

# Sweat lodge decision shows Gorsuch's attention to religious liberty

An American Indian who is serving life in prison without parole for killing his toddler believes it was “monumental” for 10th U.S. Circuit Court of Appeals Judge Neil Gorsuch to pay attention to his religious liberty case.

Judge Gorsuch ruled that a prison had to provide a sweat lodge to Andrew Yellowbear Jr., an Arapaho, for his religious practices. That decision has become one of the prime exhibits as Congress begins to debate the judge's nomination to the Supreme Court.

Judge Gorsuch listed it in his top 10 significant cases, and legal analysts said it's the type of ruling that will confound liberal critics who accuse the judge of being a right-wing ideologue.

“This is someone who could look past the fact that this is not a savory character whose religious freedom he's protecting. This is not someone who practices a religion that Judge Gorsuch himself belongs to or believes in,” said Carrie Severino, chief counsel for the conservative Judicial Crisis Network, which is backing the judge's confirmation bid.

The state prison where Yellowbear was being held, the Wyoming Medium Correctional Institution, had a sweat lodge for American Indians to use in their religious observances.

But Yellowbear, who was convicted in 2006 of killing his 22-month-old daughter, was housed away from the general population because of threats against him, and prison officials said it was too much of a hassle to give him access to the lodge.

Yellowbear sued, and a district court ruled against him. He appealed, and in 2014 his case ended up before Judge Gorsuch and two other jurists on the 10th Circuit panel.

“The prison failed to carry its burden of establishing a compelling interest because it asserted only that the costs were ‘unduly burdensome’ while failing to quantify those costs in any way,” the judge wrote in his summation submitted to the Senate Judiciary Committee this month. “The prison also failed to show that a complete denial of access to the sweat lodge was the least restrictive means of accommodating its concerns.”

Judge Gorsuch said his opinion in the case was quoted by Supreme Court Justice Sonia Sotomayor in her own opinion in a 2015 case.

The case turned on a 2000 law, the Religious Land Use and Institutionalized Person Act, which said prisons had to respect the religious rights of inmates and couldn’t circumvent those rights without an overwhelming reason.

“Native American rights — as far as being prisoners and so forth — they don’t get as much attention as your mainstream religious beliefs,” Yellowbear told The Washington Times in a telephone interview from prison.

Still, he found some fault in Judge Gorsuch’s 31-page opinion. He said the ruling didn’t guarantee him a right to use the sweat lodge but instead decided that the state hadn’t proved its case for denying him access.

“What he said there was, although I won that case in that point of time, that didn’t [require] the Department of Corrections from having to continue to offer sweat lodge services,” Yellowbear said.

Yellowbear said, without elaboration, that he has had to leave the sweat lodge in the middle of his religious ceremony twice since the ruling, and because of this, he thinks Judge Gorsuch’s philosophy “doesn’t bode well for Native American issues.”

But Sean Connelly, who served as Yellowbear’s attorney, said Judge Gorsuch has “tremendous intellect and integrity.”

Mr. Connelly worked under Judge Merrick Garland when both men were at the Justice Department and said he would have been happy to see his former supervisor on the Supreme Court.

But Republicans blocked Judge Garland last year, and Mr. Connelly said Judge Gorsuch impressed him with the handling of the inmate case.

“His exquisitely crafted Yellowbear opinion shows a willingness not to accept unsubstantiated government justifications for denying federal rights,” said Mr. Connelly.

Judge Gorsuch’s ruling in the case appears to dovetail with another of his top-10 rulings — this one on a hot-button Obamacare case.

The judge sided with a private company that objected to the Obama administration’s mandate for all businesses to provide employees with insurance that covered contraception, including the morning-after pill that many religions call an abortifacient.

That case, known as Hobby Lobby, went to the Supreme Court, where a majority of the justices upheld Judge Gorsuch’s ruling.

“The fact that he highlighted those two cases as 10 of the most significant that he’s heard during his 10 years on the 10th Circuit shows that he really believes that those cases were important to the rights of religious Americans,” said Hannah Smith, an attorney for the Becket Fund.

The Yellowbear case also provides a curious contrast with opinions of the late Justice Antonin Scalia, whose seat Judge Gorsuch would take should he be confirmed by the Senate.

In a 1990 ruling, Scalia ruled against American Indians in Oregon who were fired from their jobs as drug counselors because they had used peyote, a hallucinogenic drug that is part of some Indian ceremonies.

Scalia, writing for the five-justice majority in *Employment Division v. Smith*, said Oregon’s prohibition against peyote wasn’t aimed at religious practices but rather was a neutral exercise of the state’s police powers that applied to all people, so it didn’t infringe on the Indians’ First Amendment rights.

“There are a lot of critics of that particular opinion of Justice Scalia. It’s often one that you’ll find — one of the rare opinions you’ll find — conservatives say, ‘Yeah, he got it dead wrong in this case,’” said Ms. Severino.

A Democrat-controlled Congress, upset with the decision in *Smith*, overwhelmingly enacted the Religious Freedom and Restoration Act in 1993, then seven years later followed it up with the prison law that was the basis of Judge Gorsuch’s ruling.

Alex Luchenitser, associate legal director for Americans United for Separation of Church and State, said Judge Gorsuch’s track record on religion is concerning because it could suggest he will put the rights of religious objectors over the civil rights of minority groups and lead to government promotion of religion.

“It may be true that he may facially treat religious minorities the same as religious majority when they assert religious freedom claims, but what I’m not sure he would necessarily realize is that his view of a church-state separation — in his view, religious freedom — is a way to lead to much greater promotion of Christianity in the public square and by government,” said Mr. Luchenitser.

While liberals overwhelmingly backed the Religious Freedom and Restoration Act in 1993 — a Democrat-controlled House passed it unanimously, a Democrat-controlled Senate backed it by a 97-3 vote and President Clinton signed it — they have turned against such laws in recent years when Christian businesses began refusing to participate in same-sex weddings, citing state and federal religious freedom laws.

Dan Goldberg, legal director at Alliance for Justice, said that while Judge Gorsuch ruled for *Yellowbear*, he has sided with prisons and against prisoners in other cases.

Mr. Goldberg pointed in particular to a 2008 case, *Shook v. Board of County Commissioners of County of El Paso*, where Judge Gorsuch denied certification of a class action for a group of mentally ill inmates who argued that their mental health treatment wasn’t adequate in jail.

“Yellowbear has to be put in context that when it comes to vindicating rights of inmates, Neil Gorsuch has repeatedly sided with prisons and against constitutional rights,” Mr. Goldberg said.

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