

CHAIRMAN GRASSLEY, RANKING MEMBER FEINSTEIN, AND DISTINGUISHED MEMBERS OF THE SENATE JUDICIARY COMMITTEE:

It is an honor to again address this important committee that has done so much over the years to ensure the existence and independence of our third branch of government.

I am Robert Henry, President and CEO of Oklahoma City University, a former state legislator and Attorney General of Oklahoma, and former Chief Judge of the U.S. Court of Appeals for the Tenth Circuit, a Court I had the privilege to sit on from 1994 to 2010, the last four years of that tenure as a colleague of Judge Gorsuch. Based on that personal experience working closely with him, and with maintained contact through circuit conferences, correspondence, and judicial gatherings, I am here today to speak in support of Neil Gorsuch's nomination to serve as an Associate Justice on the Supreme Court of the United States.

In Federalist 78, Publius (in this matter, a/k/a Alexander Hamilton) described the nature and virtues of the federal judiciary. As the "least dangerous" branch would have neither "sword nor purse," care would have to be taken to protect its vital independence as it would have to referee the disputes between the more powerful political branches. "Permanency in office" would be required both to promote independence and to allow for the mastery of the voluminous "strict rules and precedents" that would prevent arbitrary judgments. The granting of permanence, the importance of integrity, and the long and laborious study required to master the judicial craft led Hamilton, whose star, gratefully, has ascended again of late, to observe: "Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges."

Now as the quotation reveals, Hamilton was practical but not prescient. He, like all the other Framers, missed the necessary inclusion of women in the political process. But my guess is that Hamilton would be very impressed with the qualifications and legal scholarship of the women who have served to date as Associate Justices on the Supreme Court: Sandra Day O'Connor, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. The point remains that the selection of federal judges in general, and certainly of Supreme Court justices in particular, is a solemn undertaking.

And that is why this committee is gathered today. Fortunately, you have before you a candidate that I believe our judicial branch's architect Hamilton would warmly embrace--and not just because they both attended Columbia. As one who has served with Neil, decided cases with him, traveled and dined with him, discussed our families together (including the menageries his daughters have maintained over the years), agreed *and* disagreed with him, I can attest to his **(1) truly remarkable intellect, (2) his oft-**

demonstrated integrity, (3) his mastery of “rules and precedents,” and (4) his fine judicial temperament and collegiality.

I believe the subject of **intellect** speaks for itself and needs but summary mention: his honors degrees from Columbia and Harvard Law School; his Marshall Scholarship to Oxford (an honor he shares with Justice Stephen Breyer) which resulted in a Doctor of Philosophy degree; and his corpus of work including outstanding service awards from the State Department and the Truman Foundation, scholarly writings, and some 900 opinions that lawyers have described as “straightforward,” “learned,” and “well-reasoned.” Deserving special mention is THE LAW OF JUDICIAL PRECEDENT which Judge Gorsuch joined with Bryan Garner, America’s foremost lexicographer and legal rhetorician, and several distinguished circuit judges of quite diverse backgrounds to develop a remarkable work of legal scholarship. Impressively, all its eminent judicial coauthors, of different political and occupational backgrounds, produced a single volume, written with a single voice, and no signed sections.

As to **integrity**, in my professional dealings with him I have never found it questionable, nor have I ever heard of it being questioned. His career choices have subjected him to numerous reviews of his character and fitness for public service. His service as a law clerk for fellow Westerner the late Justice Byron White (a highly esteemed judicial figure in the Tenth Circuit where the courthouse is named for him—and not just because of his football records), as well as his clerking for Justice Anthony Kennedy attests to that integrity. His review by this committee for the position of circuit judge also attests to the thorough examination of background that has revealed a person of total integrity. I will come back to his integrity shortly.

And much of the above also speaks to Neil’s **mastery of the law**. His experiences include both private and public practice of law, teaching law, and 11 years of the crafting of opinions on the Tenth Circuit. Indeed, Judge Gorsuch’s service in the Tenth Circuit has contributed to our jurisprudence on cases of great importance to our country, cases largely from the Great American West from whence he hails and where he proudly lives: cases involving public lands and waters, and the law (largely crafted by Chief Justice John Marshall) of our Native American nations. I have no doubt that Judge Gorsuch’s experience in these matters would be of great assistance to the Supreme Court.

Judicial temperament--which the American Bar Association defines as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice-- and **collegiality** are traits not so easy to understand if one has no experience with collegial bodies. In my view, temperament speaks primarily to a judge’s interaction with litigants and the bar, and collegiality speaks to relationship with judicial colleagues. As members of the United States

Senate, you know how important it is to be respectful *of* and respected *by* colleagues. The smaller the group, the more important these traits become. In discussing the importance of collegiality, I often mention the example of Justice Oliver Wendell Holmes, Jr. Although a brilliant justice, he could be quite irascible, having few friends on or off the bench, and once terming his colleagues “nine scorpions trapped in a bottle.” Although, at least, he included himself as a fellow arachnid, such phrases and sentiments did not help him work with colleagues and they help explain why his best work was in dissent.

Judge Gorsuch’s elegant pen is not an acid one turned on his colleagues. Although in the heat of battle sometimes judicial prose may overstate a position, I think by any standard his opinions have been fair, well-reasoned, and not *ad hominem*.

Thus, Judge Gorsuch meets the qualities Hamilton specifically addressed in Federalist 78. He has other great traits as well. One final area deserves special mention, referring again to integrity.

While I served as Chief Judge for the Tenth Circuit, Judge Gorsuch’s commitment to adequate legal representation for all parties evidenced itself in his quick and avid participation in an overhaul of the Tenth Circuit’s approach to capital habeas appellate representation. Shortly after a 2008 Tenth Circuit death penalty oral argument before a panel including now Chief Judge Timothy M. Tymkovich, Judge Carlos Lucero, and Judge Gorsuch, these judges brought their concerns about the quality of capital case representation to the attention of the Court. Recognizing Congress’s concern with “the seriousness of the possible penalty and . . . the unique and complex nature of the litigation,” 18 U.S.C. § 3599(d), Judges Gorsuch and Tymkovich volunteered to take charge of a thorough and systematic effort to improve the quality of legal representation of capital case appellants, and take charge they did. Within a few short months, they organized and executed a series of meetings, provided guidance and oversight in data-collection, and arranged conference calls with stakeholders. Working with the Office of Defender Services Training Branch, they reviewed a training assessment survey from meeting participants. After analyzing the data, the Judges focused on the root causes of the subpar capital representation: the staggering caseload overwhelmed the Circuit’s capital habeas units and the number of qualified capital habeas panel attorneys was unfortunately low.

The Judges’ proposals to improve the quantity and quality of representation in these most difficult of cases succeeded. Rather than start from scratch, they suggested expanding the use of the highly-respected appellate division of Colorado’s Federal Public Defender’s office – and pairing these skilled and experienced attorneys with private attorneys appointed under the Criminal Justice Act (CJA). Through this efficient team approach, the Colorado Public Defender office ka provided appellate

expertise to the CJA attorneys, resulting in immediate training and support. In 2009 and 2010, the Judges convened various training sessions and meetings in Oklahoma (from which most of the circuit's capital cases originated). The Judges designed these meetings to recruit qualified lawyers and assess training needs – and perhaps most importantly, Tenth Circuit Judges attended and participated in these sessions. The circuit even scheduled capital case oral arguments in the Homsey Courtroom at the Oklahoma City University School of law so that Oklahoma attorneys could attend and see how judges approach these most difficult cases.

The Judges also underscored the need for enhanced budgeting for both attorneys and the Court. CJA attorneys in the Tenth Circuit generally sought modest budgets, and increases in those budgets proved difficult to secure. They and the Court received updated training on capital case budgeting, which resulted in CJA attorneys allocating their budgets more efficiently. And the Judges' efforts yielded increases of staff in the Federal Public Defender offices in Colorado and Oklahoma, and an increase in the number of law clerks specializing in the death penalty.

Since Judge Gorsuch and Judge Tymkovich took this action, each CJA panel member has engaged in at least one moot court with a Capital Habeas Unit before appearing for argument before the Tenth Circuit. Unquestionably, Judge Gorsuch's efforts have been instrumental in improving the quality of representation in federal capital habeas cases, and in securing the funding to shore up the efforts of practitioners and federal public defenders specializing in death penalty representation. These measures reflect Judge Gorsuch's unwavering dedication to the need for quality legal representation in all capital proceedings to ensure fundamental fairness in the imposition of the death penalty. They underscore his integrity as a jurist.

Mr. Chairman, Ranking Member, and members of the committee, I appreciate the opportunity to speak to you about the intellect, integrity, legal knowledge, judicial temperament, and collegiality of Judge Neil Gorsuch. Thank you. I would be pleased to respond to any questions.