



ESSAY

A Personal Reflection on Judge Neil M. Gorsuch From a Former Colleague

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I served with Judge Neil Gorsuch on the Court of Appeals for the Tenth Circuit for over three years, before I left the bench to teach constitutional law at Stanford. I sat with him in about fifty cases. Sometimes we disagreed, strongly. More often, we agreed. I want to share my impressions of Judge Gorsuch because I assume that most Americans are fair-minded enough to evaluate him on the basis of his character, his ability, and his judicial temperament. In my opinion, based on my personal knowledge of Neil Gorsuch as a judge, the President could not have made a finer appointment.

I will not dwell on Judge Gorsuch's sterling credentials—Columbia B.A., Harvard J.D., Oxford D.Phil, successful private practice, unanimous confirmation by the Senate. Those are on the public record. Nor will I parse his many well-crafted opinions as a judge. Those are being analyzed, and spun, by advocates on both sides. I want to discuss Judge Gorsuch as a colleague and a human being and offer some more speculative thoughts about where his constitutional views may fit in these crazy times. I actively worked in favor of the confirmation of Justice Elena Kagan, wrote in support of Justice Stephen Breyer, and testified in support of Judge Robert Bork, so I do not think these comments will be read as one-sided or partisan.

I first met Judge Neil Gorsuch in 2006. I was immediately struck by his intellectual seriousness and open and gracious personality. He treats everyone with respect. Not just fellow judges, but also lawyers, law clerks, and court personnel—everyone. When discussing a point of law, Judge Gorsuch listens and learns. He does not act as if he always knows the answers. I have seen him change his mind as a result of discussion.

This quality of mind is particularly evident during oral arguments in court. Unlike some judges who treat oral arguments as a chance to make their own points, Judge Gorsuch actively engages with the lawyers, listens carefully to their positions, asks penetrating questions, and reflects fair-mindedly on what

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they have to say. Afterward, in the conference room with the other judges on the panel, he would similarly engage in a mutually respectful exchange of ideas. Never did I hear him speak dogmatically, or lose his temper, or allow any considerations to intrude other than good faith interpretations of the law.

These qualities also inform his opinions. Many have commented on Judge Gorsuch's writing skill, and it is true that he is one of the best writers in the judiciary today. More important than style, though, is that he sets forth all positions fairly and gives real reasons—not just conclusions—for siding with one and rejecting the other. And he does it in language that is accessible to nonlawyers. Courts have awesome power over people's lives, and it is important that they give reasons that all citizens can understand (even if they do not agree).

Judge Gorsuch is unfailingly cordial and collegial—not as a mere matter of etiquette, but as a deeply held value of intellectual engagement even with, or perhaps *especially* with, colleagues with whom he might not be in agreement. Justice Antonin Scalia, whom Judge Gorsuch is nominated to replace, was a pugnacious lover of intellectual battle, often caustic in rhetoric and inclined to sharpen differences. Based on my experience, Judge Gorsuch has the opposite temperament. He inclines toward finding common ground and is scrupulously respectful of the other side, in tone and in substance.

Judge Gorsuch also is deeply committed to following precedent as a central feature of the rule of law. Many was the time he and I would debate the exact meaning of a prior decision or lament instances when we thought our colleagues were transgressing the line. In fact, he literally wrote the book on the subject—he is one of the contributing authors of a legal treatise entitled *The Law of Precedent*.

From his first days on the court, Judge Gorsuch was an independent thinker, never a party-liner. I asked my research assistant to examine every case in which Judge Gorsuch sat with a mix of Republican- and Democratic-appointed judges and reached divided conclusions. In the past five years, in almost one-third of those cases, Judge Gorsuch voted with his liberal colleagues, not with the conservatives. That is the record of a moderate, fair-minded, nonpartisan jurist.

This is not just my opinion. Liberal and progressive law professors all over the country, not caught up in the politics of the day, have come to the same conclusion. No one agrees with all of Judge Gorsuch's opinions. I certainly don't. But they are without exception thoughtful, moderate, and independent.

Judge Gorsuch is undoubtedly conservative, but he has not the slightest touch of the extreme. Those who describe him as "outside of the mainstream" would have to say the same of any Republican appointee. He is about as "far right" as Justice Elena Kagan is "far left" (though, to be fair, some Republicans said that about her, with as little basis). The best description of Judge Gorsuch is that he is a constitutionalist rather than a partisan. In the years ahead of us, when a set of issues will arise that the country has never seen before, this is exactly the kind of Justice Americans of all political stripes should hope for.