

For Tribes, Gorsuch Offers Familiar Face In Unfriendly Arena

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Law360, New York (February 1, 2017, 9:36 PM EST) -- [U.S. Supreme Court](#) nominee Neil Gorsuch has extensive experience dealing with Native American cases from his time as a Tenth Circuit judge, where he often ruled in tribes' favor, but tribal advocates wonder how Judge Gorsuch may handle novel Indian law issues as part of a high court that has been largely hostile to tribes.

The 49-year-old Judge Gorsuch, who was **nominated** by President Donald Trump on Tuesday to fill the Supreme Court seat left vacant by the death of Justice Antonin Scalia a year ago, drew immediate praise from Republicans as well as some Democrats for his strong reputation and credentials, even though Democratic lawmakers are eyeing a filibuster of his nomination.

And Judge Gorsuch boasts a hefty record in the Tenth Circuit writing opinions in cases involving tribes and Native Americans — particularly relative to the other judges Trump was considering for the slot, attorneys say.

Neal Kumar Katyal, a partner at [Hogan Lovells](#) who was acting solicitor general for President Barack Obama and has represented tribes in several high-stakes cases before the Supreme Court, noted that Judge Gorsuch ruled favorably several times for tribes while in the Tenth Circuit and said he would be “consummately fair” as a justice.

Judge Gorsuch’s familiarity with Native American issues could bode well for tribes, which have fared poorly in the Supreme Court for a long time, according to Jeff Rasmussen of [Fredericks Peebles & Morgan LLP](#), who represented the [Ute Indian Tribe](#) before a Judge Gorsuch-led Tenth Circuit panel in long-running litigation over the tribe’s reservation boundaries.

“One of the problems we have is we don’t really have any justices who understand what tribes do, how things operate out here in the West,” Rasmussen said. “With Judge Gorsuch, at least that’s something he brings to the court. He does understand it.”

Judge Gorsuch has shown respect in his Tenth Circuit opinions for existing precedents regarding tribal court authority and tribal jurisdictional authority, an area where tribes have lost much ground in the courts over the last 30 years, he added.

In the Ute litigation, Judge Gorsuch wrote an **August opinion** that overturned a federal judge’s ruling in favor of a Utah town in its jurisdictional dispute with the tribe, affirming that the land at issue in the town of Myton had already been recognized as Indian Country by the Tenth Circuit in previous opinions reaching back decades.

Judge Gorsuch showed exasperation with the district court’s repeated failure to implement the

circuit court's decisions in the broader litigation over government's ability to prosecute on disputed tribal lands, which have largely been in favor of the tribe and against the state of Utah and various counties and towns.

“We’re beginning to think we have an inkling of Sisyphus’ fate,” Judge Gorsuch wrote. “Courts of law exist to resolve disputes so that both sides might move on with their lives. Yet here we are, forty years in, issuing our seventh opinion in the Ute line and still addressing the same arguments we have addressed so many times before.”

However, Judge Gorsuch’s strength in relying on prior rulings won’t necessarily translate to the high court bench — especially in Indian law, where the court is often required to make new applications of tribal sovereign immunity and tribal authority, according to Anthony S. Broadman of [Galanda Broadman PLLC](#).

And tribes haven’t tended to fare well with justices, like both Justice Scalia and Judge Gorsuch, with a commitment to originalism — the belief that the U.S. Constitution should be interpreted based on its meaning when it was adopted, according to Rasmussen.

“All these original constructionists, the one area where they’re not original constructionists is when it comes to tribes,” he said. “If they were, tribes would have much more sovereign authority and rights.”

Still, Judge Gorsuch is “too serious of a judge to make a binary prediction of whether he’ll be pro or anti-tribal,” according to Broadman.

Richard A. Guest of the [Native American Rights Fund](#) said that his group, working with the [National Congress of American Indians](#) through their joint Tribal Supreme Court Project, is still exploring Judge Gorsuch’s rulings and history in order to get a better read on the nominee.

While Judge Gorsuch's Tenth Circuit opinions show that the judge recognizes tribes as sovereign governments, he has yet to deal with a case with the complex issues of tribal civil jurisdiction over non-Indians like those raised before the Supreme Court in [Dollar General](#)’s high-profile challenge to a [Mississippi Band of Choctaw Indians](#) court last year, Guest said.

That case **ended in a tie** in June, allowing the tribal court to hear a sexual assault suit brought by a tribe member against Dollar General, but it was widely believed that Scalia, had he lived, would have voted against the tribe in the case along with the other more conservative members of the court.

Similar issues around exceptions to tribal jurisdiction over tort suits are bound to surface again once Scalia's replacement joins the high court, making Gorsuch's potential appointment an important one, attorneys say.

And there’s uncertainty over how other key tenets of Judge Gorsuch’s philosophy could influence his rulings affecting Indian Country, according to Guest.

Judge Gorsuch's hostility in another Tenth Circuit opinion toward so-called [Chevron](#) deference — which says that courts should defer to an agency's own views of a potentially ambiguous law — is a “double-edged sword” for tribes, as tribes reckon with favorable and unfavorable rulings in their extensive dealings with federal agencies, Guest said.

If Judge Gorsuch is confirmed as a Supreme Court justice, his views on agency deference may play a key role in a case centering on a [U.S. Department of the Interior](#) interpretation of the Indian Reorganization Act that allowed it to set aside land in Washington state for the [Cowlitz Indian Tribe](#)'s casino project. A [petition](#) by opponents of the casino project is pending before the Supreme Court.

Guest said he's also looking at the potential impact of Judge Gorsuch's views on religious freedom for Native American civil rights cases, including Native prisoners' rights to conduct their traditional religious practices.

In a January 2014 decision for the Tenth Circuit, Judge Gorsuch backed the right of Native American prisoner Andrew Yellowbear to access a sweat lodge for prayer and meditation, saying Yellowbear couldn't be denied the freedom to exercise his religion without a compelling reason.

And not long before, Judge Gorsuch wrote a pointed concurrence to the Tenth Circuit's 2013 en banc decision in [Hobby Lobby](#) v. Sebelius that backed the craft store chain's arguments that its Christian beliefs would be violated by the Affordable Care Act's contraception mandate. Judge Gorsuch stressed that courts must listen to a litigant's own views of the requirements of their faith and suggested that courts have no business questioning “the correctness or the consistency” of a particular religious faith.

"People demonize him for that, and yet that is the law of the land now," Guest said, as Justice Samuel Alito's [opinion](#) for the Supreme Court in the Hobby Lobby case largely upheld the Tenth Circuit ruling and Judge Gorsuch's view that closely held for-profit corporations are entitled to religious freedom protections.

--Editing by Sarah Golin and Kelly Duncan.