“The Wrongdoing of Others”: Judge Gorsuch and Judicial Activism

By Tim Kaine

The nomination of Judge Neil Gorsuch is the second Supreme Court nomination since I came to the United States Senate. My first opportunity to exercise advise and consent authority over a Supreme Court nominee came to naught. Judge Merrick Garland, nominated by President Barack Obama shortly after the death of Justice Antonin Scalia, was accorded unprecedented disrespect. Few Senate Republicans would even meet with him. The Senate Judiciary Committee refused to hold a hearing. There was never a committee vote. There was no vote on the floor. Senate traditions were shattered and the nomination expired at the end of the Obama term.

This nomination must be different. Judge Gorsuch is entitled to respectful consideration--that which Judge Garland never received--because of his public service and in order to reclaim the traditions of the body. The Supreme Court has been fixed at nine Justices since the Judiciary Act of 1869 and the effort by the GOP to artificially maintain an eight-member court for more than a year has been an egregious affront to the rule of law.

Judge Gorsuch was welcomed for personal meetings by most Senators. He was given a full hearing in the Judiciary Committee. His nomination will receive a committee vote. He will receive floor consideration, including extensive debate and a vote to see whether he can clear the 60 vote threshold that is unique to Supreme Court nominees. The elevated threshold guarantees that any nominee for this lifetime position on the nation's highest court must receive significant bipartisan support. That is especially important now given the many important issues pending before the court and the clear need to fill a position long held vacant through blatant partisan politics with someone who can bring independence and non-partisanship to the job.

Though I am not a member of the Senate Judiciary Committee, I welcomed the opportunity to meet with Judge Gorsuch. I followed his hearing with interest and have read numerous opinions he has authored. I was a civil rights lawyer for 17 years with cases in state and federal trial and appellate courts, including the United States Supreme Court. I appointed 2 Virginia Supreme Court Justices when I was Governor and taught constitutional law and legal ethics at the University of Richmond Law School. My wife Anne served as a Juvenile and Domestic Relations Court Judge for many years. I have thought long and hard about the mixture of skills required to be a good judge.

Based on his educational accomplishments, professional background and work product as a judge, Judge Gorsuch passes the test of competence to serve as Justice of the Supreme Court. But there is an equally important test—judicial philosophy. President Trump, the nominee's supporters and Judge Gorsuch himself make much of the fact that he is an "originalist" rather than a "judicial activist." Judge Gorsuch has written about judicial activism with scorn: "[T]hose who would have judges behave like legislators, imposing their moral convictions and utility calculus on others, face an uphill battle when it comes to reconciling their judicial philosophy with our founding document." His scorn extends beyond activist judges to lawyers pressing constitutional claims in the nation's courts: "American liberals have become addicted to the courtroom."

It seems fair to examine Judge Gorsuch under the standard he has set for himself. Is he an "originalist" or an "activist?"

The most famous effort to describe the role of a non-activist judge was offered by Chief Justice Roberts during his confirmation hearing in 2005. His own opening statement laid out a vision for the non-activist judge:

> Judges and justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules; they apply them. . . . I come before the committee with no agenda. I have no platform. . . . I will decide every case on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes and not to pitch or bat.

My first professional mentor was a federal appellate judge who met that standard. Judge R. Lanier Anderson of the United States Court of Appeals for the Eleventh Circuit taught his clerks the same basic philosophy elucidated by Justice Roberts. Humility. An effort to apply the law carefully. A refusal to view a case as a personal cause. That is how Judge Gorsuch is described by admirers. That is how he describes himself. And the question for a Senate charged with the constitutional responsibility to examine his nomination is to ask whether his judicial record matches the rhetoric.

For an appellate judge such as Judge Gorsuch, the calling of "balls and strikes" is a relatively binary choice. Parties may appeal cases when they are resolved in a federal district court. Appellate judges either affirm a lower court ruling or reverse it. There are some gray area cases--matters remanded back to lower courts for additional consideration. But, the daily work of a federal appellate judge is hearing cases--normally in a panel of three judges--and deciding whether to affirm or reverse the decision of a district court judge.

The decision to affirm or reverse is the "ball or strike" call. When the case is before you, you must resolve it. Not calling the pitch is not an option. Usually you affirm, occasionally you reverse. The court usually issues an opinion describing the ruling. Occasionally, a three member panel hearing a case is not unanimous and there is a dissenting opinion. Occasionally a member of the panel likes the outcome but has a separate rationale for supporting it, or a peculiar point to make about it, and writes a concurring opinion. Dissenting and concurring opinions are the exception not the norm in federal appellate practice but they are part of the development of the law.

Judge Gorsuch has sat on hundreds of panels resolving appeals presented to the Tenth Circuit. He has authored 854 opinions. He has often written for a unanimous court, but he has also written numerous dissenting and concurring opinions.

In my review of Judge Gorsuch's work, and in my discussion with him, I focused on a particular aspect of his work, the cases where he moved beyond simply resolving a case as presented, beyond just calling "balls and strikes." While an appellate judge normally votes to affirm or reverse, there are a few instances where an appellate judge has the discretion to move beyond the umpire role. In these instances, to extend the analogy, a judge chooses to go up in the booth and become a color commentator. How and when a judge chooses to do this tells you something about his philosophy. Despite his championing of originalism over activism, Judge Gorsuch has chosen to step away from the umpire's box in cases of great importance. Those choices demonstrate a firm streak of activism about particular kinds of cases--those dealing with the rights of women to exercise autonomy in making choices about their own health care.

One area where an appellate judge's behavior is voluntary, moving beyond the simple "affirm" or "reverse" decision, is in the issuance of a concurring opinion. A dissenting opinion is less discretionary--if you think the majority has made the wrong call about the validity of a lower court ruling, your duty is to dissent and explain why. But a concurring opinion is more revealing. You agree with the majority opinion and how the case is resolved. But you decide to separately write an opinion to emphasize a point that you find particularly important, a point that the majority does not embrace.

In a significant 2013 case, Hobby Lobby v. Sebelius, Judge Gorsuch joined an en banc Tenth Circuit opinion allowing a company to assert a claim under the Religious Freedom Restoration Act against the contraception mandate contained in the Affordable Care Act. The majority opinion allowed the claim to go forward, finding that the closely held company could seek the protection of the Act. This ruling was upheld by the United States Supreme Court.

Judge Gorsuch decided to write a separate concurring opinion. The majority cleared the path for Hobby Lobby to challenge the contraception mandate. Judge Gorsuch went further to allow the family owning the company (not just the company itself) to also challenge the law.

To non-lawyers, the distinction between a corporation and the individuals owning it may seem technical, but in law the distinction is profound. By incorporating their company, the Green family had obtained critical protections, including a protection of their personal assets from liability for actions of the company. And, since the individual members were not the “employer” of the Hobby Lobby employees, they had no individual duty toward the employees under the Act.

But despite the Green family’s decision to separate their own assets and legal personae from the company, Judge Gorsuch stretched to opine that the Green family members should also be able to bring suit to block Hobby Lobby employees from having access to contraception. The opening lines of the Judge’s concurrence are blunt, gratuitous and revealing:

> All of us face the problem of complicity. All of us must answer for ourselves whether and to what degree we are willing to be involved in the wrongdoing of others.

Consider the phrase-- "the wrongdoing of others.” That is how Judge Gorsuch chooses to describe the choice of women employees to use contraception. More than 60 percent of American women of childbearing age choose to do so. That choice has been constitutionally protected for more than fifty years.

This is an astounding opinion. I don’t know another like it.

I asked Judge Gorsuch about this case in our interview--why should the Green family be able to incorporate and obtain protection against any lawsuit for corporate action but nevertheless be granted the right to personally sue for a statute that applies to the corporation? His answer was completely unpersuasive--emphasizing that standing to sue is a low bar in federal court. I was left with the impression that the ruling in the case was more about his view of the issue--contraception--than about careful application of the law. And, while the concurrence extended unusual solicitude to the rights of the individual owners of the affected company, it was silent about the rights of female employees trying to access health care in accord with their own moral values, except for the insulting reference to their “wrongdoing.”

Another instructive area in examining Judge Gorsuch's fidelity to his anti-activism standard is his practice in considering whether a panel decision should be reviewed en banc. When a three judge panel resolves an appeal, Federal Rule of Appellate Procedure 35 establishes how a party may seek a rehearing of the decision by the entire membership of the circuit. The rule makes clear that such applications are generally disfavored. And the vast majority of such applications are turned down.

I know from my own appellate practice that disappointed parties often seek en banc review. A poll is conducted of the entire active membership of the relevant circuit court and, unless a majority support a rehearing, the motion is denied. Normally, the petition for rehearing is denied in a one sentence order.

Judge Gorsuch has engaged in the unusual practice of supporting en banc rehearings sua sponte, i.e., when the parties themselves have not even asked for a rehearing. And, curiously, his efforts to seek such sua sponte rehearings are most notable in cases dealing with women's autonomy in making their own health care decisions.

In the 2015 case of Little Sisters of the Poor v. Burwell, a panel of the Tenth Circuit resolved another case regarding the ACA contraception mandate and the parties chose not to seek an en banc rehearing. But despite the parties' determination not to do so, Judge Gorsuch supported a sua sponte rehearing. The rehearing was not supported by a majority of the Circuit and he joined in an opinion dissenting from the denial of en banc review.

More notable was Judge Gorsuch's decision in October 2016 in Planned Parenthood v. Herbert. A lawsuit between Planned Parenthood and the Governor of Utah over a threat to defund the organization led a district court to deny a preliminary injunction against the defunding effort. On appeal, the Tenth Circuit issued a split 2-1 decision reversing the lower court ruling and sent the matter back to the trial court for additional proceedings. The parties chose not to seek a rehearing en banc, quickly reached agreement on the preliminary injunction issue and moved forward with the litigation in the lower court.

Judge Gorsuch--who had not served on the original panel—unsuccessfully sought to have the matter reheard despite the parties' desire to move on. A review of the three opinions in the case--two concurring opinions explaining why a rehearing was not warranted and Judge Gorsuch's dissenting opinion about why the rehearing should have been granted—emphasize the unusual nature of the situation whereby Judge Gorsuch tried to resuscitate an appeal without the request of the parties and even without their knowledge.

I asked Judge Gorsuch about this case in our discussion. Why seek an en banc review when the parties don't ask for it? He responded that parties sometimes lack the resources to pursue an en banc review. But the losing party in this case, the state of Utah, clearly had the resources to pursue en banc review if it chose to do so. He then mentioned the importance of clarifying legal principles that can affect other cases. But this case involved a highly fact-specific determination--whether a party had established an entitlement to a preliminary injunction. Even the panel judge who dissented in the original ruling voted against rehearing and wrote an opinion explaining his view that the case presented no legal issue that would affect other cases.

Judge Gorsuch has criticized judges who "impose their moral convictions and utility calculi on others." When parties accept the resolution of an appeal and are content to move on without seeking a rehearing, but a judge nevertheless pushes for the matter to be reheard anyway, isn't this an imposition of the judge's personal conviction over and above the wishes of the litigants?

And when a request for rehearing fails, why not follow the normal protocol and issue a standard one sentence order denying the petition? Judge Gorsuch went out of his way in this case to maintain an appeal that was finished and then publicly opine about it when he didn't need to. As in Hobby Lobby and Little Sisters of the Poor, his own view on "the wrongdoing of others"—i.e., women making their own health care choices--shows through the relatively straightforward legal issue raised by the case.

It is one thing to call balls and strikes as an appellate judge, voting to affirm or reverse a lower court ruling. But Judge Gorsuch has a penchant for leaving the umpire box to become a color commentator in certain cases. The fact that these cases tend to be about women's autonomy in making their own health decisions is notable. One needn't be an activist about everything to be an activist. Judge Gorsuch is definitely a judicial activist.

And here is an important point about the Supreme Court. Unlike an appellate court, which entertains most appeals as of right where the judges must consider a lower court ruling and affirm or reverse, the Supreme Court controls its own docket. The bulk of its docket is cases taken via the certiorari process--a completely discretionary decision whereby the affirmative vote of 4 members of the Court puts the case up for decision. The Supreme Court is much more than an umpire, simply applying the law to matters that automatically come before it. It chooses the cases it will hear--much like a catcher calling a pitch. And it has much more discretion in the decision of a case than an appellate judge who is bound to follow precedents of the Supreme Court and the law of the relevant circuit. Thus a Supreme Court position will give Judge Gorsuch more latitude to exercise his own brand of activism than his current post.

Judge Gorsuch's appellate record makes clear that he views women making their own reproductive health decisions as a question about "the wrongdoing of others." Such a view about half of the population is jarring. He doesn't hesitate to take unusual steps to insert that moral conviction into his jurisprudence. Humility would dictate that he live in accord with his convictions but stop short of imposing them on others who are more able than he to make moral decisions governing their own lives.

I will oppose his nomination.