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Judge Neil Gorsuch

Judge Neil Gorsuch currently sits on the United States Court of Appeals for the 10th Circuit. President George W. Bush appointed him to the appellate court in 2006, and his confirmation was uncontroversial. Gorsuch obtained his undergraduate degree from Columbia University and his law degree from Harvard Law School. He was a Truman Scholar at Harvard and a Marshall Scholar at the University of Oxford, and clerked for Judge David Sentelle of the U.S. Court of Appeals for the District of Columbia Circuit and Supreme Court Justices Byron White and Anthony Kennedy. Following his clerkships, Judge Gorsuch worked as a litigator at Kellogg Huber and served for a year as the principal deputy associate attorney general in the Department of Justice. His mother, Anne Gorsuch Burford, was chosen by President Ronald Reagan as the first woman to head the EPA.

Judge Gorsuch has been thought to be a front-runner for a Supreme Court vacancy for some time, and many have described his as a natural fit to replace Justice Scalia. A former clerk has remarked that he has a "deep commitment to the original understanding of the constitution and the rule of law." David Feder, *The Administrative Law Originalism of Neil Gorsuch*, Yale J. on Reg.: Notice & Comment (Nov. 21, 2016), http://yalejreg.com/nc/the-administrative-law-originalism-of-neil-gorsuch/.

Fourth Amendment/Criminal Law/Death Penalty

Judge Gorsuch takes a textualist approach to criminal law that echoes Justice Scalia, and is not afraid to interpret the law against the government when he sees fit. He also appears to be a champion of the Fourth Amendment, often upholding its protections. For example, in *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016), Gorsuch held that the National Center for Missing and Exploited Children's (NCMEC) warrantless search of the defendant, during which they found child pornography, may have violated the Fourth Amendment, reversing the trial court's denial of a motion to suppress. Judge Gorsuch viewed the NCMEC as a government agent, if not a government agency, and held that because it performed the search without a warrant, it may have committed a Fourth Amendment violation.

In *United States v. Krueger*, 809 F.3d 1109 (10th Cir. 2015), the defendant moved to suppress statements made during an investigation on the grounds that a search warrant was invalid because the magistrate judge lacked statutory authority to issue the warrant, as he resided in the District of Kansas but issued the warrant for a home in Oklahoma. In a concurring opinion, Judge Gorsuch agreed with the majority's holding that the magistrate did not have the authority to grant the warrant, as the search occurred outside of his statutory jurisdiction. He stated:

> The government asks us to resolve but one question, bold as it is: whether a warrant issued in defiance of positive law's jurisdictional limitations on a magistrate judge's powers remains a warrant for Fourth Amendment purposes. I

> would not hesitate to answer that question put to us and reply that a warrant like that is no warrant at all.

Judge Gorsuch is also willing to dissent in Fourth Amendment cases when he disagrees with the majority and finds a potential Fourth Amendment violation where the majority does not. For example, in *United States v. Carloss*, 818 F.3d 988 (10th Cir. 2016), the majority affirmed a district court's denial of the defendant's motion to suppress evidence, when the defendant argued the Fourth Amendment violation arose out of the officers knocking on his door after passing and disregarding several "No Trespassing" signs. Judge Gorsuch dissented, explaining that by passing a "No Trespassing" sign and walking to the defendant's front porch for a "knock and talk," the police officers did in fact violate the Fourth Amendment. *Id.* at 1005. His concurrence included a thorough explanation of his understanding of Fourth Amendment law:

> Whether in arguing that the state enjoys an irrevocable license to enter or in suggesting that No Trespassing signs are categorically insufficient to bar its agents, the government appears to be moved by the same worry: that if clearly posted No Trespassing signs can revoke the right of officers to enter a home's curtilage their job of ferreting out crime will become marginally more difficult. But obedience to the Fourth Amendment always bears that cost and surely brings with it other benefits. Neither, of course, is it our job to weigh those costs and benefits but to apply the Amendment according to its terms and in light of its historical meaning. Besides, it is hardly the case that following the Fourth Amendment's teachings would leave the government as bereft of lawful alternatives as it seems to suppose. The Amendment and the common law from which it was constructed leave ample room for law enforcement to do its job. A warrant will always do. So will emergency circumstances. After-the-fact consent may suffice if freely given. And, of course, there's no need for consent when officers search only open fields rather than curtilage. Neither is there need for consent when officers enter curtilage for a non-investigative purpose. Our duty of fidelity to the law requires us to respect all these law enforcement tools. But it also requires us to respect the ancient rights of the people when law enforcement exceeds their limits.

In another Fourth Amendment case, *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), the court majority found no probable cause for an arrest. Although Gorsuch agreed that the arresting officers lacked probable cause, he would have found so on much narrower grounds than the majority. Particularly, he took issue with the majority's "laundry list of things the officers might have done, but did not do, to corroborate" a young child's statement that the officers put forth as their probable cause for the arrest. Judge Gorsuch explained:

> While I do not doubt for a moment that additional investigation would have been a good idea, asking whether the officers might've, could've, or should've done more investigation before effecting an arrest is not the test for evaluating whether probable cause existed at the time of the arrest. We have never

> previously imposed upon officers a duty to investigate certain leads we think, in retrospect and with the benefit of hindsight, might have been warranted or wise before making an arrest. Rather, precedent instructs us to examine what the officers *actually did,* asking whether, on the facts they had before them, probable cause was or was not present.

In *Cortez*, Gorsuch also took issue with the majority's view that it should be obvious to the officers that a hearsay statement from a two-year-old does not establish probable cause. He reiterated in his dissent that the officers, in determining probable cause for an arrest, may indeed rely on hearsay.

The *Cortez* case also considered a question of qualified immunity, on which Judge Gorsuch dissented from the majority and would have granted the officers qualified immunity despite lacking probable cause, as he did not view there to be adequate authority putting the officers on clear notice of the illegality of the arrest. Indeed, in criminal cases involving questions of qualified immunity for officers accused of constitutional violations, Judge Gorsuch tends to find fairly broad qualified immunity coverage protecting officers. He has stated that plaintiffs carry a "heavy burden" in trying to overcome this presumption of immunity. *Kerns v. Bader*, 663 F.3d 1173, 1180 (10th Cir. 2011).

Immigration

Judge Gorsuch has few published cases that consider the rights of immigrants. In *Porro v. Barnes*, 624 F.3d 1322 (10th Cir. 2010), the Tenth Circuit considered what constitutional provision the court should use to analyze a federal immigration detainee's claim of excessive force, with Gorsuch holding that "the due process guarantee is the proper doctrinal prism through which to analyze claims of federal immigration detainees who don't challenge the lawfulness of their detention but only the force used during that detention." He elaborated:

> Excessive force claims can be maintained under the Fourth, Fifth, Eighth, or Fourteenth Amendment—all depending on where the defendant finds himself in the criminal justice system—and each carries with it a very different legal test.
>
> We hold that it is this last, due process, standard that controls excessive force claims brought by federal immigration detainees like Mr. Porro. Why he was being detained at the Jefferson County Jail—whether, for example, he had violated his parole or was awaiting deportation—Mr. Porro does not tell us. But neither does he dispute that he had been lawfully seized and detained. In this way, he is unlike the citizen who complains about the force used to effect his seizure in his initial encounter with the police, which would trigger the Fourth Amendment's protections. Mr. Porro also appears to be unlike the convicted prisoner who may be lawfully subjected to punishment as part of his sentence, but who complains that his punishment involves excessive force and so must resort to the Eighth Amendment. No one alleges that Mr. Porro's detention

> came after any conviction. In these circumstances—circumstances in which many federal immigration detainees' claims of excessive force must surely arise—Mr. Porro appears to walk in much the same shoes as an arraigned pre-trial detainee. He is therefore protected by the due process clause (in this case, the Fourteenth Amendment's due process clause, given that Mr. Porro's complaint is against state officials). We note that other courts confronting the status of immigration detainees before us have reached this same conclusion, assessing their excessive force claims under the due process rubric.

Second Amendment

Judge Gorsuch has not weighed in clearly on the Second Amendment. He has written about firearms in other cases, though not explicitly in the Second Amendment context. In *United States v. Games-Perez*, 667 F.3d 1136 (10th Cir. 2012), the Tenth Circuit considered the federal law prohibiting the knowing possession of a gun by a felon. Specifically, the court considered what makes a violation "knowing." Is the law violated when a felon simply knowingly possesses a gun, or must they know that they have been convicted of a felony (which is not always clear based on the nature of the crime or resulting penalty)? Games-Perez appealed his sentence for possession of a firearm by a felon, arguing that he was unaware that he was actually a felon, but the majority affirmed based on Tenth Circuit precedent in *United States v. Capps*, 77 F.3d 350 (10th Cir. 1996). Concurring in the judgment, Judge Gorsuch elaborated:

> Our duty to follow precedent sometimes requires us to make mistakes. Unfortunately, this is that sort of case. In *United States v. Capps,* 77 F.3d 350 (10th Cir. 1996), this court considered 18 U.S.C. §§ 922(g) & 924(a) and their collective rule forbidding felons from keeping guns, ultimately holding that "the only knowledge required for a [criminal] conviction is knowledge that the instrument possessed is a firearm." In the case before us, Mr. Games-Perez concedes he knowingly possessed a firearm but protests that he had no idea he was a convicted felon. In light of *Capps* this is an easy case and we must affirm the conviction because Mr. Games-Perez's protests, whatever their merit, are beside the point. As my colleagues rightly observe, it matters not at all under *Capps* whether Mr. Games-Perez *ever* knew about his felon status. But just because our precedent indubitably commands this result doesn't mean this result is indubitably correct.

Gorsuch then delves into an explanation of why *Capps'* interpretation of the statute "simply can't be squared with the text of the relevant statutes." Later, when the Tenth Circuit considered a petition for rehearing en banc, Judge Gorsuch dissented from the denial, 695 F.3d 1104 (10th Cir. 2012), explaining:

> In the end, I do not for a moment question that the standard for rehearing *en banc* is a high one or that the arguments one might muster against rehearing are thoughtful or principled. In my judgment, however, none of these arguments

> compels us to perpetuate the injustice of disregarding the plain terms of the law Congress wrote and denying defendants the day in court that law promises them.

In another firearms-related case (but again one not explicitly covering Second Amendment rights), *U.S. v. Rodriguez*, 739 F.3d 481 (11th Cir. 2013), Judge Gorsuch joined an opinion written by Judge Baldock, which has been criticized by some who see it as too narrow a view of gun owners' rights. The Tenth Circuit considered "whether a police officer who observes a handgun tucked in the waistband underneath the shirt of a convenience store employee has reasonable suspicion that the employee is unlawfully carrying a deadly weapon," justifying a "stop and frisk," and answered in the affirmative. Notably in this case, the officer did not make an effort to determine whether Rodriguez was carrying the firearm legally (i.e., in New Mexico, whether it was unloaded) before taking his gun.

First Amendment/Establishment Clause/Religious Liberty

Most of the cases that Judge Gorsuch has authored concerning First Amendment rights deal with religious liberty, and he is an articulate defender of personal religious liberties. He has not, however, written widely on the First Amendment outside of the religious context.

In one First Amendment case not concerning religious liberty, *Van Deelen v. Johnson*, 497 F.3d 1151 (10th Cir. 2007), the Tenth Circuit considered allegations that county officials violated Van Deelen's First Amendment rights by seeking to threaten and intimidate him into dropping various tax assessment challenges. The district court granted summary judgment for the defendants, finding that Van Deelen's tax challenge was not a matter of "public concern." In reversing and remanding, Judge Gorsuch explained that

> [T]he constitutionally enumerated right of a private citizen to petition the government for the redress of grievances does not pick and choose its causes but extends to matters great and small, public and private. Whatever the public significance or merit of Mr. Van Deelen's petitions, they enjoy the protections of the First Amendment.

In considering challenges arising under the Establishment Clause, Judge Gorsuch has broken from the majority of the Tenth Circuit and would have granted rehearing en banc for two cases concerning Christian symbols erected on public property, *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), and *Green v. Haskell County Board of Commissioners*, 574 F.3d 1235 (10th Cir. 2009). In *Green*, at issue was the removal of a Ten Commandments display, as ordered by the court, that was admittedly erected without a religious purpose and in the context only of a larger historical presentation. Judge Gorsuch wrote a dissent to the denial of rehearing en banc, taking issue with the Tenth Circuit's application of the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for deciding Establishment Clause disputes. In Gorsuch's view, the *Lemon* test has been called into question by two other cases, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844 (2005), and *Van*

Orden v. Perry, 545 U.S. 677 (2005). It appears that Gorsuch would likely find these cases to supplant the *Lemon* test, as have a number of other circuits. Regardless, he believed here that even under the *Lemon* test, the monument should have been allowed, stating, "displays of the decalogue alongside other markers of our nation's legal and cultural history do not threaten an establishment of religion."

The same issue arose again in *American Atheists*, which concerned crosses erected by the state highway patrol on public land to honor state troopers killed in the line of duty. Again, Judge Gorsuch found himself dissenting from a denial of rehearing en banc, making many of the same arguments and citing *Green*. Judge Gorsuch wrote:

> It is undisputed that the state actors here did *not* act with any religious purpose; there is *no* suggestion in this case that Utah's monuments establish a religion or coerce anyone to participate in any religious exercise; and the court does not even render a judgment that *it thinks* Utah's memorials *actually* endorse religion. Most Utahans, the record shows, don't even revere the cross. Thus it is that the court strikes down Utah's policy *only* because it is able to imagine a hypothetical "reasonable observer" who *could think* Utah means to endorse religion — even when it doesn't.

Based on his existing jurisprudence, it appears Judge Gorsuch would not be likely to find an Establishment Clause violation for anything short of compelling religious observance, and he views religious liberty – and indeed, all individual liberties – as important constitutional values.

Notably, Judge Gorsuch does not limit his views on the free exercise of religion and the Establishment Clause to Christianity. In *Yellowbear v. Lampert*, 741 F.3d 48 (10th Cir. 2014), Gorsuch authored an opinion overturning a grant of summary judgment for defendants on a prison inmate's Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) claim based on selective denial of "access to his prison's sweat lodge – a house of prayer and meditation the prison has supplied for those who share his Native American religious tradition."

Judge Gorsuch also weighed in on the two high profile cases *Hobby Lobby Stores v. Sebelius* and *Little Sisters of the Poor Home for the Aged v. Burwell*. In *Hobby Lobby*, 723 F.3d 1114 (10th Cir. 2013), the company challenged the contraception mandate in the Affordable Care Act, arguing that it substantially burdened its free exercise of religion. Judge Gorsuch concurred with the majority judgment finding for *Hobby Lobby*. His concurrence makes clear his view that courts should listen to the proponents regarding statements about their faith, and take them at their word. In *Little Sisters of the Poor*, a Tenth Circuit panel entered judgment against the Little Sisters on their claims under the same provision of the ACA. Judge Gorsuch joined a dissent from a denial of rehearing en banc, 799 F.3d 1315 (10th Cir. 2015), maintaining again that the courts must defer to the proponent's explanation of the requirements of their religion.

Separation of Powers/*Chevron*

Judge Gorsuch places high value on the separation of powers and the checks and balances established by our constitutional framework, and has frequent commentary in his caselaw regarding these principles. For example, in *Krueger*, Judge Gorsuch stated:

> But our whole legal system is predicated on the notion that good borders make for good government, that dividing government into separate pieces bounded both in their powers and geographic reach is of irreplaceable value when it comes to securing the liberty of the people. *See generally Bond v. United States,* 564 U.S. 211 (2011); The Federalist Nos. 28, 32 (Alexander Hamilton), Nos. 46, 51 (James Madison). Ours is not supposed to be the government of the Hunger Games with power centralized in one district, but a government of diffused and divided power, the better to prevent its abuse. Congress has repeatedly displayed a preference for geographically divided power in its treatment of the federal judiciary since the Judiciary Act of 1789 — "almost invariably observ[ing]," for example, the principle that federal judicial districts should not cross state lines. Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 21 (7th ed.2015). And, sensitive to the fact that magistrate judges do not enjoy life tenure and other independence-assuring protections found in Article III, Congress has taken particular care to limit the geographic range of their authority since the very inception of the office — and it would be more than a little ironic for an Article III court to deny effect to Congress's attentive work in this area. *See generally* Sharon E. Rush, *Federalism, Diversity, Equality, and Article III Judges: Geography, Identity, and Bias,* 79 Mo. L.Rev. 119 (2014); Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789,* 46 S.C. L.Rev. 647 (1995); Thomas E. Baker, *A Catalogue of Judicial Federalism in the United States,* 46 S.C. L.Rev. 835 (1995).

And in *Games-Perez*, discussing the role of Congress versus the role of the Courts, he remarked:

> I recognize that precedent compels me to join the court's judgment. But candor also compels me to suggest that we might be better off applying the law Congress wrote than the one *Capps* hypothesized. It is a perfectly clear law as it is written, plain in its terms, straightforward in its application. Of course, if Congress wishes to revise the plain terms of § 922(g) and § 924(a), it is free to do so anytime. But there is simply no right or reason for this court to be in that business.

With regard to executive power, Judge Gorsuch has been critical of the Supreme Court's decisions in *Chevron* and *Brand X.* In *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016), Judge Gorsuch laid out his view that *Chevron* and *Brand X* were inconsistent with separation of powers as envisioned by the framers of the Constitution, who, he explained, knew that "[a] government of diffused powers . . . is a government less capable of invading the liberties of the

people." In *Chevron*, the Supreme Court held that courts should defer to federal agency interpretations when they administer a statute enacted by Congress that is broadly worded, as long as the interpretation is not clearly forbidden by the statute. In Gorsuch's view, this holding left protection of individual liberties at risk. Stating that "[t]here's an elephant in the room with us today," Judge Gorsuch wrote that "the fact is *Chevron* and *Brand X* permit 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 explained his approach:

> When the political branches disagree with a judicial interpretation of existing law, the Constitution prescribes the appropriate remedial process. It's called legislation. Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design. The framers sought to ensure that the people may rely on judicial precedent about the meaning of existing law until and unless that precedent is overruled or the purposefully painful process of bicameralism and presentment can be cleared. Indeed, the principle of *stare decisis* was one "entrenched and revered by the framers" precisely because they knew its importance "as a weapon against ... tyranny." Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions,* 64 U. Pitt. L. Rev. 695, 707 (2003).

In Gorsuch's view, *Chevron* and *Brand X* put these important principles at risk, to the detriment of protecting personal liberties.

Also important to ensuring individual liberty, in Judge Gorsuch's view, is the nondelegation doctrine, by which the constitution limits congressional ability to delegate legislative power. In *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015), Gorsuch explained this viewpoint in his dissent from a denial of rehearing en banc. He articulated the justification for the nondelegation doctrine, in part, as:

> Without a doubt, the framers' concerns about the delegation of legislative power had a great deal to do with the criminal law. The framers worried that placing the power to legislate, prosecute, and jail in the hands of the Executive would invite the sort of tyranny they experienced at the hands of a whimsical king. Their endorsement of the separation of powers was predicated on the view that "[t]he inefficiency associated with [it] serves a valuable" liberty-preserving "function, and, in the context of criminal law, no other mechanism provides a substitute." Rachel E. Barkow, *Separation of Powers and the Criminal Law,* 58 Stan. L.Rev. 989, 1011-17, 1031 (2006).

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To Judge Gorsuch, the constitutional separation of powers and the importance of enforcing them – even when challenging – is required to preserve individual liberties and fulfill the constitutional framers' vision.