EXECUTIVE DIRECTOR
John E. Echohawk

LITIGATION MANAGEMENT COMMITTEE
K. Jerome Gottschalk
Natalie A. Landreth
Melody L. McCoy

ATTORNEYS
Matthew L. Campbell
K. Jerome Gottschalk
David L. Gover
Melody L. McCoy
Steven C. Moore
Susan Y. Noe
Brett Lee Shelton
Donald R. Wharton
Heather D. Whiteman Runs Him

CHIEF FINANCIAL OFFICER
Michael Kennedy

DIRECTOR OF DEVELOPEMENT
Don Ragona

CORPORATE SECRETARY
Ray Ramirez

Native American Rights Fund

1514 P Street, NW (Rear), Suite D, Washington, D.C. 20005
(202) 785-4166 • FAX (202) 822-0068
www.narf.org

ATTORNEYS
Richard A. Guest
Joel W. Williams

BOULDER OFFICE
1506 Broadway St.
Boulder, CO 80302-6296

Ph. (303) 447-8760
FAX (303) 443-7776

ANCHORAGE OFFICE
745 W. 4th Avenue, Ste. 502
Anchorage, AK 99501-1736

Ph. (907) 276-0680
FAX (907) 276-2466

ATTORNEYS
Heather R. Kendall-Miller
Natalie A. Landreth
Erin C. Dougherty
Matthew L. Newman

March 16, 2017

MEMORANDUM

TO: Tribal Leaders and Tribal Attorneys
National Congress of American Indians – Project on the Judiciary

FROM: Richard Guest, Staff Attorney, Native American Rights Fund

RE: The Nomination of Neil Gorsuch to the Supreme Court of the United States – An Indian Law Perspective

---

On Monday, March 20, 2017, the U.S. Senate Committee on the Judiciary will begin confirmation hearings for Judge Neil Gorsuch to serve as the next Associate Justice of the Supreme Court of the United States. President Trump announced his nomination of Judge Gorsuch on January 31, 2017, as his pick to fill the vacancy on the Supreme Court created by the death of Justice Antonin Scalia. U.S. Senate Majority Leader Mitch McConnell has expressed "confidence" that the full Senate will consider and confirm Judge Gorsuch before the Easter Recess, which is scheduled to begin Friday, April 7, 2017. To be confirmed as the next Associate Justice, Judge Gorsuch must win over Democrats to meet the Senate's 60-vote threshold for cloture, unless Chairman McConnell invokes the so-called "nuclear option," allowing Republicans to push through his confirmation with a simple majority.

Judge Gorsuch hails from the West, and has served on the United States Court of Appeals for the Tenth Circuit since July 2006, nominated by President George W. Bush and confirmed by the U.S. Senate by unanimous consent (voice vote). The Tenth Circuit encompasses six states: Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming; and the territory of 76 federally recognized Indian tribes. NCAI, NARF and other advocates throughout Indian country have long sought the nomination of Justices with knowledge of federal Indian law, and more generally with experience on western issues directly impacting Indian tribes such as water law and public lands. Western experience

is lacking in the current makeup of the Court, and is a vitally important perspective. As an example, Justice Sandra Day O'Connor came to the Court in 1981 as a former attorney, legislator and judge for the State of Arizona, and participated in the historic 2001 visit to Indian reservations to learn more about tribal judicial systems and federal Indian law. Judge Gorsuch appears to share a similar interest. In 2007, he attended the NCAI Annual meeting in Denver with two other Tenth Circuit judges to participate in a dialogue with the Litigation and Governance Committee, chaired by John Echohawk.

Michael McConnell, who served with Judge Gorsuch on the Tenth Circuit and is now a law professor at Stanford, said his former colleague's Colorado background would add something distinctive to the Supreme Court. "He's a Westerner," Professor McConnell said. "There are so many cases that have to do with the West, and I also think the cultural sensibilities of the West are different. He's an outdoorsman, and the Supreme Court needs a little bit more geographical diversity."

As more fully discussed below, Judge Gorsuch has significantly more experience with Indian law cases than any other recent Supreme Court nominee. His 10 written opinions generally recognize Tribes as sovereign governments. However, the 28 Indian law cases on which he participated addressed only a subset of issues of importance to Indian tribes and, as with all Supreme Court nominees, it is impossible to predict how he will decide particular cases that may come before him on the Supreme Court.

A Brief Biography

Neil McGill Gorsuch was born in Denver, CO, in 1967 (49-years old), and currently lists Boulder, CO, as his residence. He has deep family roots in his hometown of Denver where both his parents (divorced in 1982) worked as lawyers. His mother, Anne Gorsuch Burford, worked as a deputy district attorney for the City of Denver, was elected to the Colorado House of Representatives for two two-year terms (1976-80), and became President Reagan's choice to be the first woman to Administrator of the Environmental Protection Agency (1981-83).

Gorsuch attended Christ the King, a K-12 Catholic school in Denver, and then attended Georgetown Preparatory School, a Jesuit school, in Washington, D.C. where he graduated in 1985. Gorsuch has a distinguished academic pedigree: attended Colombia University, graduating *Phi Beta Kappa* in 1988 with a Bachelor in Arts; then Harvard University, serving as editor on the *Harvard Journal of Law & Public Policy* and graduating *cum laude* in 1991 with a Juris Doctorate; and received a Doctor of Philosophy degree in Law (Legal Philosophy) from University College, Oxford in 2004 for research on assisted suicide and euthanasia. While at Oxford, he met and married his wife Louise, an Englishwoman and champion equestrienne on the riding team. They have two young teenage daughters.

After law school, Gorsuch clerked for Judge David B. Sentelle, U.S. Court of Appeals for the D.C. Circuit (1991-92), and for U.S. Supreme Court Justices Byron White and Anthony Kennedy (1993-94).

After his clerkships, instead of joining an established law firm in an appellate practice group, Gorsuch chose a recent start-up law firm in Washington, D.C., Kellogg, Huber, Hansen, Todd, Evans & Figel. As an associate (1995-97) and partner (1998-2005), his practice focused primarily on trial litigation, representing clients that included small corporations, Fortune 100 corporations, non-profit organizations and individuals, on matters ranging from complex antitrust, securities and class actions to straight forward breach of contract and breach of fiduciary duty disputes. In 2005, he became Principal Deputy to the Associate Attorney General[1] at the U.S. Department of Justice where he served until his confirmation as a judge on the Tenth Circuit in 2006. The American Bar Association's Standing Committee on the Federal Judiciary, whose purpose is to evaluate the qualifications of nominees to federal judgeships, has rated Judge Gorsuch as "well-qualified." The Committee's goal is to provide impartial, nonpartisan evaluations based on judicial temperament, competence and integrity.

There is no clear, definitive answer to the question of what kind of Supreme Court Justice Neil Gorsuch would be for Indian country if confirmed by the U.S. Senate. His ten years as a judge on Tenth Circuit provides a substantial judicial record, confirming that he is a conservative jurist with experience in Indian law cases that exceeds what we have seen in many recent Supreme Court nominations.

What is Gorsuch's Judicial Philosophy?

In its January 31, 2017, statement announcing his nomination, the White House described Judge Gorsuch as "a brilliant jurist with an outstanding intellect and a clear, incisive writing style . . . . a judge who is respected for his integrity, fairness and decency . . . . [who] understands the role of judges is to interpret the law, not impose their own policy preferences, priorities, or ideologies."[2] His judicial philosophy is often compared to Justice Scalia's – an originalist and textualist – devoted to deciding cases based on the original meaning of the Constitution and the plain meaning of the statutory text. One court observer notes:

> He is an ardent textualist (like Scalia); he believes criminal laws should be clear and interpreted in favor of defendants even if that hurts government prosecutions (like Scalia); he is skeptical of efforts to purge religious expression from public spaces (like Scalia); he is highly dubious of legislative history (like Scalia); and he is less than enamored of the dormant commerce clause (like Scalia). In fact, some of the parallels can be downright eerie.[3]

---

[1] The Office of the Associate Attorney General oversees the Antitrust Division, the Civil Division, the Environment and Natural Resources Division, the Tax Division, the Office of Justice Programs, the Community Oriented Policing Services, the Community Relations Service, the Office of Dispute Resolution, the Office of Violence Against Women, the Office of Information and Privacy, the Executive Office for United States Trustees, and the Foreign Claims Settlement Commission. In response to a request from the Senate Judiciary Committee, on March 9, 2017, the Department of Justice produced 144,000 pages of documents regarding Gorsuch's work during the Bush Administration (June 2005-July 2006). NARF is in the process of reviewing the documents and will provide updates as necessary.

[2] *See* White House Office of the Press Secretary at https://www.whitehouse.gov/nominee-gorsuch.

[3] *See* Eric Citron, Contributor, SCOTUSblog at http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/.

And echoing a common theme of Justice Scalia's jurisprudence, Judge Gorsuch once wrote that "a judge who likes every result he reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels."[4]

There is no question that Judge Gorsuch's judicial philosophy is conservative. The question is how conservative? Political scientists and court observers generally place him to the right of Alito and Scalia, with one study placing him to the right of Justice Thomas, stating "Gorsuch might be the most conservative justice on the Supreme Court." However, other observers believe that Gorsuch is no ideologue and over time "has the capacity to be more a John Roberts than a Samuel Alito – more committed to judicial restraint than to consistently toeing the conservative party line." In his opinion piece for the New York Times, Neal Katyal (former Acting Solicitor General in the Obama Administration and well-known to Indian law practitioners for his Supreme Court arguments in the *Bay Mills*, *Dollar General* and *Lewis v. Clarke* cases) observed:

> I have no doubt that, if confirmed, Judge Gorsuch would help to restore confidence in the rule of law. His years on the bench reveal a commitment to judicial independence — a record that should give the American people confidence that he will not compromise principle to favor the president who appointed him. Judge Gorsuch's record suggests that he would follow in the tradition of Justice Elena Kagan, who voted against President Obama when she felt a part of the Affordable Care Act went too far. In particular, he has written opinions vigorously defending the paramount duty of the courts to say what the law is, without deferring to the executive branch's interpretations of federal statutes, including our immigration laws.

Gorsuch's Federal Indian Law Experience

Attached is a summary of Indian law cases in which Judge Gorsuch wrote an opinion and/or participated on a panel (each is marked clearly). To generate this summary, we reviewed 60 "Indian law" cases identified through our research and those cases listed by Professor Matthew Fletcher on Turtletalk.[5] Of those 60, 30 involved appeals of criminal convictions, of which only 5 involved an Indian law question or involved tribal interests. However, Judge Gorsuch wrote opinions in 4 such criminal appeals that have been included in the summary of cases. We did not include the other 21 criminal appeals as part of this summary or consider them as part of our analysis of his Indian law experience.

The total number of case summaries is 39, but 11 have been identified as not directly raising an Indian law issue or involving tribal interests. Calculating a "win/loss" record for Indian law cases on which Judge Gorsuch participated has been challenging and fails to paint a complete picture. Some of the "wins" or "losses" were simply on procedural grounds or when the court was applying very clear

[4] *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016) (Gorsuch dissent).
[5] Available at (https://turtletalk.wordpress.com/2017/02/01/neil-gorsuch-indian-law-record-as-tenth-circuit-judge/).

precedent. Even with those caveats, quantifying the outcomes provides a valuable measuring stick in our analysis. For purposes of this memo, we only considered the 28 cases involving an Indian law issue or specific tribal interest. Others who analyze Judge Gorsuch's Indian law record may reach different conclusions, especially given the fact that a number of cases at the appellate level are decided on procedural grounds, not on the merits of the Indian law question presented. Here is the initial breakdown from the attached summary of Indian law cases (*numbers inside (parens) are cases with no Indian Law question*):

Subject	**Total Cases**	**Win**	**Loss**	**Draw**	**Written Opinions**
Tribal Sovereign Immunity	6	5	1	-	1
Indian Country Diminishment/Disestablishment	4	2	2	-	4
Religious Freedom	1	1	-	-	1
Federal Trust Responsibility	4	1	2	1	1
Exhaustion	2	2	-	-	1
Civil Rights	3	1	-	2	1
Tax	3 (1)	-	2	-	-
Employment/Labor Law	1 (1)	-	-	-	1(1)
Criminal Conviction	11 (6)	3	2	-	5(4)
Miscellaneous	4 (3)	1	-	-	2(2)
TOTAL Indian Law Cases:	39 (11) 28	16	9	3	17(7) 10

While this chart provides us with a snapshot of Gorsuch's record on Indian law cases as a judge on the Tenth Circuit, it also reveals the limited scope of Indian law questions he addressed. One important area of federal Indian law missing from his docket is tribal civil jurisdiction over non-Indians (*e.g., Dollar General, Plains Commerce Bank*). Other important areas not covered within his docket include: Treaty rights (*e.g.,* reserved rights doctrine, including water rights, fishing and hunting rights); Indian gaming (*e.g.,* gaming compact disputes; application of federal labor laws to tribal casinos); Indian Child Welfare Act issues; and matters involving political status (*e.g.,* questions of tribal recognition; arguments over equal protection).

In terms of his record on the 28 Indian law cases he decided during his ten years on the Tenth Circuit, Gorsuch voted in favor of tribal interests (16 times) more often than he voted against (9 times with 3 draws). When compared to Justice Scalia's Indian law record, the conclusion drawn is that Indian tribes will likely have a better chance on their cases with Gorsuch on the Court. During his tenure (1987-2016), Justice Scalia consistently opposed the interests of Indian tribes, voting against tribal interests 86% of the time – in 50 of the 58 Indian law cases decided by the Court. However, it is important to note that the job of a federal appellate judge differs from a Supreme Court Justice.

Appeals courts decide any case brought on appeal and generally apply well-established legal principles to decide the question. By contrast, the Supreme Court exercises discretion to pick and choose its case docket through the certiorari process and, as the "highest tribunal in the Nation," it is the final arbiter of the law in deciding all cases and controversies arising under the Constitution or the laws of the United States. As a Supreme Court Justice, Gorsuch will be in a position to break new ground and establish new law to a significantly greater extent than he has an appellate judge.

In an effort to better understand Gorsuch's Indian law jurisprudence and how that may help or hurt Tribes before the Court, this memo focuses on four substantive areas directly impacting Indian tribes in which he has written at least one opinion: Tribal Sovereign Immunity; Indian Country (Diminishment/Disestablishment); Federal Trust Responsibility; and Exhaustion of Tribal Court Remedies. While we acknowledge and recommend a reading of his ground-breaking opinion in ***Yellowbear v. Lampert***, it is principally a religious freedom case under the Religious Land Use and Institutionalized Persons Act (RLUIPA), brought by a Native American inmate who sued state prison officials because they denied him access to the prison's sweat lodge based on his placement within a special protective unit of the prison.[6] The abbreviated discussion below will hopefully initiate a broader dialogue regarding Gorsuch's Indian law jurisprudence. We recommend a reading of all the summaries of the 39 opinions listed in the attached memo Gorsuch: Summary of Indian Law Cases. We also will make copies available for those interested in reading the entire opinions.

Tribal Sovereign Immunity

With a record of 5 wins and 1 loss, there is a strong indication that Gorsuch will continue to recognize Indian tribes as sovereign governments entitled to sovereign immunity from suit absent a clear, unequivocal waiver by Congress or express consent by the Tribe. However, in ***Sanders v. Anoatubby***, he joined a panel opinion which recognized that the *Ex Parte Young* doctrine is an exception to tribal sovereign immunity for suits against tribal officials (ongoing violations of federal law seeking declaratory and injunctive relief). And in ***Somerlott v. Cherokee Nation Distributors, Inc***., although he agreed with the majority's holding that the issue of tribal sovereign immunity had not been preserved by the plaintiff on appeal, Judge Gorsuch wrote a separate concurring opinion to address what he viewed as "considerable confusion" exhibited by the parties. Under *Kiowa*, he recognized that Indian tribes are entitled to sovereign immunity from suit regardless of the type of activity (*i.e.*, commercial) or its location (*i.e.*, off-reservation). But in relation to the arguments made by Cherokee Nation Distributor (CND) regarding its status as a tribal corporation, he expressed skepticism, using the terms "no surreptitious sovereign" and "some sort of secret sovereign" to describe CND's claim for

[6] Gorsuch also wrote notable opinions involving Native American criminal defendants in *United States v. Rentz* (interpretation of criminal statute that "authorizes multiple charges [for use of a firearm] when everyone admits there's only a single use, carry, or possession") and *United States v. Dolan* (interpretation of the Mandatory Victim's Restitution Act and the meaning of the provision imposing a 90-day deadline for courts to enter a restitution order).

immunity from suit. The intent behind his use of these terms is unclear, but it calls into question whether he really agrees that the type of activity and the location of the activity (in this case an off-reservation chiropractic clinic) are irrelevant to the sovereign immunity analysis.

Nonetheless, it is very likely that had Gorsuch been on the Supreme Court when *Michigan v. Bay Mills Indian Community* was decided, he would have voted alongside Roberts and the majority to uphold the doctrine of tribal sovereign immunity under *Kiowa* – to continue to recognize that immunity includes off-reservation commercial activities of Indian tribes. The question is how will he vote on the harder issue of "special justification" referenced in footnote 8 of the majority's decision in *Bay Mills* regarding "whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct."

Indian Country: Diminishment/Disestablishment

With a total of 4 cases, and a record of 2 wins and 2 losses, this is an area that may present more questions than answers. There is no doubt that the Ute Indian Tribe scored a major victory in ***Ute Indian Tribe of the Uintah and Ouray Reservation v. Myton***, in its suit against cities, counties and state officials to halt criminal prosecution of tribal members in state court for offenses on land judicially recognized as Indian country. In writing a unanimous panel decision, Judge Gorsuch not only reversed the district court's order denying the Tribe's requested relief, he granted the Tribe's motion seeking reassignment of the case to a different district court judge on remand. In his opinion, Judge Gorsuch compares the role of the court over the past 40 years of this case with the fate of Sisyphus in rolling the rock up the hill. In 1985, the Tenth Circuit, sitting en banc, issued its first ruling against the State of Utah in favor of the Tribe, holding that all lands encompassed with the original Ute reservation boundaries established in the 1860s—including lands that were transferred to non-Indians between 1905-1945 (the "disputed lands")—remained Indian country. *Ute Indian Tribe v. Utah* (*Ute III*).

Unsatisfied with the result in *Ute III,* state and local officials sought a "friendlier forum" in which to "relitigate the boundary dispute." As a vehicle for these efforts, state court prosecutions were initiated against tribal members for crimes committed on the disputed lands, which in turn led to a favorable ruling in favor of state and local jurisdictions in both the Utah Supreme Court and the U.S. Supreme Court. *See Hagan v. Utah*, 510 U.S. 399 (1994). To address the conflict between *Ute III* and *Hagen*, and to ensure uniform allocation of jurisdiction among the state and the tribe, the Tenth Circuit recalled and modified the 10-year old mandate of *Ute III* to recognize that "lands that passed from [tribal] trust to fee status pursuant to non-Indian settlement between 1905 and 1945 do *not* qualify as Indian country." *Ute Indian Tribe v. Utah* (*Ute V*), 114 F.3d 1513 (10th Cir. 1997).

However, *Ute V* specifically held that lands within the disputed area that could have been but were not allotted to non-Indians were restored to tribal status in 1945 and are Indian country. And in 2015, "the rock returned for this court to push up the hill one more time" in ***Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah (Ute VI),*** in which Judge Gorsuch wrote a unanimous panel decision that clearly recognized that the state's prosecution of a tribal member here and its harm to tribal sovereignty are "as serious as any to come our way in a long time" and are "an invasion of tribal sovereignty [that] can constitute irreparable injury." These are indeed strong words from an appellate federal judge in recognition of tribal sovereign authority – to the exclusion of state authority – over activities on tribal lands. Nonetheless, it was a case decided based on existing Tenth Circuit precedent determining the same reservation boundaries. And it involved the displacement by the state of tribal authority over tribal members on tribal land – leaving open the question of Gorsuch's view of tribal sovereign authority over the activities of non-Indians on tribal land.

In perhaps his most troubling Indian law case, Judge Gorsuch wrote the majority opinion in ***Hydro Resources, Inc. v. EPA,*** a sharply divided en banc panel (6-5) decision of the Tenth Circuit that addressed an intra-circuit conflict and held that the Supreme Court's decision in *Venetie* had supplanted the *Watchman* "community of reference" test (the first of a two-part inquiry). Under *Venetie,* the majority held that certain non-Indian fee lands in New Mexico outside the Navajo Reservation do not qualify as a "dependent Indian community" and "Indian country" under 25 U.S.C. § 1151(b). At issue was whether Hydro Resources, Inc. (HRI) was required to obtain various regulatory permits under the Safe Water Drinking Act (SDWA) from the State of New Mexico or from the U.S. Environmental Protection Agency (EPA) to conduct its uranium mine operations. Under the Tenth Circuit's *Watchman* community of reference test, three factors were weighed to determine a "dependent Indian community": (1) the geographic definition of the community; (2) the status of the area in question as a community; and (3) the community in context of the surrounding area. In *Venetie*, the Supreme Court established a two-part test for determining whether certain lands qualify as a "dependent Indian community": (1) consists only of lands explicitly set aside for Indian use by Congress (or its designee); and (2) the federal government superintends the lands.

In dissent, Judge Ebel (joined by four other judges) found that the Supreme Court in *Venetie* did not "address a separate, antecedent question: to what area of land should this two-part test be applied?" In other words, the question that the *Watchman* "community of reference" test was intended to answer is the relevant "community" to be considered before determining whether that community is both "dependent" and "Indian." The dissent agreed with the EPA and the Navajo Nation that appropriate community of reference is the entire Church Rock Chapter of the Navajo Nation, not just the parcel owned by HRI. In conclusion, the dissent warns that the consequences of the majority opinion "are likely to be enormous, reintroducing checkerboard jurisdiction into the southwest on a grand scale and

disrupting a field of law that had been settled for decades." Thus, Gorsuch not only provided a sixth and deciding vote, he wrote the opinion which only requires courts to look at the status of a singular parcel – versus consideration of the surrounding "community of reference" – for determining whether non-Indian land qualifies as Indian country.

Federal Trust Responsibility:

In relation to the federal government's trust responsibility to Indian tribes, Gorsuch has a mixed record.[7] In ***Fletcher v. United States,*** 730 F.3d 1206 (10th Cir. 2013), Judge Gorsuch authored a unanimous panel decision and reversed the district court's dismissal of a suit brought by Osage tribal member headright holders seeking an accounting of the collection and distribution of royalty income from oil and gas reserves. Based on the Supreme Court's decision in *United States v. Jicarilla Apache Nation* and the plain language of the American Indian Trust Fund Management Reform Act, Judge Gorsuch recognized a "specific, applicable, trust-creating statute" imposing a duty on the federal government to provide the requested accounting. In addition to the text of the statute, Judge Gorsuch points to other evidence, including surrounding statutes, legislative history, and traditional trust principles. And if any residual doubt remain, or if any ambiguity regarding its meaning exists, Judge Gorsuch noted that "within the narrow field of Native American trust relations statutory ambiguities must be 'resolved in favor of the Indians.'" In the other 3 cases, Gorsuch joined unanimous panel decisions which simply recognized and/or deferred to federal agency authority contrary to the interests of the affected Tribe.

Exhaustion of Tribal Court Remedies:

As noted above, one critical area lacking on Gorsuch's Indian law docket is tribal civil jurisdiction over non-Indians. However, in *United Planners Financial Services v. Sac and Fox Nation,* he recognized the principle that tribal courts would in the first instance decide their own jurisdiction. Gorsuch wrote a unanimous panel decision to affirm the district court's holding that United Planners must first exhaust its available tribal court remedies in a suit in Tribal court brought by the Tribe for breach of contract. In pointing out that there are exceptions to the exhaustion doctrine (*e.g.*, unnecessary delay, bad faith), Judge Gorsuch writes: "we do not mean to suggest that United Planners might not eventually succeed in showing bad faith, only to suggest it hasn't established it yet."

[7] In the March 8, 2017 letter responding to a request from Senator Feinstein, Ranking Member, Senate Judiciary Committee, the Department of Justice lists a number of cases on which Gorsuch participated as Principal Deputy to the Associate Attorney General including *Cobell v. Norton,* in which he "participated in discussing litigation and settlement options in this case, and he participated in case strategy ."

Should Indian Country take a position on Gorsuch's nomination?

Indian tribes should carefully consider the nomination and potential confirmation of Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States. The Administration and his supporters on the Hill have highlighted Judge Gorsuch's significant record on Indian issues in an effort to garner additional support from Indian country for his nomination. There is a strong sense on both sides that tribal support or opposition could be important for Senators from states with significant tribal populations, and we anticipate Indian tribes being asked about their views on the nomination.

If confirmed, Judge Gorsuch would replace Justice Scalia, thus maintaining the conservative balance on the Court. There are elements in Judge Gorsuch's background, legal experience and judicial record that are encouraging, particularly when compared with recent Supreme Court nominees and other possible nominees on President Trump's short list who have had very limited exposure to Indian law and tribal governments. Judge Gorsuch has significant experience with federal Indian law, appears to be attentive to detail, and respectful to the fundamental principles of tribal sovereignty and the federal trust responsibility.

There are no guarantees, however, about how Judge Gorsuch would vote on critical Indian law cases as a Justice on the Supreme Court. His judicial record demonstrates that he does not always side with tribal interests. Hopefully, this memo and the attached Indian law cases summary provides sufficient information as a starting point for discussions around Indian country on whether to take a formal position on the nomination. NARF, in conjunction with NCAI, will monitor the upcoming confirmation hearings closely and evaluate Gorsuch's responses to questions posed by the Senate Committee on the Judiciary.