

Congressional City Conference



Judicial Update

March 13, 2017

Washington, DC

Lisa Soronen

Executive Director

State and Local Legal Center

#NLCDC

Overview of Presentation

Impact of Trump/Gorsuch on the Supreme Court

Current SCOTUS case of interest

Future possible SCOTUS cases of interest

Impact of Trump/Gorsuch on the Court

Who is Judge Gorsuch?

Tenth Circuit Court of Appeals judge (10 years on the bench)

49 years old

Harvard Law graduate

Son of the first female head of the EPA

Episcopalian

Justice Kennedy clerk

Any Republican President might have nominated him

Conservative and an originalist (like Justice Scalia)

What Do His Past Opinions Tell Us?

Keep it real

- Authored over eight hundred opinions; and participated in approximately 2,750 decisions

Most prominent issues

- Don't concern local governments
 - Affordable Care Act's birth control mandate
- Don't exist!
 - No abortion rulings or gun rulings

What Do His Past Opinions Tell Us?

Pro-religion in public spaces

Pro-qualified immunity (not knee-jerk)

Fourth Amendment (mixed like Justice Scalia)

Pro-employer (no claim employment discrimination for transgender teacher)

Speech (no current Justice views free speech narrowly)

Property rights (not a lot out there...)

Closing the courthouse door (not a lot out there...)

Three Really Big Things

***Anti-Chevron* deference**

Wants to overturn *Quill v. North Dakota* (1992)

**No problem criticizing Supreme Court
precedent he does not like**

Court We Had Before Justice Scalia died

5-4 conservative Court with Justice Kennedy in the middle

Recently Justice Kennedy has reliably voted with the liberals on social issues

Justice Scalia was the second most conservative Justice on the Court

Court We Would Have With Justice Gorsuch

Not much different than before?

- Replacing one conservative Justice with another
 - *Searching for Scalia* picked him (out of Trump's list of 21 choices) as most like Justice Scalia
- Agency deference views are probably the most significant difference
- Keep an eye on his Fourth Amendment decisions
- Don't think he will be a liberal on social issues (right away or ever)

Future Supreme Court Nominations

If Trump gets a second (third or fourth) nominee through the Court could really change

Average retirement age for Supreme Court Justices is 79

Oldest Justices are liberals and Justice Kennedy

- Justice Ginsburg (83)
- Justice Breyer (78)
- Justice Kennedy (80)

What Are His Chances of Confirmation?

Per the filibuster rule, 60 Senators are needed to have a vote on Gorsuch

Republicans can exercise the “nuclear option” (52 Republican Senators)

What Are His Chances of Confirmation?

Getting to 60

- 52 Republicans
- 5 Democrats in red-states up for re-election in 2018
- Diane Feinstein (D-Ca): nervous about the nuclear option
- Bill Nelson (D-Fl) & Tom Carper (D-Del): voted for Alito
- Perennial swing votes: Chris Coons (D-Del) & Angus King (I-Me)

Source: Politico, *These Democrats will decide Gorsuch's fate*

Will Democrats Be Able to Frame Gorsuch as Outside the Mainstream?

If Democrats lose the battle can they win the war?

"The burden is on Judge Neil Gorsuch to prove himself to be within the legal mainstream and, in this new era, willing to vigorously defend the Constitution from abuses of the executive branch and protect the constitutionally enshrined rights of all Americans."

"Given his record, I have very serious doubts about Judge Gorsuch's ability to meet this standard," [House Minority Leader Chuck] Schumer continued. "Judge Gorsuch has repeatedly sided with corporations over working people, demonstrated a hostility toward women's rights, and most troubling, hewed to an ideological approach to jurisprudence that makes me skeptical that he can be a strong, independent Justice on the Court."

Source: USA Today, *Senate Democrats express skepticism of Gorsuch*

Current SCOTUS Case of Interest

Wells Fargo and Bank of America v. City of Miami

Most interesting case of the term for cities

Very odd for a city to be suing anyone (it is usually the other way around!)

Banks targeted black and Latino customers for predatory loans that carried more risk, steeper fees, and higher costs than those offered to identically situated white customers

Banks' lending policies caused minority-owned property to fall into unnecessary or premature foreclosure

Wells Fargo and Bank of America v. City of Miami

May cities sue banks under the Fair Housing Act for economic harm caused to cities by discriminatory lending practices?

- Cities aren't the most obvious parties
 - “The City did not buy a house or take out a mortgage, and it did not experience any racial discrimination or even any actionable ‘disparate impact.’ Nor does it contend that its neighborhoods have become more or less segregated or that any ‘discriminatory housing practice’ was visited upon it.”

Wells Fargo and Bank of America v. City of Miami

Did the banks “cause” harm to the cities

- “Bank had access to analytical tools as well as published reports drawing the link between predatory lending practices ‘and their attendant harm,’ such as premature foreclosure and the resulting costs to the City, including, most notably, a reduction in property tax revenues.”
- What about other “factors of a cratering economy”?

Wells Fargo and Bank of America v. City of Miami

On paper Miami should lose but...

SCOTUSblog: Argument analysis: City likely to prevail, one way or another, in fair housing case

- Justice Elena Kagan was perhaps the justice most skeptical of the banks' position. She emphasized that the Fair Housing Act isn't limited to individual acts of discrimination, but instead focuses on harms to the community that result from discrimination. The city is saying, she told Katyal, that it is affected by "reverse redlining" – that is, a practice of charging non-white customers more for their loans than their white counterparts – because reverse redlining makes the community more impoverished, a condition from which it is now trying to recover. "And who better than the city to recognize that interest and assert it," she asked.

Wells Fargo and Bank of America v. City of Miami

Similar cases all over the country

Baltimore, Maryland; Birmingham, Alabama; Cobb County, Georgia; Cook County, Illinois DeKalb County, Georgia; Fulton County, Georgia; Memphis, Tennessee; Miami, Florida; Miami Gardens, Florida; Los Angeles, California; the Los Angeles Unified School District, California; and Shelby County, Alabama

Future Possible SCOTUS Cases of Interest

Gloucester County School Board v. G.G.

**Famous/infamous transgender bathroom case
Supreme Court removed it for the docket on
March 6**

Gloucester County School Board v. G.G.

Why does cities care about this case?

Civil rights issue

Transgender bathroom bills

Supreme Court can create momentum on this issue

Local governments are generally against *Auer* deference

Issue isn't going away; it is just going back to the lower court

Gloucester County School Board v. G.G.

Gavin Grimm is a transgender boy

**Gloucester County School Board prevented him
from using the boy's bathroom**

**He sued the district arguing discrimination in
violation of Title IX**

Gloucester County School Board v. G.G.

Title IX prohibits school districts that receive federal funds from discriminating “on the basis of sex”

A Title IX regulation states if school districts maintain separate bathrooms “on the basis of sex” they must provide comparable facilities for the other sex

In a 2015 letter the Department of Education (DOE) interpreted the Title IX regulation to mean that if schools provide for separate boys’ and girls’ bathrooms, transgender students must be allowed to use the bathroom consistent with their gender identity

Gloucester County School Board v. G.G.

Two legal questions

- Should courts defer to DOE's letter interpreting the regulation?
- Putting the letter aside, should the Title IX regulation be interpreted as DOE suggests?

Gloucester County School Board v. G.G.

The Fourth Circuit ruled in favor of G.G. giving *Auer* deference to DOE's letter

Per *Auer v. Robbins* (1997) a court generally must defer to an agency's interpretation of its ambiguous regulations

The Title IX regulation is ambiguous because it is “susceptible to more than one plausible reading because it permits both the Board’s reading— determining maleness or femaleness with reference exclusively to genitalia—and the Department’s interpretation—determining maleness or femaleness with reference to gender identity.”

Gloucester County School Board v. G.G.

Plot thickens

- Trump DOE pulls letter in February
- New “Dear Colleague” letter takes no position on whether the term “sex” in Title IX includes gender identity
- Both parties still wanted the Supreme Court to decide this case
- Supreme Court sends the case back to the Fourth Circuit to rehear the case
- Case can be appealed again to SCOTUS

Will *Quill* be Overturned?

Quill Corp. v. North Dakota (1992) prohibits states from forcing retailers with no in-state physical presence to collect and remit state sales taxes

Not a huge deal in 1992; huge deal in 2017

Justice Kennedy's wrote a concurring opinion in *DMA v. Brohl* (2015) :

- I/we were wrong in *Quill*
- Please bring us a case allowing us to reconsider *Quill*

Will *Quill* be Overturned?

South Dakota (and other states) passed a law defying *Quill* with the hopes the Supreme Court will hold their law constitutional and overturn *Quill*

A state court just ruled against South Dakota; the South Dakota Supreme Court should do the same—then on to SCOTUS

In the last year Judge Gorsuch wrote an opinion strongly suggesting SCOTUS should overturn *Quill*

\$23 billion in lost tax revenue a year

Waters of the United States

If water is defined as “waters of the United States,” per the Clean Water Act the federal government has jurisdiction over the water

Local governments would generally prefer that the federal government not have jurisdiction over water

Federal water=permits

Permits=time+hassle+money

In spring 2015 EPA issued final rules defining WOTUS

Main Objections to the Regulations

Definition of ditches

Definition of tributaries

**Not being adequately involved in the
regulatory process**

Sixth Circuit Issues Nationwide Stay

Regulations are not currently in effect

Court issues a preliminary injunction generally agreeing that the regulations

- Go to far
- Weren't issued with proper process

After the fact, the Sixth Circuit rules that it and not a federal district court has jurisdiction to rule on merits of WOTUS regulations

SCOTUS to Decide Who Rules on WOTUS

Federal district court or federal court of appeals?

Does this matter?

- Practical matter: 6th Circuit may not have jurisdiction to issue the stay

**Supreme Court will resolve this case by June 30,
2018 (more likely March 2018)**

WOTUS Executive Order

Calls for the “rescinding or revising” of WOTUS definitional regulations

Acknowledges that rewriting the WOTUS definitional regulations will require going through the lengthy and complicated process under the Administrative Procedures Act

This process involves proposing a new rule, receiving and responding to (likely thousands) of comments, and issuing a final rule

What Happens to WOTUS Litigation?

EO directs the Attorney General to “inform any court of such review and take such measures as he deems appropriate concerning any such litigation pending the completion of further administrative proceedings related to the rule”

The Attorney General may ask the Sixth Circuit to voluntarily vacate its decision temporarily staying the regulations given that the new administration intends to change them

The Sixth Circuit is more likely to agree to this if none of the parties object

A number of states and environmental groups have intervened in support of the current WOTUS regulations and may object

What Happens to WOTUS Litigation?

If the Sixth Circuit vacates the stay the practical effect is the current regulations would no longer be valid

Vacatur of the Sixth Circuit stay also would likely moot the Supreme Court challenge on jurisdiction

If the Sixth Circuit refuses (or isn't asked) to vacate the Sixth Circuit decision regarding the stay, the Supreme Court jurisdiction litigation is likely to proceed

New Rule will be Challenged

EO instructs that Justice Scalia's decision in *Rapanos v. United States* (2006) be "considered" in defining the term "navigable waters"

Rapanos is a 4-1-4 decision

Justice Scalia wrote the plurality opinion defining this term more narrowly than Justice Kennedy's solo concurring opinion

Apparently every court to rule in the issue has held Justice Kennedy's opinion controlling

If the new definition of WOTUS relies on Justice Scalia's opinion—it will almost certainly be challenged on this ground, along with many others.

SCOTUS will Review Some Version of WOTUS

Views of the new Justice will matter

Justice Gorsuch opposes agency deference to statutes (which will be at the heart of any challenge)

He may still think the current WOTUS regulations are a reasonable interpretation of the Clean Water Act (regardless of what the EPA thinks)

DOL Final Overtime Rules

If your city pays anyone less than \$47,476/year, such employees will now have to be paid overtime if he or she works over 40 hours a week

This salary level will be increased every three years

Texas District Court Temporarily Blocks Rules

FLSA doesn't have a salary test

- “If Congress intended the salary requirement to supplant the duties test, then Congress, not the Department, should make that change.”

DOL lacked the authority to automatically update salary level

Should *Garcia v. San Antonio Metropolitan Transit Authority* (1985), where the Court held that the FLSA applies to the states be overturned?

Nevada v. DOL

What Will President Trump Do?

May stop defending the litigation?

**But these rules might help a significant group
of his supporters**

**AFL-CIO has filed a motion to intervene in the
litigation which could keep it going regardless
of the government's involvement**

Cell Site Location Information

Do you need a warrant to ask cell provider for this information?

Cert petition: *Carpenter v. United States*

Numerous other cases in the lower courts

Debtor's Prison Litigation

Ferguson report: primary goal of Ferguson's municipal court system was not "administering justice or protecting the rights of the accused, but of maximizing revenue"

Supreme Court has repeatedly stated that before courts convert unpaid criminal fines into jail time they must make a reasonable inquiry into the defendant's ability to pay

Defendants must make "all reasonable efforts to pay"—including seeking work and borrowing money

If they still can't pay, they may not be automatically imprisoned without considering alternative means of punishing them

Debtor's Prison Litigation

Claims in at least 12 states (Arkansas, Missouri)

Including: municipal courts failed to determine indigency, failed to tell defendants they could request an indigency determination, and failed to consider alternative punishments

Local governments may not be liable--municipal judge acting in a judicial capacity may cause the constitutional violation

Pressure to settle may be high

Mickelson v. County of Ramsey, MN

Eighth Circuit debtor's prison case

County collects \$25 from arrestees upon booking; if arrestee isn't charged or gets acquitted he/she can fill out a form and get it back

Question presented: "Whether due process allows governments to confiscate money from innocent people on the basis of an arrest and then force those people to prove that they are entitled to have their money returned"

Cert petition filed; county asked to respond

Isn't really a cert split; city won a 7th circuit case 2-4-3-1

SCOTUS took sort of similar case this term involving a Colorado statute

Questions?

Contact us!

**Please fill out this
session's evaluation on
the NLC Events app!**

Lisa Soronen

Executive Director
State and Local Legal
Center

Isoronen@sso.org
@SLLCSCOTUS

NLC

NATIONAL
LEAGUE
OF CITIES

CITIES STRONG TOGETHER