

**Senator Dianne Feinstein**  
**Nomination hearing for Judge Neil Gorsuch**  
**March 20, 2017**

Thank you very much, Mr. Chairman. Judge Gorsuch, I want to welcome you and your family.

We're here today under very unusual circumstances. It was almost a year ago today that President Obama nominated Chief Judge Merrick Garland for this seat.

Unfortunately, due to unprecedented treatment, Judge Garland was denied a hearing and this vacancy has been in place for well over a year. I just want to say I'm deeply disappointed that's is under these circumstances that we begin our hearings.

Merrick Garland was widely regarded as a mainstream, moderate nominee.

However, President Trump repeatedly promised to appoint someone "in the mold of Justice Scalia" and said that the nomination of Judge Gorsuch illustrates he's "a man of his word."

For those of us on this side, our job today is not to theoretically evaluate this or that legal doctrine or to review Judge Gorsuch's record in a vacuum. Our job is to determine whether Judge Gorsuch is a reasonable, mainstream conservative or is he not.

Our job is to assess how this nominee's decisions will impact the American people and whether he will protect the legal and constitutional rights of all Americans—not just the wealthy and the powerful.

We hold these hearings not because court precedent and *stare decisis* are something average Americans worry about.

We hold these hearings because the United States Supreme Court has the final word on hundreds of issues that impact our daily lives.

The Supreme Court has the final say on whether a woman will continue to have control over her own body or whether decisions about her health care will be determined by politicians and the government.

It decides whether billionaires and large corporations will be able to spend unlimited sums of money to buy elections, and whether states and localities will be able to pass laws and make it harder for poor people, people of color, seniors and younger people to vote.

It is the Supreme Court that will have the final word on whether corporations will be able to pollute our air and water with impunity.

Or whether the NRA and other extreme organizations will be able to block commonsense gun regulations, including those that keep military-style assault weapons off our streets.

And it is the Supreme Court that will have the ultimate say on whether employers will be held accountable for discriminating against workers or failing to protect workers when they're harmed or killed on the job.

For example, last year, Judge Gorsuch sat on a case that involved a truck driver who was stranded in the freezing cold for several hours after his trailer's brakes froze. He had no heat. In fact, it was so cold that the driver was "having trouble breathing," his "torso was numb and he could not feel his feet."

Despite this, his employer directed him to wait for a repairman or else drive both the truck and the trailer. When no one came, the driver unhitched the trailer to search for assistance because driving with frozen brakes with a fully-loaded trailer would have been too dangerous.

A week later he was fired.

After hearing the case, the administrative law judge, ruled that firing the driver was a violation of the health and safety law intended to protect workers. The United States Department of Labor's administrative review board and the Tenth Circuit agreed.

Judge Gorsuch dissented and sided with the company.

In another case, Judge Gorsuch wrote a separate opinion, this time to challenge a long-standing legal doctrine that allows agencies to write regulations necessary to effectively implement the laws that Congress passes and the president signs. It's called the Chevron doctrine.

This legal doctrine has been fundamental to how our government addresses real world challenges in our country and has been in place for decades. If overturned, as Judge Gorsuch has advocated, legislating rules are very difficult.

In fact, Congress relies on agency experts to write the specific rules, regulations, guidelines and procedures necessary to carry out laws we enact.

These are what ensure the *Clean Air Act* and the *Clean Water Act* to protect our environment from pollution.

They are the specific protections put in place by the FDA and the agriculture department that safeguard the health and safety of our food supply, our water, our medicines.

And they are the details needed to support the infrastructure of our communities—our roads, highways, bridges, dams and airports.

We in Congress rely on the scientists, biologists, economists, engineers and other experts to help ensure our laws are effectively implemented.

For example, even though Dodd-Frank was passed nearly seven years ago to combat the rampant abuse that led to our country's worst financial crisis since the Great Depression, it still requires

over a hundred regulations to be implemented by the Securities and Exchange Commission, the Commodity Futures Trading Commission and other regulators in order to reach its full effectiveness, as intended by Congress when it was passed.

Judge Gorsuch's position, were it to be adopted, would take away agencies' authorities to address these necessary details. Such a change in the law would dramatically affect how laws passed by Congress can be properly carried out.

Two weeks ago, the *Washington Post* ran an op-ed written by a woman who "desperately wanted to have a baby." She described how she and her husband went to great lengths for four years trying to get pregnant and were thrilled when they finally succeeded.

Tragically, after her 21-week check-up, they discovered her daughter had multicystic dysplastic kidney disease. They were told by three separate doctors that her condition was 100 percent fatal and that the risk to the mother was sevenfold if she carried her pregnancy to term. The mother described their excruciating decision and the unforgiving process the couple endured to get the medical care they needed.

The debate over *Roe v. Wade* and the right to privacy, ladies and gentlemen, is not theoretical. In 1973, the court recognized a woman's fundamental and constitutional right to privacy—that right guarantees her access to reproductive health care.

In fact, the Supreme Court has repeatedly upheld *Roe's* core finding, making it settled law for the last 44 years.

I ask unanimous consent Mr. Chairman to enter into the record the 14 key cases where the Supreme Court upheld *Roe's* core holding and the total 39 decisions where it has been reaffirmed by the court.

If these judgements, when combined, do not constitute super-precedent, I don't know what does.

Importantly, the dozens of cases affirming *Roe* are not only about precedent, they are also about a woman's fundamental and constitutional rights. *Roe* ensured that women and their doctors will decide what's best for their care, not politicians.

President Trump repeatedly promised that his judicial nominees would be pro-life and quote "automatically" end quote overturn *Roe v. Wade*. Judge Gorsuch has not had occasion to rule directly on a case involving *Roe*. However, his writings do raise questions.

Specifically, he wrote that he believes there are no exceptions to the principle that, quote, "the intentional taking of human life by private persons is always wrong," end quote. This language has been interpreted by both pro-life and pro-choice organizations to mean he would overturn *Roe*.

The Supreme Court is also expected to decide what kind of reasonable regulations states and localities can implement to protect our neighborhoods and schools from gun violence. In fact,

just last month, the Fourth Circuit became the fifth appellate court to uphold a state's ban on assault weapons and large-capacity magazines under Heller.

These new cases, taken together, enable the enactment of prudent and legal legislation to restrict military-style weapons from flooding our streets.

Now while Judge Gorsuch has not written decisions on the Second Amendment, he did write an opinion to advocate making it harder to convict a felon who illegally possessed a gun. In this opinion, Judge Gorsuch argued against the court's own precedent.

Specifically, in this case, the defendant had been charged with attempted robbery in July of '09. After pleading guilty, he was given probation. However, quote, "he repeatedly, both orally and in writing, told that possession of a firearm," end quote, violated his probation, which would mean he could not, quote, "escape the consequences of his felony conviction."

Less than a year later, he was apprehended by the police holding, quote, "a fully loaded Hi-Point .380 caliber pistol with an obliterated serial number," end quote—in clear violation of his probation. Later, he argued he didn't know he was a felon.

Six circuit courts, including the Tenth, have determined that the government does not need to prove a defendant knew he was a felon to convict for this crime.

Despite this, Judge Gorsuch wrote two separate opinions that argued in favor of making it harder to convict felons who possess guns. In one he wrote that sometimes following precedent, quote, "requires us to make mistakes," end quote.

I find this concerning. Following precedent in this case was not a mistake. It led to the conviction of a felon who should not have had a firearm.

Judge Gorsuch has also stated that he believes judges should look to the original public meaning of the Constitution when they decide what a provision of the Constitution means.

This is personal, but I find this "originalist" judicial philosophy to be really troubling. In essence, it means that judges and courts should evaluate our constitutional rights and privileges as they were understood in 1789.

However, to do so would not only ignore the intent of the framers that the Constitution would be a framework on which to build, but it severely limits the genius of what our Constitution upholds.

I firmly believe the American Constitution is a living document intended to evolve as our country evolves.

In 1789, the population of the United States was under 4 million. Today, we're 325 million and growing. At the time of our founding, African Americans were enslaved. It was not so long after

women had been burned at the stake for witchcraft. And the idea of an automobile, let alone the Internet, was unfathomable.

In fact if we were to dogmatically adhere to “originalist” interpretations, then we would still have segregated schools and bans on interracial marriage. Women wouldn’t be entitled to equal protection under the law. And government discrimination against LGBT Americans would be permitted.

So I am concerned, when I hear that Judge Gorsuch is an “originalist” and a “strict constructionist.”

Suffice it to say, and I conclude the issues we are examining today are consequential. There is no appointment that is more pivotal to the court than this one. This has a real world impact on all of us. Who sits on the Supreme Court should not simply evaluate legalistic theories and Latin phrases in isolation. They must understand the court’s decisions have real world consequences for men, women and children across our nation.

Thank you Mr. Chairman.