



A Year On, Gorsuch is Critical Conservative Counterweight on Supreme Court

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Justice Neil Gorsuch was sworn in as the Supreme Court's latest member one year ago today, marking the anniversary of what commentators at the time called President Donald Trump's biggest win in his first hundred days in office.

Gorsuch was nominated to fill the seat left by the late Justice Antonin Scalia, who died in the midst of the 2016 presidential campaign. Scalia's death prompted a showdown between President Barack Obama, who nominated the left-leaning D.C. Circuit Judge Merrick Garland to fill the vacancy, and Senate Republicans, who promised to filibuster any nomination until a new president had been installed in the Oval Office.

Just days after his swearing in, newly inaugurated President Trump nominated Gorsuch, then a 49-year-old Federal Appeals Court judge in his home state of Colorado. Gorsuch was characterized at the time as a conservative, an originalist as to constitutional interpretation, and a textualist as to statutory interpretation. He followed in the footsteps of his predecessor, and in the mold of other judges backed by prominent conservative judicial organizations like the Federalist Society.

Since his confirmation—a 54-45 vote that ushered in the end of the filibuster for Supreme Court nominations—Gorsuch has lived up to this reputation.

"Tonight I can report, a person can be both a committed originalist and textualist and be confirmed to the Supreme Court of the United States," Gorsuch said in a speech before a Federalist Society's annual dinner last November. "Originalism has regained its place at the table of constitutional interpretation, and textualism in the reading of statutes has triumphed. And neither one is going anywhere on my watch."

Gorsuch's commitment to reading the law as written is a key feature of his tenure thus far, according to Carrie Severino, chief counsel at the Judicial Crisis Network and a former Supreme Court Clerk.

"That's a theme that we have seen carried out through his whole first term, that he is exactly as he presented himself during his confirmation hearings, the kind of judge who is firmly committed to our constitutional structure. The legislature makes the laws, and the judges simply interpret them," Severino told the *Free Beacon*.

Gorsuch's one-year anniversary comes before the summer term, when the majority of the Supreme Court decisions for his first year on the bench are likely to come down. As such, he has written just a few opinions. His first, in June, pertained to a minor point of interpretation of federal law governing the collection of debt. That opinion was joined by a unanimous court, signaling its relatively uncontroversial nature.

Still, Gorsuch's presence in the court room, and his votes on decided cases, are not without impact, coming as they do from the nation's highest court.

"Even though he hasn't had a chance to write any major opinions, whether majority, concurrence, or dissent, I think it's pretty safe to say that he's turning out exactly as observers hoped or feared," Ilya Shapiro, senior fellow in constitutional studies at the Cato Institute, told the *Free Beacon*.

Gorsuch's vote was important, for example, in the case of Trinity Lutheran Church, which was denied state funding for its playground thanks to a state law barring the public funding of religious organization. The court, in a 7–2 majority Gorsuch joined, sided with the church and called this denial "odious to our Constitution."

"Right off the bat, in April when he had come on to the court, was the Trinity Lutheran case. That was a great result in many ways," Severino said. "First of all in that it recognized the importance of religious freedom as a fundamental constitutional value, and that the state can't have a second-class citizen approach to religious institutions. But I think it was also encouraging to see that it was something that wasn't simply ideologically divided."

Gorsuch's stance on religious liberty is likely to be important in forthcoming decisions such as the one in Masterpiece Cakeshop, which pits a same-sex couple against a baker who says his religious beliefs prohibit him from letting his art participate in the couple's marriage ceremony. Gorsuch's conservative vote is also likely to be critical to *Janus v. AFSCME*, which concerns whether or not individuals can be compelled to pay union dues.

One trend that has stuck out in Gorsuch's opinions and concurrences is his close agreement with another conservative on the high court, Justice Clarence Thomas. Gorsuch has voted with Thomas, often identified as the court's most rightward member, in all but three of the cases that have been before the Court since the junior justice began his term.

While he may be close to Thomas, both Severino and Shapiro expect that Gorsuch will break from his predecessor, Justice Scalia, in one important area: judicial deference to executive

agencies. In the *Chevron* and *Auer* cases, the Supreme Court established a strong presumption of deference to executive branch interpretations of law, leaving many seemingly unlawful regulations unquestioned.

Scalia generally backed so-called *Chevron* and *Auer* deference, as part of his strong theory of the executive. But legal scholars have called *Chevron* enormously consequential in the rise of the modern administrative state, leading conservatives to challenge it. Justice Thomas wrote separately in 2014 questioning the practice of judicial deference, and Gorsuch was noted as a critic of deference in his lower-court position. In *Garco Construction, Inc. v. Speer*, Gorsuch joined a Thomas dissent calling for the court to revisit *Auer* deference.

"Gorsuch has stepped right into Justice Scalia's shoes, though without dominating oral argument as much. The real difference will come in cases presenting judicial-deference doctrines (like *Chevron* and *Auer*), where Gorsuch's work on the Tenth Circuit indicates he'll be less deferential to administrative agencies." Shapiro said.

Although the court has not yet explored overturning *Chevron* and *Auer*, there's still time. Just 50 years old, Gorsuch has a lifetime of service in front of him. As such, he may yet prove to be President Trump's most critical—and lasting—act while in office.

"He's the real deal, and will be a central part of President Trump's legacy regardless of anything else," Shapiro said.