

## Power Move: Gorsuch Opt's Out Of High Court Labor Pool

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<http://dailycaller.com/2017/05/02/power-move-gorsuch-opts-out-of-high-court-labor-pool/#ixzz4g32YSr77>

In an early show of independence, Justice Neil Gorsuch declined to join the Supreme Court's "cert pool," an administrative division of labor that allows for efficient review of the deluge of petitions the justices receive each term.

Adam Liptak of The New York Times first reported the news late Monday, citing the Court's public information office.

The cert pool was established in 1973 during the early days of the Burger Court, in order to efficiently review the near 8,000 petitions received each term. In practice, the petitions are apportioned among the Court's law clerks, who then circulate a memo to the justices recommending a grant or denial. Therefore, a law clerk's recommendation significantly affects the outcome of a petition.

In choosing not to join the pool, Gorsuch is flashing an independent streak. By having his own staff review each petition, he may be signaling misgivings about the judgments of other chambers, or of pool memos prepared by clerks who don't share his interpretative commitments. Under the cert pool system, the justices must accept that a significant portion of petitions are reviewed by young clerks who may not share their opinions on a wide range of legal issues.

On the other hand, it may simply reflect a preference for the work product of his own clerks, an inclination shared by other federal judges including Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals. He may also feel that opting out of the pool ensures greater scrutiny is given to each petition.

The decision also suggests Gorsuch might share the concerns of many court-watchers and legal scholars who have criticized the pool. Detractors argue it empowers well-credentialed but unseasoned law clerks, privileges certain parties over others, and has resulted in a dramatic decrease in the size of the Court's docket.

With respect to docket size, critics claim the cert pool incentivizes risk-averse behavior among clerks, who fear the pronounced embarrassment that attends recommending a grant for a case which the justices later dismiss as "improvidently granted." As a result, they claim, the conservative posture of the clerks causes worthy cases to be dismissed, leaving important controversies unresolved.

One such critic is Professor Douglas Berman of The Ohio State University Mortiz College of Law. Berman, a former 2nd Circuit law clerk who writes extensively on sentencing, adds that the cert pool may inhibit the justices from thoroughly reviewing the rulings of the lower courts, resulting in lengthy, disjointed, and confusing opinions.

“Notably, the growth of the cert pool has not only paralleled the shrinking of the docket, but also the proliferation of long fractured opinions,” he wrote in 2007. “Perhaps if the Justices spent more time personally reading cert petitions and lower court rulings — and not just summaries from one clerk in the pool — they might directly discover areas of the law in need of extra attention and also might better appreciate the mess they sometimes make by issuing fractured rulings.”

Seven of the nine justices currently participate in the cert pool. Justice Samuel Alito opted out of the system in 2008.

Gorsuch has not yet commented publicly on his decision.