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To: Interested Parties
From: Elizabeth B. Wydra, President, Constitutional Accountability Center
Subject: The Nomination of Judge Neil Gorsuch to the Supreme Court of the United States
Date: March 31, 2017

Constitutional Accountability Center ("CAC") is a think tank, law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's values, text, and history. We work in our courts, through our elected government, and with legal scholars to preserve the rights and freedoms of all Americans and to protect our judiciary from politics and special interests.

As litigators and defenders of the judiciary and rule of law, CAC has a vested interest in nominations to the federal courts; and there are no nominations more important than those to the Supreme Court, the final arbiter of constitutional liberties and protections. The American people are entitled to Supreme Court Justices who will not only safeguard the Constitution, but also adhere to mainstream legal thought and serve as an impartial, independent check on the President and Congress. It is with these considerations in mind that we reviewed the nomination of Judge Neil M. Gorsuch.

We were hopeful when President Trump nominated Judge Neil Gorsuch, as he was a self-professed and widely acclaimed originalist. To live up to the name, originalists—and CAC considers itself among them—must be faithful to the text and history of the whole Constitution, including the powerful Amendments that have, over time, pushed our country further along the arc of progress. These Amendments, among other things, removed the stain of slavery from our nation's charter, guaranteed equal protection of the law to all persons, guaranteed the right to vote free from discrimination based on race and gender, and eradicated the poll tax so that the right to vote does not depend on a person's ability to pay at the ballot box. To have a justice on the Supreme Court who takes seriously this arc of progress, written into the words of our Constitution, and uses it as his north star in deciding the cases of national import that reach the Supreme Court is something CAC would cheer—even if that nominee is not necessarily the one that we would have chosen all other things considered. We hoped Judge Gorsuch was such a nominee.

However, upon reviewing his originalist bona fides,[1] we became concerned that Judge Gorsuch's record suggested he might be merely a selective originalist, a judge who gives pride of place only to parts of the Constitution, while ignoring the latter, progressive Amendments that prohibit states from infringing on individual rights, protect substantive fundamental rights and equality, and give Congress broad powers to help realize these constitutional promises. His record raised concerns[2] for CAC as an organization that believes that constitutional interpretation should begin with a careful analysis of

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[1] David H. Gans, *The Selective Originalism of Judge Neil Gorsuch: A Review of the Record* (2017), *available at* http://theusconstitution.org/sites/default/files/briefs/CAC-Selective-Originalism-of-Gorsuch.pdf.

[2] Press Release, Elizabeth Wydra, President, Constitutional Accountability Ctr., Trump's Supreme Court Selection, Judge Neil Gorsuch: A Troubling Record, and a Profound Burden of Proof (Jan. 31, 2017) (*available at* http://theusconstitution.org/media/releases/trump%E2%80%99s-supreme-court-selection-judge-neil-gorsuch-troubling-record-and-profound).

constitutional text and history, including the text and history of the Constitution that point in a progressive direction.

Unfortunately, during his confirmation hearing, Judge Gorsuch did not answer questions about post-Bill of Rights Amendments that would have quelled our concerns about his judicial philosophy, and he provided answers that could not be squared with the text and history of the Constitution. We expound upon these considerations in parts I and II, respectively. For these reasons, as we explain in detail below, there is too much doubt that Judge Gorsuch has the proper fidelity to the whole Constitution that originalism requires. As a result, CAC cannot endorse the confirmation of Judge Gorsuch and calls upon the Senate to vote NO on his confirmation.

I. SELECTIVE AGREEMENT WITH CONSTITUTIONAL PRECEDENT AND DISCUSSION OF CONSTITUTIONAL PROVISIONS

Although Judge Gorsuch has described himself as an originalist,[3] his pre-hearing record, as we have shown, raised concerns about whether he is a *selective* originalist,[4] committed only to following some of the Constitution's text and history, but not all. Regrettably, Judge Gorsuch's testimony at his confirmation hearing did not dispel those concerns. While Judge Gorsuch gave excellent answers to questions about certain constitutional provisions and constitutional precedents of the Supreme Court, his unwillingness to address other provisions and cases in fact heightened the concerns about his fidelity to the entire Constitution.

Not surprisingly, a number of Senators sought to elicit Judge Gorsuch's jurisprudential views of Supreme Court rulings protecting fundamental rights. This is a legitimate line of questioning of a Supreme Court nominee.[5] But in response to Senators' questions about some of the most important constitutional rulings by the Court in the past 65 years, Judge Gorsuch was very selective in his replies, stating his agreement with the Court's rulings in some of those cases but refusing to state whether or not he agreed with others or thought they vindicated the text and history of the Amendments they enforced.

For example, when asked if he agreed with the result in *Brown v. Board of Education*,[6] Judge Gorsuch commendably testified that it was "a seminal decision that got the original understanding of the Fourteenth Amendment right and corrected one of the most deeply erroneous interpretations of law in Supreme Court history, *Plessy v. Ferguson*, which is a dark, dark stain on our court's history."[7] And he testified that Justice Harlan's dissent in *Plessy*, which was vindicated in *Brown*, "got the original

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[3] *Confirmation Hearing on the Nomination of Neil Gorsuch to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary,* 115th Cong. (2017) [hereinafter *Hearings*], (statements of Judge Neil Gorsuch and Sen. Ted Cruz), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885.

[4] *The Selective Originalism of Judge Neil Gorsuch*, *supra* note 1.

[5] Vikram Amar, *Supreme Court nominees should weigh in on these rulings. You're up, Judge Gorsuch*, Wash. Post, (Mar. 19, 2017), https://www.washingtonpost.com/opinions/supreme-court-nominees-should-weigh-in-on-these-rulings-youre-up-judge-gorsuch/2017/03/18/d54df6ac-0b2c-11e7-b77c-0047d15a24e0_story.html?utm_term=.97cdd5247eba.

[6] 347 U.S. 483 (1954).

[7] *Hearings, supra* note 3 (statement of Sen. Richard Blumenthal), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246 (referring to *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

meaning of the Equal Protection Clause right the first time. And the court recognized that belatedly [in *Brown*]. It's one of the great stains on the Supreme Court's history that it took it so long to get to that decision."[8]

Similarly, when asked whether he agreed with the result in *Loving v. Virginia,* in which the Supreme Court struck down state laws prohibiting interracial marriage, Judge Gorsuch enthusiastically hailed the ruling as:

> Seminal. Important. Application of the principles recognized in *Brown* versus *Board of Education*. A vindication, again, for the original meaning of the—of the equal protection clause. That all of us, every single person, is equal, and that we can all choose with whom we wish to live our lives without respect to race. It's—it's one of the great moments—we visited some dark moments in Supreme Court history and we visited some bright moments, Senator.[9]

Those terrific answers stand in sharp contrast to Judge Gorsuch's refusal or failure to state whether he agreed with or thought the Court got the text and history of the Constitution right in *Griswold v. Connecticut*,[10] *Eisenstadt v. Baird*,[11] *Roe v. Wade*,[12] *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[13] *Lawrence v. Texas*,[14] and *Obergefell v. Hodges*.[15] In these cases, the Supreme Court held that the Constitution protects fundamental rights going to the heart of personal liberty and autonomy – reproductive freedom (including the right to use contraceptives and the right to choose abortion), sexual intimacy between consenting adults, and marriage equality for gay men and lesbians.

All that Judge Gorsuch would say about these cases is that they are precedents of the Supreme Court,[16] an undeniable fact that of course is also true of *Brown* and *Loving*. Even Chief Justice John Roberts, at his own Supreme Court confirmation hearing, testified that he agreed with the Court's ruling in *Griswold*,[17] while Justice Samuel Alito, at his hearing, stated that he agreed with the ruling in

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[8] *Hearings, supra* note 3 (statement of Sen. Richard Blumenthal), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885.

[9] *Hearings, supra* note 3 (statement of Sen. Richard Blumenthal), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246.

[10] 381 U.S. 479 (1965).

[11] 405 U.S. 438 (1972).

[12] 410 U.S. 113 (1973).

[13] 505 U.S. 833 (1992).

[14] 539 U.S. 558 (2003).

[15] 576 U.S. ___ (2015).

[16] See, e.g., *Hearings, supra* note 3 (statement of Sen. Mazie Hirono, discussing *Obergefell*), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885**;** *id.* (statement of Sen. Richard Blumenthal, discussing *Griswold, Eisenstadt, Roe, Casey, and Lawrence*), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246**;** *id.* (statement of Sen. Charles Grassley, discussing *Roe* and *Griswold*), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885.

[17] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 207 (2005) (statement of Chief Justice John G. Roberts, Jr.).

Eisenstadt.[18] But Judge Gorsuch would not state his agreement with any of the cases that make up an important fabric of American law: the last half century of constitutional precedents beginning with *Griswold* that protect the full scope of liberty for all in accordance with constitutional text and history.

As with his willingness to discuss precedent, Judge Gorsuch was similarly selective in his willingness to discuss the text and history of specific constitutional provisions. For instance, in explaining the proper application of original meaning jurisprudence, Judge Gorsuch used as an example *United States v. Jones*,[19] in which the Supreme Court was asked to determine whether the attachment by police of a GPS tracking device to a suspect's vehicle was a search within the meaning of the Fourth Amendment. Judge Gorsuch gave an excellent, even enthusiastic, explanation of how the original meaning of the Fourth Amendment—added to the Constitution in the 18th century—could properly resolve a 21st century question involving technology that the Amendment's Framers could never have dreamed of.[20]

But when asked by Senator Patrick Leahy which side of the Supreme Court's 5-4 ruling in *Shelby County v. Holder*[21] he would have voted on, Judge Gorsuch demurred.[22] The Court in that case ruled unconstitutional a key provision of the Voting Rights Act of 1965, one of our country's iconic civil rights laws. Judge Gorsuch could have availed himself of the opportunity to discuss the text and history of the Fifteenth Amendment, which protects the right to vote free from racial discrimination, and gives Congress the power to enforce that right by appropriate legislation. But he did not do so. A true originalist committed to following the text and history of the entire Constitution ought to be willing to discuss other provisions of the Constitution and Supreme Court precedents as he did the Fourth Amendment and *Jones*.

Judge Gorsuch's selective willingness to discuss the Constitution and constitutional precedents unfortunately leaves us with the doubts we had prior to his hearing as to whether he has fidelity to the *entire* Constitution, or whether he simply has not thought through the text and history sufficiently to dispel those doubts. Indeed, Judge Gorsuch's testimony left us with even greater concerns than we had going into the hearings.

Another topic on which Judge Gorsuch was conspicuously silent was the original meaning of the Foreign Emoluments Clause, which prohibits federal office holders from accepting emoluments from foreign governments without congressional consent. Senator Leahy asked Judge Gorsuch to describe "the purpose of the emoluments clause."[23] This should have been an easy question for a self-professed originalist to answer. The text and history of the Constitution make clear that the Foreign Emoluments Clause, along with the Domestic Emoluments Clause, reflected the Framers' profound concerns about corruption. The Foreign Emoluments Clause, in particular, also reflected the Framers' worries that

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[18] *Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary,* 109th Cong. 318 (2006) (statement of Justice Samuel A. Alito).

[19] 565 U.S. 400 (2012).

[20] *Hearings, supra* note 3 (statement of Sen. Amy Klobuchar), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885.

[21] 570 U.S. ___ (2013).

[22] *Hearings, supra* note 3 (statement of Sen. Patrick J. Leahy), *available at* https://www.c-span.org/video/?425138-1/supreme-court-nominee-stresses-independence-calls-criticism-judges-disheartening&start=18885.

[23] *Hearings, supra* note 3 (statement of Sen. Patrick J. Leahy), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246.

foreign influence could undermine the nation's independence and democratic character. Whatever debates might exist about the precise scope of the Clauses and how they might be applied in specific contexts, the general question posed by Senator Leahy should have been an easy one.

And yet Judge Gorsuch would do little more than repeat back the text of the Clause itself, offering that it "prohibits members of the government of . . . this country from taking emoluments [and] gifts from foreign agents." The "question," he went on, "is what exactly does that mean? And that is the subject on which there is ongoing litigation right now . . . and I have to be very careful about expressing any views." Senator Leahy rightly pushed Judge Gorsuch on this point, observing that Governor Randolph "said it was done in order to exclude corruption and foreign influence." He also pointed out that Judge Gorsuch wouldn't be hesitant to discuss the Fourth Amendment or the Fifth Amendment (the meaning and application of which are the subjects of constant litigation). But Judge Gorsuch was unwilling to acknowledge even the important anti-corruption purpose of the Clause, saying again simply that he was "hesitant to discuss any part of the Constitution to the extent we're talking about a case [that] is likely to come before a court."

Judge Gorsuch's silence on the original meaning of the Foreign Emoluments Clause, especially in contrast to his willingness to speak at greater length about other parts of the Constitution, is deeply troubling, especially against the backdrop of concerns about whether he will have the requisite independence from the President who nominated him.

II. MISAPPLICATION OF CONSTITUTIONAL TEXT, HISTORY, AND VALUES

During his testimony, Judge Gorsuch also made statements that cannot be squared with the Constitution's text and history. For example, Judge Gorsuch sharply distinguished the Declaration of Independence from the Constitution, observing that the Declaration is not "the law," though he added that the Declaration "should inform a judge in understanding the background of the Constitution." [24] While it is obviously true that the Declaration as a document itself is not "the law," an originalist committed to the text and history of the entire Constitution would recognize that the Framers of the Fourteenth Amendment wrote the Declaration's promises of liberty and equality directly into the Constitution. As the Reconstruction Framers recognized, the Fourteenth Amendment would be the "gem of the Constitution" because "it is the Declaration of Independence placed immutably and forever in our Constitution."[25] The Fourteenth Amendment was designed to guarantee to all the "unalienable rights" to which the Declaration referred. Judge Gorsuch, however, failed to honor this critical aspect of our Constitution's text and history, and, as noted above, refused to express his agreement with a half-century of the Supreme Court's jurisprudence protecting the full scope of liberty for all and fulfilling the Constitution's guarantees.

Judge Gorsuch's testimony also failed to heed the Constitution's promise of access to the courts, and its guarantee of rights so fundamental that they should not be subject to the whims of the political process. When the Framers designed the Fourteenth Amendment, they sought to ensure that fundamental rights "cannot be wrested from any class of citizens, or from the citizens of any State by

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[24] *Hearings, supra* note 3 (statement of Sen. Ben Sasse), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246.

[25] *See* Hon. Schuyler Colfax, My Policy Revisited: Necessity of the Constitutional Amendment (Aug. 7, 1866), *in* Cincinnati Commercial, Aug. 9, 1866, *reprinted in Speeches of the Campaign of 1866 in the States of Ohio, Indiana, and Kentucky* 14 (1866).

mere legislation."[26] Judge Gorsuch, in his testimony, failed to appreciate this basic principle. During the hearing, he repeated criticisms he had made in his 2005 article, *Liberals 'N' Lawsuits*,[27] which argued that liberals were too reliant on courts "as the primary means of effecting their social agenda on everything from gay marriage to assisted suicide to the use of vouchers for private-school education," urging them to recognize that the "ballot box and elected branches are generally the appropriate engines of social reform." Judge Gorsuch expressed his view that, in such cases, "judges are not well equipped to decide policy matters." While Judge Gorsuch properly recognized that "courts . . . can vindicate civil rights for minorities,"[28] his testimony suggested that he considered the question whether same-sex couples had a right to marry a loved one—vindicated by the Supreme Court in *Obergefell v. Hodges*[29]—was a mere policy choice to be decided by the democratic process, not a fundamental right of all persons secured by the Fourteenth Amendment's guarantees of liberty and equality. Judge Gorsuch is correct that purely political disputes belong in the political arena—but claims rooted in constitutional guarantees truly do belong in our nation's courts.

These are not small quibbles. To be sure, even among those of us committed to the Constitution's text, history, and values, we will not always be in perfect agreement on the Constitution's original meaning. As CAC's report *Laying Claim to the Constitution* explains, these debates do not always track ideological lines, and will involve, for example, questions about the role of precedent and the level of generality at which constitutional provisions should be interpreted.[30] But we cannot overlook Judge Gorsuch's apparent refusal to engage with transformative elements of our Constitution and what appears to be a selective originalism that privileges the Constitution as it stood in 1789 over the Constitution as it stands today.

Education, experience, and a reputation for being a genial and admired person and colleague are all things that are admirable in a Supreme Court justice. However, having all three does not entitle the holder to a seat on the highest court in the land—there is an elevated standard for Supreme Court justices. At his confirmation hearing, the burden was on Judge Gorsuch to prove to the American people that his record and judicial philosophy together demonstrate a respect for our constitutional values of liberty, equality, and justice for all. He had to demonstrate a history of being open-minded, fair, and guided by the *whole* text and history of the Constitution, recognizing the transformative nature of the Amendments ratified over the past centuries of American history to make our Constitution a more equal and more inclusive document. And it was on him to convince the American people that he has the independence to serve as a check on the elected branches when they threaten to violate fundamental constitutional rights and values, ignore structural protections against corruption and self-dealing, or otherwise act in their own interest instead of the public's interest. Judge Gorsuch did not advocate for himself in a way that satisfied this burden.

Should Judge Gorsuch be the next Associate Justice to join this august body for a lifetime appointment, we sincerely hope our understanding of his statements during his confirmation hearing is

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[26] Cong. Globe, 39th Cong., 1st Sess. 1095 (1866).
[27] Neil Gorsuch, *Liberals 'N' Lawsuits,* National Review (Feb. 7, 2005), *available at* http://www.nationalreview.com/article/213590/liberalsnlawsuits-joseph-6.
[28] *Hearings, supra* note 3 (statement of Sen. Chris Coons), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246.
[29] *Id.*
[30] James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism* (2012); *available at* http://theusconstitution.org/think-tank/narrative/laying-claim-constitution-promise-new-textualism.

wrong. When it comes to questions of law concerning later Amendments, and particularly the Amendments that are akin to a Second Founding of the United States—the Thirteenth, Fourteenth, and Fifteenth—we hope he will make decisions in line with a comment he made to Senator Feinstein during his hearing:

> [I]t would be a mistake to suggest that originalism turns on the secret intentions of the drafters, of the language of the law. The point of originalism, textualism, whatever label you want to put on it; what good judge always strives to do, and I think we all do, is try to understand what the words on the page mean. Not import words that come from us. But apply what you, the people's representatives, the lawmakers have done."[31]

If he is confirmed to the Court, we at CAC will present to Justice Gorsuch the best originalist arguments, rooted in the text, history, and values of the Constitution, in support of constitutional rights, liberties, and structural protections that help make our nation more free and fairer for all. For the history of our whole Constitution is one of progress over time, increased democratic participation, and the constant quest to make equality and justice a reality for all persons in this country. True and faithful originalists recognize this progressive arc and apply it to the constitutional questions before them. Should he be confirmed, we hope a Justice Gorsuch will do the same.

[31] *Hearings, supra* note 3 (statement of Sen. Dianne Feinstein), *available at* https://www.c-span.org/video/?425536-1/supreme-court-nominee-judge-neil-gorsuch-defends-originalist-stance-rulings&start=18246.