.¹

¹ Robert Loeb and Paul David Meyer, *The Gorsuch Nomination: The Return of the Business Friendly Court?* (Feb. 7, 2017), available at <https://www.orrick.com/Insights/2017/02/The-Gorsuch-Nomination-The-Return-of-the-Business-Friendly-Court>.

And a piece in *The Employer Defense Report* of the Conn Maciel Carey law firm entitled [“Supreme Court Nominee Neil Gorsuch Sides with Businesses on Labor Issues”](https://employerdefensereport.com/2017/02/10/supreme-court-nominee-neil-gorsuch-sides-with-businesses-on-labor-issues/) opined that

Judge Gorsuch’s opinions on labor and employment topics suggest that he favors businesses . . . Judge Gorsuch would likely be a welcome addition to the nation’s highest court by employers. . . Ultimately, as to labor and employment cases that come before the Supreme Court, employers will likely benefit from Judge Gorsuch’s confirmation if it should proceed. His ideals comport with President Trump’s small government/anti-regulation agenda, and it seems likely that he would be highly critical of agency action throughout his tenure on the bench.²

Gorsuch and the Roberts Court’s Pro-Business Lean

The enthusiasm in the business community for a Gorsuch confirmation stems, as reflected in the Orrick article, from the conclusion that a Justice Gorsuch would re-establish a pro-corporate conservative majority on the Supreme Court. This would further solidify the hold that big business has on the Court, as exemplified by the increasing success of the U.S. Chamber of Commerce before the Roberts Court. Since 2010, Constitutional Accountability Center has tracked the Supreme Court activities of the Chamber of Commerce and released [empirical studies documenting a sharp increase in the Chamber’s success rate before the Court](#) since Chief Justice Roberts and Justice Alito were confirmed. We have shown not only that the Chamber [now wins the vast majority of its cases](#) (69% during the Roberts Court, compared to 56% during the stable Rehnquist Court and 43% during the late Burger Court), but also the existence of a sharp ideological divide on the Roberts Court in favor of the Chamber, with the Court’s conservatives almost always ruling in favor of the Chamber in closely decided cases. On the Roberts Court, Justice Scalia had supported the Chamber’s position in 71% of its cases (second only to Justice Alito’s 74%), and his death left the Chamber without one of its most reliable votes. Clearly, the business community is counting on Judge Gorsuch, if confirmed, to provide another consistent vote in its cases, whether they involve forced arbitration, the rights of workers, consumers, and other everyday Americans, or anything else pitting the rights of individual Americans against more powerful businesses.

The business community has these expectations because, from cases such as those discussed below, they see in Gorsuch’s record a judge who favors cramped interpretations of laws protecting workers and others, and one who strongly favors arbitration. They also see in Gorsuch a judge who has an openly-expressed hostility to Supreme Court precedent mandating

² Lindsay A. DiSalvo, *Supreme Court Nominee Neil Gorsuch Sides with Businesses on Labor Issues* (Feb. 10, 2017), available at <https://employerdefensereport.com/2017/02/10/supreme-court-nominee-neil-gorsuch-sides-with-businesses-on-labor-issues/>

judicial deference in certain circumstances to agency interpretations of laws they administer, including laws protecting workers, consumers, the environment, and more.

Key Business Cases in Judge Gorsuch's Record

For example, in *TransAm Trucking, Inc. v. Administrative Review Board, Department of Labor*,³ Gorsuch dissented from the Tenth Circuit's ruling upholding a decision by the Department of Labor in favor of a trucker who had been fired when, after being stranded for hours in subzero temperatures in an unheated truck waiting for repairs to the frozen brakes on his trailer, he had refused his employer's directive either to continue to remain with the trailer (although he was going numb) or to drive away with the trailer, despite its frozen brakes. Instead, he unhitched the trailer and drove away, seeking warmth and safety. The majority held that the trucker was protected by a federal safety statute that "makes it unlawful for an employer to discharge an employee who 'refuses to operate a vehicle because . . . the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition.'"⁴ Gorsuch disagreed, and would have upheld the company's firing of the trucker, arguing that the trucker had not "refused to operate" his vehicle because he drove away without the trailer—disregarding the majority's conclusion that the trucker's refusal to operate his vehicle in the unsafe manner his employer had directed qualified him for protection under the safety statute.

Gorsuch's dissent relied upon a crabbed interpretation of a federal law intended, among other things, "to promote the safe operation of commercial motor vehicles" and "to minimize dangers to the health of operators of commercial motor vehicles."⁵ Instead of considering the text of the statute as a whole and Congress's plan in enacting the law, Gorsuch's dissent focused narrowly on several words of text. Starting with statutory text is entirely proper, of course, but courts interpreting laws must consider all of the text, not just the text of isolated phrases. Just two years ago, in *King v. Burwell*,⁶ the Supreme Court properly rejected narrow textualism that operates to defeat Congress' plan in enacting a law. As Chief Justice Roberts wrote for a 6-3 majority in *King*, "[a] fair reading of legislation demands a fair understanding of the legislative plan."⁷ Gorsuch's dissent in *TransAm Trucking* was anything but a fair reading of a statute enacted to protect worker and public safety. Indeed, an AP story reporting that "[Gorsuch Often Sided with Employers in Workers' Rights Cases](#)" specifically points to *TransAm Trucking* as illustrative of how Gorsuch's "fidelity to literal texts can lead to findings that appear to defy common sense and fairness."

³ 833 F.3d 1206 (10th Cir. 2016).

⁴ *Id.* at 1211.

⁵ *Id.* at 1212.

⁶ 135 S. Ct. 2480 (2015).

⁷ *Id.* at 2486.

Gorsuch’s dissent in *Compass Environmental, Inc. v. Occupational Safety and Health Review Commission*⁸ is another example of his narrow interpretation of rules intended to protect worker safety, and the leeway he gives to businesses. In this case, he would have ruled in favor of a company that had failed to provide safety training to one of its workers about the dangers of an overhead high-voltage power line on a construction site, training that the company had in fact provided to other workers who had joined the job earlier. Tragically, the worker who had not received the training was electrocuted when his equipment came too close to the power line. The Department of Labor cited the employer for a “serious violation” of OSHA regulations and assessed a fine for failing to train the worker adequately. On appeal, the Tenth Circuit upheld the citation and fine, agreeing with the Secretary of Labor that a “reasonably prudent employer” – the evidentiary standard applicable here – would have provided the training.

Judge Gorsuch disagreed, claiming that the Secretary of Labor had failed to prove what a “reasonably prudent employer” would have done in terms of safety training, since she had provided no evidence of the training that *other* employers would have given in these circumstances. In so arguing, Judge Gorsuch totally discounted the fact that the company itself had previously trained its other workers on the very clear danger posed by the high voltage line, training that the company now claimed was “unnecessary” and not probative of what “a reasonably prudent employer” would have done.⁹ The majority rejected those stunning assertions, explaining that “[a]n employer’s identification of and training on a specific hazard is certainly relevant to the question of whether a reasonably prudent employer would have provided training on this hazard.”¹⁰ Judge Gorsuch, however, applying an unduly high test for determining the safety training that was required in these circumstances, would have held that it was improper for the company to have been sanctioned for a lack of training resulting in the electrocution of its employee.¹¹

The simple fact that Judge Gorsuch sided with businesses over workers is not necessarily what causes concern—it is that in these two cases he applied cramped readings or understandings of the relevant statutes and legal standards in order to do so. The Roberts Court has already shown a willingness to bend over backwards to accommodate corporate interests at the expense of working Americans, and the next Justice needs to be someone who will apply the law fairly to all.

⁸ 663 F.3d 1164 (10th Cir. 2011).

⁹ *Id.* at 1169.

¹⁰ *Id.*

¹¹ Cases involving consumer safety in which Judge Gorsuch wrote or joined majority opinions siding with businesses include *Zen Magnets, LLC v. Consumer Prod. Safety Comm’n*, 841 F.3d 1141 (10th Cir. 2016) (Gorsuch joins majority opinion invalidating CPSC regulation setting safety standards for small toy magnets that pose grave dangers to children because of risk of ingestion; the dissent would have upheld the rule, stating that “the record supports the Commission’s findings on both the unreasonable risk of injury and reasonable necessity for the rule”) and *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335 (10th Cir. 2015) (opinion by Gorsuch holding that a patient’s state law tort claims against a medical device manufacturer arising out of injuries she sustained from the manufacturer’s promoted off-label use of the device were pre-empted by federal law; the dissent would have allowed some of the claims to proceed, noting the “important federalism concerns at the heart of this case”).

Another aspect of Judge Gorsuch's record that is particularly appealing to the business community is what the Orrick article calls his "[deep-rooted skepticism of administrative agency interpretations of the law.](#)" Similarly, the *Employer Defense Report* calls Gorsuch "[a staunch opponent of the power wielded by administrative agencies.](#)" These views come through in Gorsuch's dissents in such cases as *TransAm Trucking* and *Compass Environmental*, both cited by Orrick as "shed[ding] light on how [Gorsuch] would approach individual cases involving agency rulings" if confirmed. Another is *National Labor Relations Board v. Community Health Services*,¹² in which the NLRB ("Board") petitioned the court to enforce a backpay order of more than \$100,000 against an employer that had unlawfully reduced the hours of some of its full-time staff. At issue was whether the Board had properly declined to deduct from the backpay award the interim earnings of affected employees (that is, earnings from secondary employment the workers had taken on to help make ends meet). The Tenth Circuit held that the Board had provided reasonable justifications for declining to deduct those interim earnings (including encouraging productivity and employment and accounting for additional hardships on the workers), and directed that the backpay award be enforced. In so ruling, the court noted that its task in this case was "narrow," and that the Board was entitled to deference in its backpay determination.¹³

Judge Gorsuch dissented, not only disagreeing with the majority's view of the Board's justifications for the backpay award, but also criticizing the Board's motives: "In the end," wrote Gorsuch, "it's difficult to come away from this case without wondering if the Board's actions stem from a frustration with the current statutory limits on its remedial powers – a frustration that it cannot pursue more tantalizing goals like punishing employers for unlawful actions or maximizing employment . . ."¹⁴

And in *Gutierrez-Brizuela v. Lynch*,¹⁵ Judge Gorsuch went even further, taking the unusual step of writing a concurring opinion in a case in which he himself had written the majority opinion, for the sole purpose of attacking, at length, the doctrine of "*Chevron* deference" (named for the Supreme Court case from which it originates).¹⁶ The *Chevron* doctrine generally requires courts to defer to agencies' reasonable interpretations of laws that they administer when those laws are ambiguous. In his concurring opinion in *Gutierrez-Brizuela*, Gorsuch suggested that *Chevron* deference was contrary to the Constitution's principle of separation of powers, claiming that *Chevron* has permitted "executive

¹² 812 F.3d 768 (10th Cir. 2016).

¹³ *Id.* at 772.

¹⁴ *Id.* at 786 (Gorsuch, J., dissenting). However, Gorsuch has looked more favorably on NLRB decisions when the Board rejects employee union claims. [As the Employer Defense Report has pointed out](#), Gorsuch has "sided with the National Labor Relations Board ("NLRB"), one of several administrative agencies he has criticized for overstepping its boundaries, in dismissing claims by employee unions," citing as one example *Teamsters Local Union No. 455 v. NLRB*, 765 F.3d. 1198 (10th Cir. 2014) (Gorsuch opinion upholding NLRB order that an employer's unlawful and quickly-withdrawn threat to hire permanent replacement workers during a lockout of union workers did not make the lockout itself unlawful).

¹⁵ 834 F.3d 1142 (10th Cir. 2016).

¹⁶ *Chevron U.S.A. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

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.”¹⁷

Although *Chevron* deference can lead courts to defer to rules across the ideological spectrum, it has often resulted in courts upholding protections for the environment and for consumers, workers, and others, and drawn the ire of the business community that chafes at being regulated. Indeed, Judge Gorsuch's "willingness to challenge the *Chevron* Doctrine" was specifically cited by the National Federation of Independent Business in its statement "[welcom\[ing\]](#)" Gorsuch's nomination and essentially linking his confirmation to hoped-for victories in cases in which "NFIB is suing to overturn the EPA Waters of the U.S. Rule, the EPA Clean Power Plan, and the Department of Labor Overtime Rule. . . [and that] could end up in the Supreme Court."¹⁸

Finally, in addition to weakening regulatory agencies, another key agenda item for the business community is expanding forced arbitration – using take-it-or-leave-it contracts with workers, consumers, and others, often through fine print, to require people to give up their right to sue in court when victimized by corporate abuse or other wrongdoing. The business community sees Gorsuch as a supporter of arbitration and a friend of its agenda in this area as well. [The Orrick article](#), for example, states that "Judge Gorsuch's opinions on the Tenth Circuit suggest that his confirmation would restore the pro-arbitration direction of the Court," pointing by way of example to *Ragab v Howard*,¹⁹ in which Gorsuch dissented from the Tenth Circuit's ruling denying the defendants' motion to compel arbitration. In this case, the plaintiff and the defendants had entered into six different agreements governing their business relationship, each containing conflicting arbitration provisions. Given the conflicts among those provisions, and the lack of agreement on the essential terms of any arbitration, the court held that there had been no meeting of the minds regarding arbitration, and thus arbitration could not be compelled. Judge Gorsuch, however, would have compelled the parties to arbitrate, notwithstanding that there was no single arbitration agreement to enforce. Instead, he suggested some "workarounds" (his word)²⁰ to get past the absence of a governing arbitration agreement.

Conclusion

When the Senate Judiciary Committee holds its confirmation hearing for Judge Gorsuch, scheduled to begin on March 20, 2017, Senators should carefully question Gorsuch about his

¹⁷ 834 F.3d at 1149 (Gorsuch, J., concurring).

¹⁸ And, as noted above, the head of the NFIB, Juanita Duggan, was among the small group who met with Trump the morning after the announcement of the Gorsuch nomination and who "committed vocally to supporting Judge Gorsuch throughout the confirmation process."

¹⁹ 841 F.3d 1134 (10th Cir. 2016).

²⁰ *Id.* at 1139 (Gorsuch, J., dissenting).

record in business cases. They should seek to determine, among other things, why he reads statutes and rules meant to protect ordinary Americans from corporate wrongdoing so narrowly that he undermines Congress' objectives in enacting them. They should probe his judicial philosophy regarding arbitration, and seek to learn whether he will support businesses in depriving Americans of their rightful day in court when they are victimized by them. They should question him about his hostility to *Chevron* deference and his apparent desire to overturn that precedent. In short, as the Senate considers confirming Neil Gorsuch to the Supreme Court, the American people are entitled to know whether, as the business community is expecting, a Justice Gorsuch would be another reliable vote in favor of corporate America and against the rights and interests of workers, consumers, and other less powerful individuals.