

REMARKS OF ELIZABETH WYDRA AS PREPARED FOR DELIVERY  
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A Tale of Two Justices in a Blockbuster Supreme Court Term

Good morning. My name is Elizabeth Wydra and I am President of Constitutional Accountability Center.

I'm excited to welcome you to the National Press Club today for CAC's Fifth Annual "Home Stretch at the Supreme Court."

Back in April 2014, CAC wanted to build a new Supreme Court event, one that would help shape the conversation at a key time on the Court's calendar.

To be sure, there are great panel conversations held both at the start of each Term in October, and at the end before the July 4th holiday.

But in between, we saw value in gathering Supreme Court observers and practitioners at the end of April, the day after oral arguments have ended for the Term.

We saw an opportunity to look back at the most important events affecting each Term to that point, while also looking ahead to major developments we can expect before the last week of June.

None of us predicted President Donald Trump four years ago, but your attendance today is testimony that we were right about this event: A conversation about the Court and its incredibly important work is timely and productive at this point in the Term, and we're glad that you can join us once again.

This Term has all the earmarks of being a blockbuster.

Partisan gerrymandering. President Trump's Muslim travel ban. Equal treatment of LGBTQ Americans in the public square. Purges of the voter rolls. The future of public sector unions. Cell phone privacy. Free speech and abortion access.

The sweep of this Term is simply breathtaking. Frankly it's a little hard to imagine the crush of momentous decisions we have in store for June as the Court ponderously wades through its docket.<sup>1</sup>

And I say that as someone who was in the middle of the historic Terms that decided the fate of the Affordable Care Act, Section 5 of the Voting Rights Act, and marriage equality.

If that wasn't enough, this Term places at center stage the careers of two justices—Justice Kennedy and Justice Gorsuch—the Court's longest-serving current member at one pole, and its rookie on the other. As I noted in October, "Justice Gorsuch, newest to the court, could benefit from watching—and emulating—his mentor and former boss," Anthony Kennedy.<sup>2</sup>

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<sup>1</sup> "Empirical SCOTUS: Slow and steady," Adam Feldman, SCOTUSBlog, March 21, 2018:

[http://www.scotusblog.com/2018/03/empirical-scotus-slow-steady/?utm\\_term=.uw6KE18QYp](http://www.scotusblog.com/2018/03/empirical-scotus-slow-steady/?utm_term=.uw6KE18QYp)

<sup>2</sup> "A Tale of Two Justices in the Trump Era," Elizabeth Wydra, Washington Monthly, October 6, 2017:

<https://washingtonmonthly.com/2017/10/06/a-tale-of-two-justices-in-the-trump-era/>

On the heels of his “victory lap” with Senator Mitch McConnell in Kentucky<sup>3</sup>, and then speaking at President Trump’s hotel here in DC, last year Justice Gorsuch sent strong signals that he was not particularly interested in even appearing impartial, or above showing partisanship.<sup>4</sup>

Add to that his early penchant for lecturing his new colleagues, both from the bench and in his opinions, and the stately deportment of Justice Kennedy stood in even greater relief.<sup>5</sup>

Looking back on the oral arguments this Term, Gorsuch seems to have gotten the message. Even as he has so far lived up to the business community’s highest hopes, voting with the U.S. Chamber of Commerce in 9 out of 10 cases to this point, Justice Gorsuch seems to have checked the behavior that contrasted so sharply, not only with the Justice he once clerked for, but also the goals of the current Chief Justice.

John Roberts has taken great pains to lift his institution above the partisan fray and improve its standing with the public, even if some of us might not think he has always succeeded.

President Trump’s Muslim ban certainly does not make that job any easier.

The day before Donald Trump was inaugurated President, Rich Wolf’s headline in USA Today asked whether Chief Justice Roberts will be Trump’s friend or foe?<sup>6</sup> That question holds for Justice Gorsuch, as well, and the answer should be the same: Neither.

To the degree Gorsuch applies the text and history of the whole Constitution, rather than a selective originalism that allows him to reach the outcomes he already agrees with, then he will be an independent check on Trump’s unconstitutional behavior.

Topping that list is this president’s multiple attempts to ban immigrants—students, siblings, spouses, refugees fleeing war—from entering the country, based on his animus against their religion.

In short: Trump’s Muslim travel ban is a major test for Gorsuch as Trump’s Justice. Gorsuch didn’t tip his hand at yesterday’s argument, but either way we’ll have to wait until the end of June to see whether he passes that test.

Meanwhile, we can look at the unexpected vote Gorsuch cast this month in a deportation case.

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<sup>3</sup> “Gorsuch’s speeches raise questions of independence, critics say,” Robert Barnes, Washington Post, September 27, 2017: [https://www.washingtonpost.com/politics/courts\\_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f41773cd5a14\\_story.html](https://www.washingtonpost.com/politics/courts_law/gorsuchs-speeches-raise-questions-of-independence-critics-say/2017/09/27/5accdb3c-a230-11e7-b14f-f41773cd5a14_story.html)

<sup>4</sup> “Neil Gorsuch doesn’t seem to care much about impartiality after all,” Elizabeth Wydra, Washington Post, August 21, 2017: [https://www.washingtonpost.com/opinions/neil-gorsuch-doesnt-seem-to-care-much-about-impartiality-after-all/2017/08/21/e8fc6842-844d-11e7-902a-2a9f2d808496\\_story.html](https://www.washingtonpost.com/opinions/neil-gorsuch-doesnt-seem-to-care-much-about-impartiality-after-all/2017/08/21/e8fc6842-844d-11e7-902a-2a9f2d808496_story.html)

<sup>5</sup> “How Badly Is Neil Gorsuch Annoying the Other Supreme Court Justices?” Jeffrey Toobin, New Yorker, September 29, 2017: <https://www.newyorker.com/news/daily-comment/how-badly-is-neil-gorsuch-annoying-the-other-supreme-court-justices>

<sup>6</sup> “Chief Justice Roberts: Will he be Trump's friend or foe?” Richard Wolf, USA Today, January 19, 2017: <https://www.usatoday.com/story/news/politics/2017/01/19/chief-justice-roberts-president-trump-oath-swearing-in/96735156/>

That he and Justice Thomas disagreed on the text and history underlying the Court's vagueness doctrine, applying the Constitution's Due Process guarantees, is an early data point in evaluating Justice Gorsuch's fidelity to the whole Constitution.

As others have noted, we should be cautious about overreading or misreading this vote. He is, after all, clearly still set against the modern administrative state. But ultimately, he had the better of that particular dispute with Justice Thomas, and when Gorsuch is right we should say so.

While it took many years into Justice Antonin Scalia's tenure for progressive legal scholars to hold him accountable to the method he purported was "easy as pie," we don't have that problem with Justice Gorsuch.

CAC and others have been following his jurisprudence very closely from the start, and we won't be distracted by arcane academic debates.

If, for example, Justice Gorsuch believes that the *Piggie Park* case was correctly decided—rejecting a restaurant owner's plea to discriminate against black customers, justified by his sincerely-held personal religious beliefs—then Gorsuch's vote in *Masterpiece* should be straightforward.

The Fourteenth Amendment's guarantee of equality is now the bedrock of our Constitution.

If the Court was right to reject the restaurant owner's racial discrimination, then rejecting a baker's plea to discriminate against gays and lesbians for personal religious reasons, should be rejected just as quickly.

That leads us to Justice Kennedy. His views in cases like *Masterpiece*, and in the partisan gerrymandering cases, are characteristically expected to be decisive.

Last year from this podium, amidst a swirl of rumor about his potential retirement, I argued that Anthony Kennedy is the best steward of his own towering legacy. That hasn't changed.

Kennedy has hired his clerks for the next Term, which has calmed the rumor mill this April.

Only he knows his mind on this point, but it still makes little sense to hand off his life's work to a President so erratic and chaotic, facing multiple investigations, disdainful of courts and judges that disagree with him, with a checkered judicial nomination record that includes ghost-hunting, Klan-defending bloggers<sup>7</sup>, and a guy who once wrote that Kennedy himself is a "judicial prostitute."<sup>8</sup>

Instead, and entirely apart from his own legacy, I believe that Kennedy values the Court as an institution as much as the Chief Justice does. The Court continues to be the one branch of government that largely functions. Creating a vacancy today in this toxic environment puts that in jeopardy, placing the Court

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<sup>7</sup> "Trump Judicial Nominee Brett Talley Appears to Have Defended 'the First KKK' in Message Board Post," Mark Joseph Stern, Slate, November 15, 2017:

[http://www.slate.com/blogs/the\\_slatest/2017/11/15/trump\\_nominee\\_brett\\_talley\\_appears\\_to\\_have\\_defended\\_the\\_first\\_kkk.html](http://www.slate.com/blogs/the_slatest/2017/11/15/trump_nominee_brett_talley_appears_to_have_defended_the_first_kkk.html)

<sup>8</sup> "Trump nominee called Kennedy 'judicial prostitute'," Seung-Min Kim, Politico, May 26, 2017:

<https://www.politico.com/story/2017/05/26/trump-judicial-nominee-justice-kennedy-slight-damien-schiff-238874>

directly in the middle of partisan politics in a mid-term election year, and Kennedy's critical fifth vote in the hands of perhaps the least competent president in modern history to manage and value it.

Let me close today by noting that Constitutional Accountability Center was founded in 2008. That means that here in 2018, we are celebrating our tenth year of promoting the progressive promise of the Constitution's text and history. We have filed more than 150 briefs in that time—including more than 100 in the U.S. Supreme Court—representing clients ranging from criminal defendants, to coalitions of conservative and liberal academics, to Members of Congress and state legislators of both parties.

I encourage you to visit our new website at [www.theconstitution.org](http://www.theconstitution.org) and learn more about our work.

And now, I couldn't be more proud to kick off our Fifth Annual Home Stretch event, by welcoming the fantastic moderator of our wonderful panel today.

Ari Melber needs little introduction, but I should say that he is MSNBC's Chief Legal Correspondent, an NBC News Legal Analyst, and the host of "The Beat with Ari Melber," his great show that airs nightly at 6pm Eastern on MSNBC.

Thank you, Ari, for leading the discussion today.

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