U.S. Supreme Court Confirmation of Justice Neil Gorsuch and Potential Future Impacts on Environmental Laws and Regulations

April 11, 2017

On April 10, 2017, Justice Neil Gorsuch assumed the seat on the U.S. Supreme Court previously held by Justice Antonin Scalia. Justice Gorsuch, who was appointed by President George W. Bush to the United States Court of Appeals for the Tenth Circuit in 2006, has generally espoused conservative views on most legal issues throughout his 24-year career as a lawyer and judge. His nomination was supported by conservative groups such as the Federalist Society and the Heritage Foundation, which presumably believe his approach to interpreting the law aligns closely with that of the late Justice Scalia. Justice Gorsuch was confirmed in spite of a filibuster by Senate Democrats to prevent his appointment; by employing the "nuclear option," a majority vote in the Senate was used to change Senate debate rules to eliminate the filibuster for U.S. Supreme Court appointments. Justice Gorsuch was confirmed in a 54-45 vote, with one Senator not voting.

In many respects, Justice Gorsuch's elevation to the U.S. Supreme Court simply restores the ideological *status quo* of the Court prior to Justice Scalia's death in February 2016. The Court will again be divided between four members each on the liberal and conservative wings, with Justice Kennedy (for whom Justice Gorsuch served as a law clerk) occupying the middle position in many cases. Nonetheless, among many other areas of law, the placement of 49-year-old Justice Gorsuch on the U.S. Supreme Court for a lifelong tenure will likely have significant implications for environmental law cases that will come before the Court in future years. In particular, Justice Gorsuch's views on the key U.S. Supreme Court precedent regarding the deference due to federal agencies, as established by the case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* ("***Chevron* deference**"), and the proper role of administrative rulemaking more generally, promise to affect the administrative rulemaking process and the leeway that federal agencies have in crafting regulations.

The following memorandum discusses Justice Gorsuch's expressed views on a number of issues relevant to environmental law, and the potential impact that his elevation to the U.S. Supreme Court will have.

Overview

In general, the Senate confirmation hearings offered limited clarity on Justice Gorsuch's opinions relating to environmental and other matters. During the hearings, Justice Gorsuch largely adhered to the so-called "Ginsburg standard" by declining to answer how he would rule on particular cases that may come before him. This has become standard procedure for U.S. Supreme Court nominees in recent years, but some commentators have noted the considerable extent to which Justice Gorsuch avoided revealing his views.

Despite his many years of prominent legal work and service as a lawyer and judge, Justice Gorsuch has not participated in or ruled on many environmental cases, nor has he demonstrated particular favor for, or opposition to, environmental laws and protections *per se*, for instance, ruling both for and against the U.S. Environmental Protection Agency ("**EPA**") on various occasions. However, in the same way that Justice Scalia's conservative outlook on various legal doctrines had an overall tendency to result in narrower interpretation of environmental laws and to support challenges to such laws, Justice Gorsuch's views (which in many respects align with Justice Scalia's, as described further below) appear likely to follow a similar path with similar consequences.

Past Views Relevant to Environmental Law

During his time on the bench and in legal practice, Justice Gorsuch has expressed the following views on various doctrines or legal ideas, which may be relevant to legal challenges involving environmental laws and regulations:

- ***Chevron* Deference.** The most significant area where Justice Gorsuch's views are likely to impact environmental laws and regulations involves the application of *Chevron* deference to federal agency regulations. *Chevron* deference emerged from the 1984 U.S. Supreme Court case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which held that in cases where Congress has been silent or ambiguous in statutes administered by particular agencies, courts must give deference to such agencies' interpretation of those statutes. *Chevron* deference allows agencies to promulgate more extensive and detailed regulations, and is often viewed as favorable to environmental laws, since it allows an agency's scientific and other expertise to inform more detailed and impactful regulations.

  In August 2016, Justice Gorsuch wrote a concurring opinion in an immigration law case, *Gutierrez-Brizuela v. Lynch*, in which he questioned both the doctrine of *Chevron* deference and subsequent applications of *Chevron* deference by courts. In particular, Justice Gorsuch noted that because the U.S. Administrative Procedure Act vests U.S. federal courts with the power and duty to interpret statutory provisions, deferring to agency interpretations may therefore be in tension with Congress's directions. He also noted that *Chevron* deference may raise due process and separation of powers concerns. The current use of *Chevron* deference, Justice Gorsuch noted in his concurrence, "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power."

  In his Senate Judiciary Committee questionnaire, Justice Gorsuch listed *Gutierrez-Brizuela* first among the major cases he has participated in as a judge.[1] As such, his views on *Chevron* deference were given a significant amount of attention during his confirmation hearings. While Democratic committee members criticized Justice Gorsuch's views, claiming that *Chevron* deference was essential for environmental protections, Republicans echoed his concerns that *Chevron* deference concentrates too much power in executive agencies (as opposed to the judicial or legislative branch). For his part, Justice Gorsuch has noted that *Chevron* deference is not an inherently liberal or conservative concept, but rather benefits the political party in charge of the executive branch. Indeed, Justice Scalia himself was an early and avid proponent of *Chevron* deference. In practice, to the extent the Trump administration seeks *Chevron* deference for narrow interpretations of environmental laws, overturning *Chevron* deference may help environmental groups succeed in the short term if such groups oppose the Trump administration's more conservative environmental and energy policies. However, in the long term, overturning *Chevron* deference would also curtail executive agencies' flexibility to promulgate new, more expansive rules on environmental protection under future administrations.

  Following the pattern for his confirmation hearings as a whole, however, Justice Gorsuch declined to clearly state whether he would seek to constrain *Chevron* deference once appointed to the U.S. Supreme Court, noting that he would keep an "open mind."

- **Originalism and Textualism.** As Justice Gorsuch noted during his confirmation hearings, and as made plain by his nearly 11 years as a judge, he subscribes to "originalist" and "textualist" approaches to constitutional and statutory interpretation, as did Justice Scalia. Originalism is the

[1] A copy of the questionnaire is available here.

idea that judges should interpret the words of the Constitution as they were understood at the time that they were written. Textualism is the interpretive theory where only the ordinary meaning of the words of the law being reviewed are considered when interpreting them; legislators' intent in passing the law, the issues the law is meant to address, or the consequences of a particular interpretation are disregarded. In a 2016 tribute to Justice Scalia following his death, Justice Gorsuch endorsed the late Justice's legal theories, noting that judges should "apply the law as it is, focusing backward, not forward, and looking to text, structure, and history . . . [not] their own moral convictions or the policy consequences they believe might serve society best."[2]

While not a hard and fast rule, as applied in cases that come before the U.S. Supreme Court, originalism and textualism, on balance, may tend to constrain, rather than expand, regulatory authority of executive agencies like the EPA and correspondingly limit the scope of environmental laws and regulations. For instance, in the 2006 case *Rapanos v. United States*, which involved interpreting the U.S. Clean Water Act, Justice Scalia's plurality opinion adopted a narrow interpretation of the term "waters of the United States," based on a textualist approach, which essentially limited the term to navigable waters and other large bodies of water. In contrast, Justice Kennedy's concurring opinion, which has been used as the operative test since this case, took a broader approach and expanded the scope of bodies of water that the EPA could regulate under the U.S. Clean Water Act.[3] However, there have been instances when textualism has resulted in more expansive regulatory authority. For example, in the 2001 case *Whitman v. American Trucking Associations, Inc.*, which involved interpreting the U.S. Clean Air Act, Justice Scalia's opinion applied textualist principles to hold that a U.S. Clean Air Act provision did not allow the EPA to factor costs into the setting of the pollution standards at issue in this case (therefore giving the EPA greater leeway to regulate in this area without having to first consider the costs of such regulatory actions).

- **Denying Standing or the Right to Intervene to Environmental Groups.** In some prior cases, Justice Gorsuch has determined that environmental groups seeking to sue or to intervene in existing cases have lacked standing or have otherwise lacked the right to intervene, thus preventing their legal challenges from going forward at all.[4] Such denials align with conservative precedent on the U.S. Supreme Court, notably Justice Scalia's opinion in the 1992 case *Lujan v. Defenders of Wildlife*, which found that conservationists could not prove direct injury in a suit involving the U.S. Endangered Species Act. In the 2015 case *Backcountry Hunters and Anglers v. U.S. Forest Service*, Justice Gorsuch wrote an opinion denying standing to Backcountry Hunters and Anglers, a public lands advocacy group, which challenged an agency's tightening of a vehicle access regulation as not being sufficiently stringent. Justice Gorsuch reasoned that, because a victory for the group would, in fact, reinstate an earlier, more lenient rule rather than result in a stricter standard, they lacked standing (in other words, a favorable ruling in the case

[2] Honorable Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Res. L. Rev. 905 (2016), *available at* ***http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4658&context=caselrev***.

[3] The definition of "waters of the United States" is the topic of the contested "WOTUS Rule" that the EPA under the Obama Administration finalized in June 2015. In a February 28, 2017 Executive Order, President Trump directed the EPA to begin a rulemaking to undo the WOTUS Rule and specifically to adopt Justice Scalia's view of U.S. Clean Water Act jurisdiction as laid out in the *Rapanos* decision. For more information on reversal of the WOTUS Rule, see our previous **Client Newsflash**.

[4] Standing, at the U.S. federal level, is a legal doctrine that requires a plaintiff to have a sufficient stake in the matter being litigated in order to have the matter heard by a court. At a high level, the plaintiff needs to establish (a) an actual or imminent "injury in fact" related to the matter being litigated, (b) a causal connection between that injury and the action of the defendant that plaintiff is challenging, and (c) that it is likely the injury will be redressed by a favorable decision in the case at hand.

would not provide redress to plaintiffs' claimed injury). Such an approach could prevent future environmental groups from even bringing any lawsuits to challenge agency action as insufficient. In addition, in a 2013 case, *New Mexico Off-Highway Vehicle Alliance v. U.S. Forest Service*, in a dissent that used arguments unrelated to traditional standing doctrine, Justice Gorsuch argued that several environmental groups, including the Sierra Club, should have been prevented from intervening in a lawsuit against the government because their presence would add complexity and expense to the case and because their interests were aligned with the views of the defendant, the U.S. Forest Service.

Because it appears the Trump administration may not defend environmental safeguards as vigorously as the Obama administration had, as evidenced by, among other things, President Trump's proposed significant cuts to the EPA's budget, the ability of states, environmental groups and other parties to assert rights under federal environmental laws could become a tool used by such entities and parties to co-opt the EPA's enforcement role and object to the pro-industry regulatory regime promised by the Trump administration. However, the ability of environmental groups to assert such rights could be impeded by narrow judicial views on standing. Standing may especially remain a particular hot-button issue in climate change cases. In the 2007 case *Massachusetts v. EPA*, the U.S. Supreme Court found that states had standing to sue the EPA over its decision to not regulate greenhouse gases under the U.S. Clean Air Act, finding that the potential future harm to coastlines from rising seas, among other impacts, was sufficient harm to create standing. Justice Scalia and other conservative justices gave a minority dissent on the standing analysis and other aspects of the case. Had the narrower views of what justifies standing prevailed in that case, or if they gain sway in the future, they could curtail the ability of states or environmental groups to challenge efforts by a Trump administration-led EPA to undo Obama-era climate change or other energy regulations going forward.

- **U.S. States' Rights.** In the context of environmental laws and regulations, states' rights play a role when a state chooses to enact laws or regulations that are more stringent than analogous U.S. federal laws and regulations (for example, California has often enacted environmental laws and promulgated environmental regulations that are more stringent than their U.S. federal counterparts). Various judicial doctrines of "preemption" can be applied by judges to invalidate state laws and regulations in the face of an equivalent U.S. federal legal regime. However, in the 2015 case *Cook v. Rockwell International Corp.*, Justice Gorsuch held that a state tort law allowing residents to seek damages from a nuclear weapons producer for leaks of radioactive materials was *not* preempted by a federal law that created a liability arrangement for similar incidents because, in his view, the text of the federal law did not indicate an intent to preempt state law in this area.

  In addition, because the "commerce clause" of the U.S. Constitution gives Congress the power to regulate interstate commerce, the judicial "dormant commerce clause" doctrine allows courts to strike down state laws and regulations that are found to interfere with interstate commerce, even if there is no federal law or regulation that is equivalent to the state law or regulation at issue. There is some indication that Justice Gorsuch is skeptical of applying the dormant commerce clause doctrine to invalidate state laws and regulations, as was Justice Scalia. For example, in the 2015 case *Energy and Environmental Legal Institute v. Epel*, Justice Gorsuch held that a Colorado requirement that state utilities obtain at least 20% of their power from renewable sources did not unlawfully regulate out-of-state nonrenewable energy production in violation of the dormant commerce clause.

  If Justice Gorsuch's opinions in *Cook* and *Energy and Environmental Legal Institute* are a guide to his views on preemption and the dormant commerce clause, he could be said to have a conservative approach to states' rights that favors states' ability to enact laws and regulations in the face of equivalent federal laws and regulations, or in areas that might touch on interstate

commerce. In the environmental context, this could lead to him ruling in favor of state laws and regulations that are more stringent than, or that relate to areas not covered by, federal laws and regulations.

The New Balance of the U.S. Supreme Court

In many respects, Justice Gorsuch's elevation to the U.S. Supreme Court simply restores the ideological *status quo* of the Court that existed prior to Justice Scalia's death in February 2016. The Court will again be divided between four members each on the liberal and conservative wings, with Justice Kennedy occupying the middle position in many cases. Furthermore, given Justice Gorsuch's well-known respect for Justice Scalia's legal reasoning, there is reason to believe that his appointment will not cause a significant shift, at least immediately, in the makeup of the conservative wing's philosophy. However, with Justice Gorsuch now on the bench, the Court will again have nine justices, ending the series of 4-4 decisions over the past year that have given unclear or nonbinding guidance from the Court on many issues.

The most significant effects of Justice Gorsuch's appointment will be felt in later years. Justice Gorsuch, age 49, is the youngest appointee to the U.S. Supreme Court since Justice Clarence Thomas, who was 43 years old when he was confirmed in 1991. As a result, Justice Gorsuch may have a long career on the Court and shape its jurisprudence for years to come.

Like many of the current justices on the U.S. Supreme Court during their confirmation process, Justice Gorsuch did not tip his hand as to how he would rule on future cases. But while he has not specifically set his sights on undoing environmental laws and regulations, his conservative ideology, if presented with the right cases and alignment with his peers, will likely lead to less generous decisions on standing for environmental groups and narrower interpretations of environmental laws and regulations, with a commensurate shrinking of environmental regulatory action. On the other hand, Justice Gorsuch's views on states' rights may favor states' ability to enact more stringent environmental laws and regulations should such shrinking of federal environmental regulatory action occur.

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