

THE SUPREME COURT AND ITS FUTURE

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Remarks given at the National Press Club

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As prepared for delivery:

Good morning everyone and welcome to the National Press Club. My name is Elizabeth Wydra, and I am President of Constitutional Accountability Center.

I want to thank the Press Club for graciously hosting us for the fourth consecutive year, as we and our panel of distinguished guests examine the Supreme Court's important work, in a Term perhaps most notable for what went on outside the courthouse than for the cases heard within.

I also want to thank everyone from the press and the public who are joining us today here in the room, as well as those watching online. You can follow along on social media with the hashtag HomeStretch.

With the conclusion of the Term's oral arguments each year, all of us who advocate before the Justices and observe the Court can take the opportunity to step back. This annual focal-point in the Court's calendar is an ideal moment to examine the Justices and their work, when all eyes turn to the last two months of business: The Court's Home Stretch.

Today, as in years past, we will look behind us at the cases and events that have shaped the Term so far, as well as look ahead to cases and issues yet to come that will affect the lives of millions of Americans, and possibly change the course of the law in significant ways.

Before our amazing panel begins their discussion, I wanted to offer a few thoughts on the Court as we have known it since February of last year, and its uncertain future in the years ahead.

Countless gallons of ink – or billions of pixels – have been spilled over the vacancy that former Justice Antonin Scalia's death left behind.

This morning, let me cut to the chase.

My organization worked hard to get a hearing and a vote for President Obama's nominee, Merrick Garland. Senate Republicans refused, which was shameful, unprecedented, and brazenly political.

When Senate Republicans got their wish, and a Republican president was able to put forth a nominee, my organization then opposed the confirmation of the Court's newest Justice, Neil Gorsuch.

We did not do this lightly.

Upon analyzing his record, as well as his confirmation hearing performance, we were deeply concerned that now-Justice Gorsuch is a selective originalist — giving pride of place to certain parts of the Constitution, while giving an extremely crabbed view of the substantive fundamental rights protected, *in particular*, by the Constitution's later Amendments, including the 14th Amendment and its broad guarantee of equality for all.

That said, as we advocate for those rights and liberties protected by the *whole* Constitution in the many important cases to come — which will depend on understanding the original meaning of our Constitution — we at CAC will work very hard to win his vote. I hope we are wrong about him being a selective originalist.

Because if Justice Gorsuch is true to the original meaning of the *whole* Constitution — not just the parts that conservatives like — we *should* win his vote.

When President Trump nominated Neil Gorsuch on the last day of January this year, I said that Trump had placed a heavy burden on him.

Gorsuch was nominated on the heels of Trump's first attempt at a Muslim travel ban. He was also chosen after months of candidate Trump's litmus-test promises about positions that his nominee would have to support — including on abortion, guns, and evangelical religious liberty.

Gorsuch had a lot to prove to the American people. He had to prove that he was independent from President Trump; that he wasn't another predictable vote for big business and the U.S. Chamber of Commerce, stretching the law in their favor; that he wasn't selected according to any of Trump's blatant litmus tests; and that — as a self-described originalist — he would follow the text and history of the Constitution, even when it would displease the conservative ideologues who chose him.

Did Gorsuch make his case? Many of us left his confirmation hearing even more concerned than before. But it's also easy enough to conclude that he did.

He *was* confirmed to the Court, after all.

I would argue, however, that confirmation didn't lift the heavy burden that then-Judge Gorsuch carried into the Senate Judiciary Committee.

In fact, between the way President Trump picked him, and the way Senate Republican Leader Mitch McConnell coerced his confirmation, the weight now on Justice Gorsuch's shoulders is heavier than it was in January.

Unable to win the confidence of 60 Senators, the only way Gorsuch could have been confirmed was for Senator McConnell to do what he did: blow up the Senate and force his nomination through.

That was a mistake.

Rather than follow tradition and find a nominee with broad bi-partisan support – the same support that Chief Judge Merrick Garland had – President Trump and Senator McConnell instead placed the institution of the Supreme Court in partisan political peril.

As Linda Greenhouse recently observed, thanks to Trump and McConnell, the Court has been turned into a political prize.

That's the last place where Chief Justice John Roberts wants it to be.

In the process, the conservative interest groups who lobbied and spent millions of dollars on the Gorsuch confirmation, have tried to reduce the new Justice to something of a legal vending machine.

The business community, pro-life advocates, the National Rifle Association, and other hardline conservative interests, placed big bets on President Trump's promise to appoint someone whose positions on their issues were locked in.

The question I'd like to ask is, "Is that the kind of Justice Neil Gorsuch wants to be?"

The Court's conservative ringer, appointed by an authoritarian President whose knowledge of the Constitution famously extends to twelve mythical Articles while exhibiting, in his repeated attempts at a Muslim travel ban, near total ignorance of even the basic parameters of America's fundamental values?

That doesn't seem like the judge he has said he will be.

But as the work of the Court moves forward – both with respect to future landmark cases, as well as many others that will escape broader notice – the work and votes of Justice Gorsuch will not be taken at face value.

Instead, they will be viewed through the lens of the far-right conservative politics surrounding his confirmation that burned a hole in the fabric of the Court's legitimacy.

That hole, however, can be repaired.

Justice Gorsuch can help heal the breach by making good on his commitment to the Senate last month.

“These days we sometimes hear judges cynically described as politicians in robes,” he said, “seeking to enforce their own politics rather than striving to apply the law impartially. But I just don't think that's what a life in the law is about,” Gorsuch claimed.

If Justice Gorsuch really means that, then he will follow the text and history of the *whole* Constitution where it leads, and he will follow it to the progressive outcomes it so often commands: equal citizenship for women, the right to vote unencumbered by racial discrimination, and access to America's courts to vindicate individual rights.

These and other principles may not match his political preferences, but he is a judge, and that is what the Constitution requires.

Indeed, how soon – and how often – President Trump and Senator McConnell are disappointed by Neil Gorsuch, will be a key measure by which the burden he carries into the Court every day as its newest Justice, is lifted, or merely compounded.

Now, in contrast, the Justice who swore Gorsuch in at the White House – the Court's longest serving Republican appointee – shoulders a different responsibility today.

Faced only months ago with the prospect of no longer being the fulcrum of a 5-4 conservative majority, potentially forced to rediscover his footing on a Court with five progressive appointees, Justice Anthony Kennedy is once again at the center of American law.

While we don't always agree with Justice Kennedy – his campaign finance jurisprudence being a prime example – he has built a priceless, though fragile, legacy. He has vindicated, at historic and pivotal moments, the principle of equality for gays and lesbians, and been a gradual but important guardian of anti-racial discrimination principles in higher education, public housing, and jury deliberations.

In the Trump era, it is impossible to imagine any stronger or more able steward of Justice Kennedy's edifice of equality and respect for individual liberty – which rests on the weight of just one vote – than Kennedy himself, which, despite all the pressure and pointed rumors of his retirement, I think he realizes.

With a raft of controversial issues making their way before the Court in the next Term – from voting rights, to the Muslim travel ban, to gun regulation – Justice Kennedy's influence over the nation's future will be more compelling than ever.

The Supreme Court is once again The Kennedy Court, and he is once again its most important Justice.

Thank you again for joining us today. Now let me turn the stage over to the incredible Amy Howe, of SCOTUSBlog and AmyHowe.com, who will moderate today's discussion and introduce our extraordinary panel.