



## REPORT ON TENTH CIRCUIT NOMINEE NEIL GORSUCH

President Bush has nominated Neil Gorsuch for a seat on the U.S. Court of Appeals for the Tenth Circuit. For the past year, Mr. Gorsuch has been the Principal Deputy to the Associate Attorney General at the U.S. Department of Justice. Mr. Gorsuch, a native of Colorado, is strongly supported by Colorado Republican Senator Wayne Allard, who called him “extremely qualified for this position,” and a “top-flight nominee.”<sup>1</sup> Colorado’s other senator, Democrat Ken Salazar, a member of the “Gang of 14,” introduced Mr. Gorsuch at his hearing before the Senate Judiciary Committee but has not thus far publicly endorsed the nomination.<sup>2</sup> Mr. Gorsuch has spent most of his career in private practice representing corporate clients. He has expressed strong personal opinions in several published pieces, including an op-ed criticizing Democrats and liberals for what he said was an “addiction” to constitutional litigation, a piece attacking plaintiffs’ lawyers in securities fraud cases, and law review articles supporting federal term limits and opposing legalization of doctor-assisted efforts by the terminally ill to end their lives.

### I. BRIEF BIOGRAPHY

Neil Gorsuch was born on August 29, 1967 in Denver, Colorado. He graduated from Columbia University in 1988 and Harvard Law School in 1991. He also obtained a doctorate in philosophy from Oxford University in 1995. While at Harvard, Mr. Gorsuch participated in the Harvard Prison Legal Assistance Project and the Harvard Defenders program. After law school, he clerked for Judge David Sentelle on the U.S. Court of Appeals for the D.C. Circuit, retired Supreme Court Justice Byron White and Justice Anthony Kennedy. From 1995-2005, Mr. Gorsuch worked at the firm of Kellogg, Huber, Hansen, Todd, Evans & Figel, where he became a partner in 1998.

In private practice, Gorsuch primarily represented corporate clients and worked on large anti-trust, class action and securities litigation. During his time at the firm, Mr. Gorsuch drafted amicus briefs in three Supreme Court cases, each involving issues related to corporate class actions.<sup>3</sup>

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<sup>1</sup> Press Release, Senator Wayne Allard, Senator Allard Lauds Nomination of Neil Gorsuch to 10th Circuit Court of Appeals (May 9, 2006) (available at [http://allard.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease\\_id=231870&Month=5&Year=2006](http://allard.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=231870&Month=5&Year=2006)).

<sup>2</sup> Jared A. Taylor, *Denver Native Gorsuch Sails Through Hearing for 10<sup>th</sup> Circuit*, SCRIPPS HOWARD NEWS SERVICE, June 22, 2006.

<sup>3</sup> See *California Public Employees’ Retirement Systems v. Fezlen*, 525 U.S. 215 (1999); *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336 (2005).

In 2005, Mr. Gorsuch became Principal Deputy to the Associate Attorney General at the U.S. Department of Justice. The Associate Attorney General's Office is responsible for advising and assisting the Attorney General and the Deputy Attorney General in "formulating and implementing Departmental policies and programs pertaining to a broad range of civil justice, federal and local law enforcement, and public safety matters."<sup>4</sup> The Associate Attorney General's Office oversees important divisions at the Department of Justice, including the Antitrust, Civil, Civil Rights and Environment and Natural Resources Divisions.

In his Senate questionnaire, Mr. Gorsuch stated that his responsibilities include assisting in "managing the Department's civil litigating components" and making "[m]ajor litigation decisions in certain significant cases – such as whether to file suit, what motions and defenses to bring, whether and how to settle significant cases on advantageous terms [and] editing and reviewing trial and appellate court legal briefs and plotting case strategy."<sup>5</sup> The questionnaire does not specify, however, which cases and policies Mr. Gorsuch has weighed in on.

Mr. Gorsuch is a member of a variety of political, public service, scholarly and social organizations, including: the Republican National Lawyers Association; the conservation group Trout Unlimited; the Association of Marshall Scholars; and the University Club. He is also a member of the American Trial Lawyers Association. According to publicly available documents, since 1999 Gorsuch has contributed \$3,050 to a variety of Republican candidates and causes.

## II. PUBLISHED WRITINGS

While in college, Mr. Gorsuch co-founded a newspaper and a magazine at Columbia University. Both publications – *The Morningside Review* (the magazine) and *The Federalist* (the newspaper) – were intended to counter what Mr. Gorsuch and his co-founders saw as the predominance of liberal political views at Columbia during the mid-to-late 1980s. A review of available issues of the *The Morningside Review*, located in the Columbia archives, revealed two pieces authored by Mr. Gorsuch: one was a comment on U.S. policy in Afghanistan;<sup>6</sup> the other, a general defense of conservative political philosophy.<sup>7</sup> The Columbia archives also contain most, but not all, of the editions of the *The Federalist* published during Mr. Gorsuch's tenure at the paper. According to its initial statement of purpose, *The Federalist* attempted to provide a "classically liberal" forum for conservative students and others who want to air views not typically heard on campus.<sup>8</sup> Mr. Gorsuch, one of the paper's three founders, served on the board of editors and later as a contributor. Among other things, editorials published during his tenure encouraged a boycott of the Soviet Union, promoted the Strategic Defense Initiative ("Star Wars"), and attacked "political correctness" at Columbia. A search of the archives at Columbia

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<sup>4</sup> U.S. Department of Justice, <http://www.usdoj.gov/aag/index.html> (last visited June 20, 2006).

<sup>5</sup> Neil Gorsuch, Responses to Senate Judiciary Committee Questionnaire, at 8 (on file with Alliance for Justice).

<sup>6</sup> Neil M.T. Gorsuch, *The State Department vs. Afghanistan*, THE MORNINGSIDE REVIEW, Vol. V, Number 1, Winter 1986.

<sup>7</sup> Neil M.T. Gorsuch, *A Tory Defense*, THE MORNINGSIDE REVIEW, Vol. V, Number 3, Oct. 1986.

<sup>8</sup> *The Federalist*, <http://www.columbia.edu/cu/thefed/v3/volume15/5/fedhistory.shtml> (last visited June 20, 2006).

University revealed only one piece directly attributed by Mr. Gorsuch. In it, he and his co-author argued against the movement to make fraternities and sororities at Columbia co-ed.<sup>9</sup>

During his professional career, Mr. Gorsuch's has had several pieces regarding his legal views published in academic journals and the popular press.

#### **A. Views on Aspects of the Civil Justice System**

In an op-ed published in the *National Review Online* shortly before he became a Department of Justice official, Mr. Gorsuch attacked "American liberals" for what he said was an over-reliance on constitutional litigation.<sup>10</sup> He asserted that liberals' "overweening addiction to the courtroom" negatively affects public policy by aggrandizing the courts and consequently dampening "social experimentation" by the legislative branches.<sup>11</sup> As a result, he argued, reliance on constitutional litigation has led to the politicization of the judiciary and the judicial selection process. Mr. Gorsuch also predicted that the "Left's alliance with trial lawyers and its dependence on constitutional litigation to achieve its social goals risks political atrophy," which will ultimately invite "permanent-minority status for the Democratic party."<sup>12</sup> Mr. Gorsuch concluded that the country would be much better off if liberals "kick[ed] their addiction to constitutional litigation" and attempted to "win elections rather than lawsuits."<sup>13</sup> Mr. Gorsuch was not similarly critical of constitutional litigation, initiated by conservative groups, aimed at invalidating public policies like land use and environmental regulation, campaign finance reform, affirmative action and gun control.

In another article, which discussed a securities fraud class action he handled for the national Chamber of Commerce as amicus, Mr. Gorsuch launched into an attack on plaintiffs' lawyers for using such cases as vehicles for "free ride[s] to fast riches." He concluded that that they involve "frivolous claims ... [that] impose[] an enormous toll on the economy, affecting virtually every public corporation in America at one time or another and costing business billions of dollars in settlements every year."<sup>14</sup>

#### **B. Views on End-of-Life Decisions**

Mr. Gorsuch has written on the debate over whether state governments should permit what he refers to as doctor-assisted suicide. Throughout his writings, which include a forthcoming book and two significant law review articles,<sup>15</sup> he has rejected the underlying legal

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<sup>9</sup> Michael Behringer and Neil Gorsuch, *Coed Fraternity: Pro/Con*, THE FEDERALIST, Vol. II, Number 6, March 6, 1988.

<sup>10</sup> Neil Gorsuch, *Liberals' n' Lawsuits*, NATIONAL REVIEW, Feb. 7, 2005 (available at <http://www.nationalreview.com/comment/gorsuch200502070742.asp>).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Neil M. Gorsuch and Paul B. Matey, *No Loss, No Gain*, LEGAL TIMES, Jan. 31, 2005.

<sup>15</sup> Neil M. Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press forthcoming July 2006 see synopsis at <http://www.pupress.princeton.edu/titles/8317.html>); Neil M. Gorsuch, *The Legalization of Assisted Suicide and the Law of Unintended Consequences*, 2004 Wis. L. Rev. 1347 (2004); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J.L. & Pub. Pol'y 599, 641 (2000).

and moral arguments put forward in support of legislation allowing doctors to assist terminally ill patients to end their lives.

In one comprehensive article he authored on the topic, Mr. Gorsuch reviewed the legal and historical context in which the modern debate has occurred. He concluded that legalizing doctor-assisted suicide is not supported by the law, by history or by morality. First, focusing primarily on common law traditions, Mr. Gorsuch rejected arguments that legalized assisted suicide is supported by history: “history does not support a right to assistance in suicide or euthanasia ‘right.’ To the contrary, there is a long-standing modern consensus aim[ed] at preventing suicide and punishing those who assist it.”<sup>16</sup> Next, Mr. Gorsuch examined, and rejected, a variety of philosophical arguments invoked to support doctor-assisted suicide, including the neutrality principle (government should not be involved in making moral judgments about how people live their lives); the harm principle (government’s only role is to prevent individuals from harming others); and the utilitarian approach (suggesting that the benefits of assisted suicide outweigh the costs).

Mr. Gorsuch’s concluding argument against legalizing doctor-assisted suicide was that “the intentional taking of a human life by private persons is always wrong.”<sup>17</sup> While making exceptions for killing in the context of war and criminal justice, Mr. Gorsuch posited that adherence to this principle correctly prevents society from venturing into “troubling territory,” where it would “become[] enmeshed in making moral decisions about which [intentional killings] it deems permissible.”<sup>18</sup> In support of his view, Mr. Gorsuch argued that common law traditions reflect the concept that all “intentional acts against human life” are wrong.<sup>19</sup> He concluded that given the lack of persuasive arguments by the proponents of assisted suicide, the common law traditions disfavoring the intentional taking of life, and the “persuasive moral reasoning,” founded in the “recognition of the sanctity of life,” legalizing “assisted suicide and euthanasia, plainly would not be permitted.”<sup>20</sup>

### **C. Views on Term Limits**

In a law review article defending the constitutionality of term limits, Mr. Gorsuch asserted that such limits serve an appropriate and legitimate purpose in regulating congressional elections.<sup>21</sup> The Framers, he argued, failed to include term limits in the Constitution because they believed frequent elections would preclude the continual re-election of incumbents. The advent of standing congressional committees and legislative seniority, however, has increased legislators’ incentive to stay in office and thereby undermined the Framers’ vision of short electoral terms. Term limits are thus necessary, Mr. Gorsuch concluded.

In making his argument for the constitutionality of term limits, Mr. Gorsuch emphasized the difference between a legally permissible “manner regulation,” which implicates the

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<sup>16</sup> Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J.L. & Pub. Pol’y 599, 641 (2000).

<sup>17</sup> *Id.* at 697.

<sup>18</sup> *Id.* at 701.

<sup>19</sup> *Id.* at 705.

<sup>20</sup> *Id.* at 710.

<sup>21</sup> Neil Gorsuch and Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limits*, 20 Hofstra L. Rev. 341 (1991).

procedure of an election, and an impermissible “qualification,” which augments the three constitutionally-enumerated qualifications: age, residence and citizenship. He argued that term limits are manner regulations because they involve procedural concerns, such as the general timing of the election, and because, in his view, the Supreme Court had suggested that regulations not involving age, residency and citizenship were manner regulations. In addition, Mr. Gorsuch suggested that state-imposed term limits do not hinder the First Amendment rights of free speech and assembly, as elected officials do not have an unfettered right to candidacy, and voters do not have a fundamental right to vote for particular individuals. He also asserted that Fourteenth Amendment equal protection rights are not implicated, as term limits do not discriminate against poor or minority candidates, impose only a minimal burden on incumbents, and work to treat all voters equally. In balancing the interests of candidates and voters against the interests animating term limits, Mr. Gorsuch found that term limits would have little negative impact.

Mr. Gorsuch’s ideal term limit system was modeled on a measure passed in Colorado, which limited U.S. Senators and Representatives to twelve years in office but allowed them to run again after a four-year rotation out of office, though the term-limited former official was allowed to conduct a write-in campaign at any time. For Mr. Gorsuch, such a system would promote some of the “most basic and important” governmental interests by “[m]aintaining a representative democracy and limiting the influence of unfair electoral advantages . . . .”<sup>22</sup>

Mr. Gorsuch’s arguments were ultimately rejected by the Supreme Court several years after he published his article. The Court embraced the idea that states may impose “manner” regulations on elections. But it found that the restrictions limiting electoral terms, as applied to federal elections, did not constitute such a regulation; rather, according to the Court, they were unconstitutional “qualifications” regulations.<sup>23</sup> The Court’s decision invalidated state-imposed Congressional term limit laws throughout the country, including the Colorado law that Mr. Gorsuch held out as a model.

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<sup>22</sup> *Id.* at 379-380.

<sup>23</sup> See *U.S. Term Limits v. Thornton*, 514 U.S. 799 (1995).