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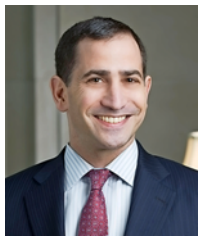
Practitioner Insights: Judge Gorsuch on Administrative and Environmental Law



BRIAN ISRAEL AND LAURA COTTINGHAM

President Donald Trump's nomination of Judge Neil Gorsuch of the U.S. Court of Appeals for the Tenth Circuit to replace the late Justice Antonin Scalia on the U.S. Supreme Court does not ensure a sway vote on popular, current issues. However, Gorsuch's writings on administrative law make clear that he opposes excessive executive branch rulemaking and the so-called ''Chevron'' deference.

Chevron deference, named for the 1984 Supreme Court case *Chevron v. Nat'l Res. Defense Council*, refers to the doctrine that reviewing courts will defer to regulatory agencies when they interpret ambiguous language in laws passed by Congress. Gorsuch believes that such deference to administrative agencies runs afoul of the separation of powers doctrine set forth in the Constitution (*Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 21 ERC 1049 (U.S. 1984)).

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As an associate justice, it is reasonable to expect that Gorsuch would seek to alter administrative jurisprudence as it relates to agency deference and roll back environmental regulatory actions that, in his judgment, represent an expansion of Congressional intent. On the other hand, in the context of an executive branch that is seeking to reduce regulation, a principled jurisprudence that provides less deference to the agency does not itself imply less environmental regulations if the underlying legislation provides otherwise.

Despite his anticipated skepticism of agency rulemaking, Gorsuch's opinions have largely sided with agency actions, suggesting an even-handed, deliberate analysis in cases involving regulatory agencies.

In opinions addressing environmental issues, Gorsuch's writings do not signal a categorical pro- or anti-environmental leaning. On one hand, he has authored an opinion analyzing Colorado's renewable energy

mandate under dormant commerce clause jurisprudence, ultimately upholding the mandate and delivering a win for environmentalists. But on the other hand, Gorsuch has shown some resistance to resolving cases on the merits in lawsuits asserted by non-governmental organizations, and has frequently dismissed such suits on a strict application of procedural rules.

Looking beyond his jurisprudence, Gorsuch is an avid outdoorsperson. In an apparent illustration of his affinity for the outdoors, Gorsuch opened one opinion by stating that ''[e]veryone enjoys a trip to the mountains in the summertime'' (*Scherer v. U.S. Forest Serv.*, 653 F.3d 1241, 1242 (10th Cir. 2011)).

It is, of course, unclear to what extent Gorsuch's appreciation of the natural world would impact his approach to environmental cases before the Supreme Court.

Skeptical View of Chevron Deference In 2016, Gorsuch authored a lengthy concurrence critiquing the current status of administrative law jurisprudence, particularly with respect to *Chevron* deference (*Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142 (10th Cir. 2016)).

Beginning with the premise that the current state of the law ''permit[s] 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,'' Gorsuch challenged the *Chevron* doctrine as one that conflates the respective roles of our three branches of government: ''*Chevron* invests the power to decide the meaning of the law, and to do so with legislative policy goals in mind, in the very entity charged with enforcing the law. Under its terms, an administrative agency may set and revise policy (legislative), override adverse judicial determinations (judicial), and exercise enforcement discretion (executive).''

Gorsuch then posited that ''a world without *Chevron*'' would not be an overly drastic departure from the current state of the law: ''Surely Congress could and would continue to pass statutes for executive agencies to enforce. And just as surely agencies could and would continue to offer guidance on how they intend to enforce those statutes. The only difference would be that courts would then fulfill their duty to exercise their independent judgment about what the law is.''

Gorsuch's concurrence in *Gutierrez-Brizuela* followed soon after another 2016 opinion lamenting the state of executive rulemaking, as applied to Medicare Benefits. Gorsuch declared that the Centers for Medicare & Medicaid Services was ''struggling to keep up with the furious pace of its own rulemaking'' (*Caring Hearts Personal Home Services, Inc. v. Burwell*, 824 F.3d 968, 970 (10th Cir. 2016)).

He then articulated his thesis that executive agencies have been afforded too much leeway in their exercise of legislative authority.

''Executive agencies today are permitted not only to enforce legislation but to revise and reshape it through the exercise of so-called 'delegated' legislative authority,'' Gorsuch wrote. ''The number of formal rules these agencies have issued thanks to their delegated legislative authority has grown so exuberantly it's hard to keep up. The Code of Federal Regulations now clocks in at over 175,000 pages. And no one seems sure how many more hundreds of thousands (or maybe millions) of pages of less formal or 'sub-regulatory' policy manuals, directives, and the like might be found floating around these days.''

Gorsuch also commented on the effects of executive rulemaking on the regulated community: ''For some, all this delegated legislative activity by the executive branch raises interesting questions about the separation of powers. For others, it raises troubling questions about due process and fair notice—questions like whether and how people can be fairly expected to keep pace with and conform their conduct to all this churning and changing 'law.' ''

U.S. v. Magnesium Corp: Upholding EPA's Decision, With Reservations In a case examining the Environmental Protection Agency's regulations governing the treatment of mined and processed magnesium wastes under the Resource Conservation and Recovery Act (RCRA), Gorsuch authored a panel opinion upholding the agency's decision to require a magnesium processor to comply with the regulations as interpreted by the agency, even though such interpretation conflicted with a previous, but tentative, EPA interpretation (*United States v. Magnesium Corp. of America*, 616 F.3d 1129, 71 ERC 1641 (10th Cir. 2010)).

The facts of the *Magnesium Corp.* case are important for understanding Gorsuch's opinion. In 1989, the EPA issued a rule setting criteria for determining whether mine wastes would be considered hazardous, and thus would be subject to more stringent handling requirements under RCRA.

In 1990, the EPA then submitted a report to Congress recommending that many wastes be exempt from RCRA's hazardous waste regulations, including the type of waste at issue in *Magnesium Corp.* The agency emphasized that the report's findings were ''tentative'' and encouraged comments from the public for consideration before issuing the final rule in 1991. The final rule exempted ''process wastewater'' from the hazardous waste requirements, but did not explicitly define the scope of such waste. The EPA and Magnesium Corp. then, for over a decade, debated which wastes qualified for process wastewater. The agency ultimately asserted RCRA violations against the company.

In writing for the panel, Gorsuch concluded that the agency was free to apply its current interpretation without going through notice and comment. Consistent with precedent, he held that ''an agency commits itself to a particular interpretation of its own regulation only when it adopts that interpretation definitively, and conditional or qualified statements, including statements that something 'may be' permitted, do not establish definitive and authoritative interpretations.''

Gorsuch noted that the EPA's overt classification of the 1990 Report as ''tentative'' and their invitation for public comment indicated that the agency had not taken a definitive position in its 1990 interpretation.

Deliberate Approach to Judging Agency Actions While the above opinions indicate Gorsuch's general jurisprudential philosophy with regard to executive rulemaking, it is also clear that he takes a deliberate, even-handed approach when evaluating specific agency actions.

For example, Gorsuch addressed a challenge to an administrative action brought by a group of recreational users of the Mt. Evans, Colo., recreational area, who argued that the *U.S. Forest Service's* implementation of amenity fees for visitors exceeded the scope of

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the agency's statutory authority under the Recreation Enhancement Act (REA) (*Scherer v. U.S. Forest Service*, 653 F.3d 1241 (10th Cir. 2011)).

After noting that ''[e]veryone enjoys a trip to the mountains in the summertime,'' Gorsuch held that there had been no impermissible agency action under the statute. In so doing, he noted that the REA authorizes the agency to charge fees for facilities that offer certain amenities to the public, but prohibits fees for certain persons such as hikers and boaters, who do not use such amenities.

Gorsuch found that the plaintiffs did not show that the collection of fees was per se impermissible under the REA. However, Gorsuch noted that a different lawsuit with a more tailored question as to whether the fee was invalid as applied to a particular visitor might yield a different result.

Two other decisions addressing challenges to executive agency action, in which Gorsuch sat on the panel but did not author the decision, include a straightforward analysis of administrative law principles.

Gorsuch voted with the unanimous majority on the three-judge panel deciding an Administrative Procedure Act challenge by an environmental nongovernmental organization under the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA) (*Forest Guardians v. U.S. Fish and Wildlife Service*, 611 F.3d 692 (10th Cir. 2010)). The panel considered whether the *U.S. Fish and Wildlife Service's* final rule authorizing the introduction of an experimental population of captive-bred falcons—an endangered species—in an area with non-captive bred falcons, was arbitrary and capricious under the APA.

The court cited *Chevron*, and held that the agency had reasonably interpreted the term ''population'' in the ESA because such interpretation did not conflict with the plain language of the statute and closely aligned with Tenth Circuit precedent. The panel also upheld the agency's NEPA analysis, finding that the agency took the requisite ''hard look'' at the environmental impact of their proposed action and did not predetermine the result of its environmental analysis.

In another relevant case, an NGO challenged the Bureau of Land Management's suspension of a coal mining company's lease and tolling of the statutory ''diligent development'' period, thereby extending the time in which the company could begin coal production (*S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't*, 620 F.3d 1227, 71 ERC 2134 (10th Cir. 2010)).

The majority, including Gorsuch, found that an administrative order issued by BLM in 2002 was ambiguous as to the meaning of ''final court decision.'' That phrase referred to the NGO's separate, then-unresolved, proceeding—an administrative appeal challenging the company's state mining permit. In assessing the agency's interpretation under *Chevron*, the majority held that the ''final court decision'' was unclear as to what event would trigger the end of the suspension. The court deferred to the agency's interpretation that its Order ''intended the suspension to last until [the mining company] had obtained the required permits and successfully fought off any court challenges to the agency decision.''

The dissenting judge found the language unambiguous, writing that it clearly meant that the suspension period lasted only as long as the relevant judicial proceedings, not for the duration of time in which the permitting process could be challenged. Thus, the majority held that the company's mining lease remained valid; the dissent opined that it did not. While this case offers an example of Gorsuch affording deference to an agency's interpretations, it also presents an instance of an NGO's arguments failing to sway him on the merits of the case.

Upholding Colorado's Renewable Energy Mandate In a significant 2015 case, Gorsuch addressed the validity of Colorado's renewable energy mandate requiring electricity generators to ensure that 20 percent of electricity sold to state consumers comes from renewable sources (*Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015)).

An organization whose members included out-of-state coal producers argued that the mandate improperly interfered with interstate commerce because it would impact the amount of electricity being supplied to the regional grid by fossil fuel producers.

Gorsuch, writing for the three-judge panel, disagreed, finding that the law did not implicate any dormant commerce clause issues because it was not a price control statute and did not link in-state prices to out-of-state prices. He further found that the statute did not discriminate against out-of-state consumers or producers or disproportionately harm out-of-state businesses.

While Gorsuch did not offer commentary on the substance of the renewable energy mandate itself, his analysis nonetheless indicates a willingness to side with states interested in promoting such mandates in the future, at least on commerce clause grounds.

Procedural Obstacles for Environmental NGOs Gorsuch's opinions involving environmental NGOs generally show a reluctance to wade into the merits of cases that can be resolved on procedural grounds, as well as his high standards for allowing litigants to bring their case before the court.

In a case involving a challenge by off-road vehicle enthusiasts to a Forest Service plan limiting the number of roads and trails available for recreational use, Gorsuch dissented from the majority on the three-judge panel on the issue of intervention (*N.M. Off-Highway Vehicle All. v. U.S. Forest Service*, 540 F. App'x 877 (10th Cir. 2013)).

The majority found that environmental NGOs met the requirements for intervention as of right because although the Forest Service and NGOs sought the same remedy—to uphold the plan—the agency could not adequately represent the interests of the public and the interests of private NGOs simultaneously. In addition, the NGOs' prior objections to the agency's actions in administrative proceedings indicated that the parties might differ on litigation strategy and appropriate remedy.

Gorsuch disagreed, writing that intervention was inappropriate because the interests of the NGOs were adequately represented by the Forest Service. In his view, speculation about legal objectives or litigation strategy was insufficient to justify intervention. He opined that a court could properly consider intervention if and when the interests of the Forest Service and NGOs diverged in the future.

He also joined the majority in a case concerning right of way access over federal lands (*Wilderness Society v. Kane Cty.*, 632 F.3d 1162 (10th Cir. 2011)).

Both the majority and concurring opinions explained why the case should be resolved on procedural grounds. The background of the case highlights the significance of the court declining to determine the case on the merits.

In this case, Kane County, Utah, asserted a right of way over roads in the Grand Staircase Escalante National Monument pursuant to a statute (R.S. 2477), which allows a party to obtain a ''right of way for the construction of highways over public lands, not reserved for public uses.'' The BLM had previously designated these roads as off-limits to vehicles such as ATVs and snowmobiles. After the county asked the agency to remove federal signs from their asserted rights of way without success, it removed the signs, put up new ones authorizing off-road vehicle use, and passed ordinances allowing for such vehicle use.

Environmental NGOs challenged the county's actions under a number of legal theories premised on the Supremacy Clause. Among them were arguments that the county's actions violated the Federal Land Policy and Management Act, the Wilderness Act, the National Park Service Organic Act, and various regulations and agency decisions implementing the statutes.

The Tenth Circuit, on rehearing en banc, held that the NGOs lacked prudential standing because they sought to enforce the federal government's property rights rather than their own.

Gorsuch wrote separately, noting that he would dismiss the case on mootness grounds because the county had repealed the ordinances at issue and removed the signs authorizing off-road use. He also noted that the NGOs lacked redressability under the Supremacy Clause for the remaining claims, which dealt with whether the county could install road numbering signs on its claimed rights of way.

Gorsuch declined to weigh in on the prudential standing analysis and ultimately did not provide any substantive commentary about the merits of the case. He did, however, comment on the fact that they presented intriguing questions of law.

''Fact is, federal law doesn't always point harmoniously in a single direction—and when it comes to land policy this is perhaps particularly true,'' he wrote.

It is worth nothing that the dissent in Kane County sharply criticized the majority for dismissing this ''pivotal case which, unless reversed or modified, will have long-term deleterious effects on the use and management of federal public lands.''

Similarly, Gorsuch authored a panel opinion in the long-fought legal dispute over snowmobiling in Yellowstone National Park, but issued his decision solely on procedural grounds (*Wyoming v. U.S. Department of Interior*, 587 F.3d 1245, 69 ERC 1801 (10th Cir. 2009)).

The court dismissed the appeal, which was brought by environmental NGOs (intervenors), as moot based on the National Park Service's implementation of intervening regulations during the course of litigation. Gorsuch refrained from commenting substantively on the questions surrounding appropriate snowmobile access in the park, emphasizing his aversion to ''judicial activism'' by noting that a decision on the merits ''would have no effect in the world we now inhabit but would serve only to satisfy the curiosity of the litigants about a world that once was and is no more'' and commenting, ''[a]s Chief Justice Roberts has succinctly put our point, 'if it is not necessary to decide more, it is necessary not to decide more.'''

Conclusion Gorsuch undoubtedly seeks to curtail judicial deference to agency rulemaking, which could significantly impact environmental law going forward.

Of course, it is difficult to predict how less deference to agencies would impact environmental issues under the Trump administration. Arguably, in the short term at least, less deference to the EPA could have the effect of maintaining, rather than decreasing, environmental regulations.

A careful reading of Gorsuch's writings suggests a deliberate and even-handed approach when evaluating agency decisions. Regarding environmental issues generally, Gorsuch's opinions do not indicate a categorical predisposition in opposition to environmental regulations. Indeed, Gorsuch's opinion in the Colorado renewable energy case, as well as his opinion in the *Scherer v. U.S. Forest Service* matter, evidence an openness to environmental concerns, including regulatory controls, when appropriate.

Finally, in lawsuits involving environmental NGOs, Gorsuch has often imposed rigorous constraints on such actions and applied procedural rules stringently.

Environmental organizations may find these decisions troubling, though it remains to be seen whether Gorsuch has a wholesale opposition to claims brought by such organizations.

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