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DEEP DIVE: THE SUPREME COURT 2016, AND ALL ITS COMPLEXITY

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DEEP DIVE THE SUPREME COURT 2016, AND ALL ITS COMPLEXITY

(1.15 p.m.)

MR. ROSEN: Ladies and gentlemen, welcome to our Supreme Court Deep Dive. It is hard to imagine a more important issue in the next presidential election than the future of the Supreme Court. It's no exaggeration to say that this election will indeed determine the shape of the court for years to come. And discussing what the future of the court and the Constitution will look like we have a spectacular blockbuster panel beginning with a wonderful senator sitting right next to me and followed by America's top Supreme Court observers and Scholars.

I'm Jeffrey Rosen, the President of the National Constitution Center in Philadelphia. The National Constitution Center is a very special place. It is the only institution in America that brings together all sides, liberals and conservatives and everyone in between for constitutional education and debate. And the centerpiece of our educational efforts is the spectacular interactive Constitution which we will have at our disposal later on. We will be able to click on it and answer your constitutional questions, hear the leading conservative and liberal scholars in the country tell you what the Second Amendment means and what other amendments mean and it will be just a remarkable bipartisan love fest.

SEN. KLOBUCHAR: You just randomly picked that one out?

MR. ROSEN: It just by a non-controversial -- sort of fun one to talk about. It's going to be great. So let's jump right in. We're so privileged to have Senator Klobuchar from Minnesota. The Senator in addition to being one of the senate's leading champions of the Constitution has a great background. She is a graduate of the University of Chicago Law School where her teacher in constitutional law was Geff Stone who we will be hearing from later.

SEN. KLOBUCHAR: That means that if I -- you

asked a question I can call a friend, right? Up here?

MR. ROSEN: He's right there. And then she went on to serve as prosecutor where she distinguished herself and she's just been -- taken the senate by storm and is just such a thoughtful voice in these troubled times. Please join me in welcoming Senator Klobuchar.

(Applause)

MR. ROSEN: Senator, you have closely followed the Merrick Garland confirmation hearings. It has now been a 100 days since he was nominated. On July 19th, it will be a 125 days and Merrick Garland will surpass the record previously held by Louis Brandeis.

SEN. KLOBUCHAR: Who you just wrote a book about.

MR. ROSEN: Oh, really? I couldn't imagine mentioning it, but we're going to have a great session about it 4:10, so go hear about Louis Brandeis then because he is -- well, he was the greatest critic of bigness in business and government since Thomas Jefferson. He's a great man, but he waited a long time for a hearing. Merrick Garland is waiting longer. Tell us about the latest state of play with the Garland confirmation.

SEN. KLOBUCHAR: Well, thank you. And I don't think anyone would have imagined the day that Justice Scalia died that we would be this far into without even having a hearing. Of course there were early indications that morning and I thought they were just mistakes, people's press spokespersons on the Republican side said we're not going to have a hearing, we're not going to move forward, and I thought that just can't be possible, but that's where we are. I was there in the Rose Garden as a member of the judiciary committee when the President nominated Judge Garland, and I still remember there he is, stoic, you know, very thoughtful, careful person, and this tear kind of rolled down his cheek, and I thought not only does he have this incredible honor of being nominated for the highest court of the land, but he has this burden, the burden of trying to get confirmed, but the burden of

really holding up this simple principle that we have in independent judiciary because when you go back through time, now that we've reached over a 100 days, we haven't seen anything like this happen. You have to go back to the Civil War, we were able to get the justices confirmed in a 100 days civil war, World War I, World War II, the Depression, the Vietnam War, the crises we've had economically over time.

And here we are in the year 2016 over a 100 days, and when you go back to the time when we've had judiciary hearings that's 1916, we have had a hearing for every nominee except for nine of them, and those nine got confirmed in less than 11 days and that's why we didn't have hearings. So this is unprecedented. I've had to put myself in the shoes of my colleagues and think, well, if we had a Republican President and a Democratic senate, what would I do? And I have publicly said I would call for a hearing because you must have a process in a democracy, and the gridlock and the kind of polarization that we've seen should not be extended into the judiciary. The American public is with us on this. There was a recent poll out in May showing that something like, depending on which poll you look at, 65 to 70-some percent of the American public thinks we should have a hearing. The majority of Republicans think we should have a hearing. Four out of 10 republicans, this was a PPP poll from I think last week actually said that they didn't trust the Republican nominee to pick the next nominee.

Okay, but I won't go into that, but the point is, is that President Obama knowing we were in these polarized time picked a nominee who's known as a consensus nominee. Not everyone on our side of the aisle is even happy about that, but he picked someone that has tended to look for consensus, who's well-respected, who is the prosecutor who oversaw the Oklahoma City bombing case and the Unabomber at the same time, someone who is respected on both sides of the aisle. His confirmation vote was overwhelming when he was up for the D.C. Circuit with Senator Hatch literally standing on the floor challenging people to come to the floor to say anything bad about Judge Garland. When I was involved in the Sonia Sotomayor and Elena Kagan hearings, and I played (inaudible) with

both hearings, some of my Republican colleagues behind closed doors would actually say to me, well, if Judge Garland hadn't been nominated, then I'd be okay.

And so that's what the state of play is, and my hope is that because of the public pressure and what's happening right now in some of the states where there are senate seats up that we will eventually have these hearings because I just can't think of a historical reason not to do it and I can't think of a reason when you look at the nominee not to go forward with the hearings.

MR. ROSEN: I want to ask more about the consequences of the vacancy in a moment, but I'm going to jump to the question on everyone's mind. If Hillary Clinton wins the next Presidential election, might the Republicans confirm Judge Garland in a lame duck session?

SEN. KLOBUCHAR: We don't know now. First of all, two of my colleagues, Senator Kirk and Senator Collins, Senator Collins very strongly have called for hearings now. One other -- one or two other of my colleagues also called for hearings, one in his home state in front of reporters, and then changed their position after they were threatened in primaries. And then Senator Flake has called for hearings in a lame duck, but then a lot of his colleagues and leadership on the Republican side said that wouldn't happen. Well, I believe you never know what's going to happen until you get to that moment, and for all we know that they could decide that they want to have hearings in the fall. So we just keep pushing and pushing and making the historical arguments, the legal arguments, and certainly the fact that we've now had seven decisions, five 4-4 decisions, is that right Geff Stone, I hope so --

SPEAKER: Yes. Yes.

MR. ROSEN: She knows it once again.

SEN. KLOBUCHAR: Two that were remanded back and some very significant decisions including the recent immigration decision where it's clear the Supreme Court is there to give guidance to the lower court. And you just

can't have a situation where you have 4-4 decisions. What if we had a Bush v Gore happen? What if we had some kind of an emergency decision that had to be made by the court? And so you're starting to see the consequences that legal scholars predicted which is a diminished power of the court, right, you're seeing a degraded view of what's happening from the public and you're just seeing all around a -- the situation that we don't want to have seep into our courts the politicization of our courts to a degree that we've never seen before.

MR. ROSEN: The National Constitution Center is nonpartisan, so all of my questions are just descriptive and informational, but I'm going to ask one more political question. If Hillary Clinton wins and the senate goes Democratic, there may be pressure on the President-elect to appoint a more liberal nominee. You are a great fan of Judge Garland. Do you think that President Clinton would stick by Judge Garland and do you think she should?

SEN. KLOBUCHAR: I don't know what she's going to do. She hasn't said what she's going to do. She has said some very positive things about Judge Garland she -- obviously when you look back at her statements at the time, but I think that -- I don't think it's surprising that she wasn't going to say who she would nominate. I do think there'll be some public interest in the senate for those people that have stood by him in wanting to see him nominated, but there'll be people on the other side as well. So I really wish I could predict what would happen, but I can't.

MR. ROSEN: And what will you recommend? You're a fan of Judge Garland. Do you think he should be confirmed?

SEN. KLOBUCHAR: I am. I am. I would like to see him confirmed obviously, but I think that that is up to a President to make that decision.

MR. ROSEN: Okay. And just a little more on the back story because we're all fascinated, he's met with Democrats, he's met with some Republicans. How have those meetings gone?

SEN. KLOBUCHAR: Well, those meetings have gone well. I think there's been 42 meetings with Democratic senators and 16 with Republican senators and one with Angus King, our resident independent senator, but who's counting how many there have been? And so he's really been doing his job. He's been going through and meeting with people. He has submitted 2,000-plus pages of a questionnaire and appendix. He got the highest rating you can get from the ABA. So it is literally teed up because those questionnaires are there for staff to look at, they're for the public to look at, they're up on a website so people can see what's out there, and I think it's very smart to do that because again you never know what's going to happen, so you want to have everything done, you want to have these meetings done, and overall the meetings have been really positive with my colleagues when I talked to them.

MR. ROSEN: You've issued a list of questions that you would ask him and you've studied his record and you know him. Do you think he would be a liberal voice on the court?

SEN. KLOBUCHAR: You know, again, I will leave that for the scholars. I know that he has been someone and been on an appellate court, so he's someone that has been able to work with colleagues of different ideological views to find that place where you can get an opinion. Elena Kagan as someone that also has those skills, and I think that that's a positive. He's been a little different than some of the liberal members on some of the security issues, and some of the criminal justice issues, but I think he would be a fair and thoughtful member of the court. I don't like giving labels to people on the court because sometimes they surprise you.

MR. ROSEN: You make a great point about Justice Kagan being a pragmatist, and she and Justice Breyer, and Chief Justice Roberts and Justice Kennedy have kind of formed a pragmatic block. Would it be helpful to have another liberal justice who could help the court achieve compromise rather than polarizing?

SEN. KLOBUCHAR: Yes, I think that would be really helpful because when you look at what's been happening right now with these decisions, that is not helpful for the country. When you have the whole country, you have 4 million people -- just think about this, 4 million people with the immigration decision recently, the parents of the dreamers that thought that they had this executive order, by the way as you know there's some precedent for this when George H. W. Bush was President, 1.5 million people affected by an immigration executive order that he issued. Every President literally in the last few decades has issued some executive order allowing immigrants to stay or affecting their status. Minnesota has the biggest Liberian population in the country, little fact you can come away from this tent with, and they are always in this kind of temporary status even though they've been in their state 20-30 years. Sometimes Congress extends that status every year and sometimes the President does.

So there was some legal basis clearly for the President moving forward. There's a chance of appealing the decision from the lower court. There's a chance of asking for a reconsideration of the Supreme Court decision. But overall these people are now in limbo with a 4-4 decision, and with Congress -- I mean, my hope is Secretary of State Clinton has said that immigration reform will be one of her top priorities, if not her top priority when she gets in. And I think the time has come. I've been through the Bush administration's attempt to get that done. I was one of eight senators that worked on that. And I can tell you President Bush -- this is George W. Bush, was devoted to trying to get this done. He tried everything to get this done for all the good reasons, and we were so close. And that is when we started to see the pushback, talk radio and calling the Republicans involved, I still remember this, the Masters of the Universe, that was child's play compared to what we see now. And we weren't able to get the votes to get it done because it was too late in his term.

And then the President comes in, Obama comes in, in the middle of the worst downturn since the Depression, not a time where you can attempt immigration reform, so I

don't think you can criticize him for not doing it right away. We were losing more jobs in the country than there were people in the state of Vermont. The first month he comes in, so he waits, he does it when he thinks he can. We get a bipartisan agreement in the senate, the DREAM bill that involves support from the chamber of commerce and the AFL-CIO, the migrant workers, and the Farm Bureau and the Farm Union, that's unheard of. We got 68 votes for that bill. It had security money for the border, a lot of money for the border. It also had processes for ag workers, and it had some good things for green cards and to keep the innovation going given that 70 of our Fortune 500 companies were formed by immigrants. And then once again our hopes were dashed in the House when it just got set in the deepfreeze.

And so that doesn't -- so when you look at this, it can be a bad story I just told you, but it also can be a moment of hope when you see the fact that we're able to move a bill like that through the senate, and if this presidential election changes things in terms of even tightening the numbers in the House, taking back the senate, putting in a president that's supportive of immigration reform, then we have a good possibility to move as the court has asked us to do basically in these opinions to move out of the legislative branch on this issue.

MR. ROSEN: Very interesting. So as you say, if Congress acted, then the court would uphold it. If Congress doesn't act would the new President have -- say it's Hillary Clinton, have to reenact this by executive order and then would you need a liberal court to uphold the order?

SEN. KLOBUCHAR: Well, I think you would -- you could potentially, and you can ask your expert on this, have this case come up again somehow depending on what the administration does with reconsideration appeal with a different court, so that is one strong possibility and I'm sure that's something they're looking at right now in the Justice Department.

MR. ROSEN: You were also closely following

environmental issues and you think that they are stymied by a 4 to 4 court?

SEN. KLOBUCHAR: Well, that is the -- that is a pretty interesting one because that is the clean power rules that came out at the EPA after years of not being able to get anything done in Congress after the failure of cap and trade which by the way had the worst name in America because you would go in parades and people would yell, no one trade, no one caps, okay, so it didn't really -- any way, but it -- that aside we all know what a serious issue this is and that time is ticking here, and so what the administration did because of inability to get anything and I will say we've gotten movement on energy efficiency and so bipartisan support on some bills which is I think what we should be doing right now given the politics of this in the Congress instead of just saying, oh, we can't do anything, I like that we're moving incrementally on some issues that help with climate change.

But the clean power rules are critical right now, and we have huge business support for it. You know, I'll be at the chamber at -- against it in some of the business groups. Companies in my state like Cargill and General Mills are -- have come out in favor of this bill, a number of business leaders, and a number of companies, just you can see the big name companies behind this, the movement of the EPA power rules and that's because in part they were done in a reasonable fashion of 32 percent, a reduction in green house gases from the 2005 level by 2030. It's a long-term goal. It's achievable. It was part of the agreement the President made when he signed the International Treaty.

So this is not even just about our country, this is about the entire world and how we're able to make some changes to bring down green house gases and do something about climate change. And what's happened legally as you know is a few days before Justice Scalia died, literally 3 days before or 4 days before, the power plant rules were stayed. And that was kind of unheard of, but the thought was that they had just had another ruling out of a case in Michigan where they had ended up overturning or striking

down the EPA rules and yet a lot of the companies had already made the changes on them, so that kind of might have gone into their thought process, but they stayed the rules and now we're stuck in this limbo as we wait to see what happens. The D.C. Circuit is going to look at the rules and then enforce it, probably goes up to the court.

And so that's where we are on that, but the stay has meant that the EPA can't really take any actions toward moving forward. However, the states, many states are still taking -- moving forward, coming up with what their plan will be to fit the rules and there's lot of things going on in the states which is positive and of course there's a lot of things going on internationally. So we're in a strange way in a better place than we've been in years in moving on climate change because the public has changed, they've started to realize when John Oliver had the 100 scientists on the stage in white coats and 99 of them were on one side and one on the other to sort of make his case that this is the scientific consensus when we have a vote in the United States Senate and only one person votes against the fact that climate change is real, that happened. I know it's a small victory, but it was a victory. When those things happened, there was a change going on in the country and there was a change with millenials and young people and what they think. So I don't want to be all negative because I see a change coming our way, but it is unfortunate as we look at our -- we're racing against time here on climate change and what's happening around our world. And so the hope is that with a new justice on there that at least we can move forward instead of keeping having 4-4, 4-4, 4-4, and a diminished power to the highest court of the land.

MR. ROSEN: You mentioned climate change. There have been a number of other issues where the court has struck down active Congress that were passed by overwhelming bipartisan majorities, including most famously Citizens United and campaign finance and also the Voting Rights Act of 2006. From your perspective as a Senator, why is it important to have a court that defers to Congress and why does the court matter?

SEN. KLOBUCHAR: Well, those decisions to me were the most unfortunate and I am -- you know, I have appreciated some of interesting decisions and the work that's been done were Justice Kennedy or Justice Roberts will vote a different way. I will -- one of my little -- my little world-mapping of constitutional scholar like your panelists, I did predict the upholding of the Affordable Care Act in our caucus --

MR. ROSEN: Wow.

SEN. KLOBUCHAR: -- a true fact. Some senators have been over watching the decision and we had our Democratic caucus meeting and they all said this is a disaster like which is much remembered, I stood up, I said no, it will -- it will be upheld and Justice Roberts will write the opinion.

MR. ROSEN: That's great. How did -- how did --

SEN. KLOBUCHAR: It was a pretty good moment for me.

(Laughter)

SEN. KLOBUCHAR: And then I --

MR. ROSEN: Wait, wait. Stop, stop, stop, how did you predict that?

SEN. KLOBUCHAR: I predicted it because I thought that just the importance -- Justice Robert's role in the court, of course it's decided on legal reasons, so I didn't predict it on that, unlike the story that has come out of the caucus was that I actually predicted the tax reason it was decided, completely wrong.

MR. ROSEN: You did I'm sure.

SEN. KLOBUCHAR: But people said just go with it, so I'm like okay, but I wasn't based on legal analysis, just based on a feeling that the legacy of the court and other things. So -- but one -- that all being said and my appreciation for the fact that the justices

have from time to time made independent decisions including certainly the chief justice, I was -- that decision in Citizens United just I to this day don't know if they understood the impact that it would have and I suppose everyone on that court, you know, used to a judge and hasn't said in that call room and made those calls to raise like a \$1,000 a person and \$5,000 a person because the campaign finance rules set those limits, and that's a good thing for our country because everything is transparent and reported and you know where the money comes from and there's limits on how much an individual can give.

And now we have a situation where this money from the outside can just come in a wash and just obliterate everything you raise. I've never had a super PAC. I'd never had a super PAC run against me. I got 30 percent of the Romney vote in the last election voting for me. So I think I'm at pretty good credible position to say that when you have to -- when you're in a senate race and you have no personal wealth yourself like me and when you first run and no one knows who you are nationally and you literally resort to setting an all-time senate record, this is true fact, I raised \$17,000 from ex-boyfriends --

(Laughter)

SEN. KLOBUCHAR: -- because I got so -- I got so desperate because no one would call me back and I finally found all my -- all the address books and as my husband has pointed out, it's not an expanding base.

(Laughter)

SEN. KLOBUCHAR: And so the point is I kind of know what it's like in the trenches to do this and to come into this with no connections to money until if you have a situation where someone like me has a fighting chance because I can get enough support and then I can raise my \$10 million by getting support and having some business support and doing this and getting -- I can do this, but if someone could just threaten every time with my little \$10 million to come in and squash me with \$50 million or \$100 million from the outside, I'm not going to have a

chance, and that's the problem with this outside money. And it takes the campaigns away from the individuals whether they're Republicans or Democrats and it makes it so that we can't get compromised on either side, the left or the right because you're less afraid of the people on the other side than you are from people on your own base that will put the money in against you and so it makes it really, really hard to get a compromise in the Congress.

So I just think that if they knew all this when they were making that decision from the left and the right and maybe that would have been made it different one and hopefully there'll be some reconsiderations of Citizens United, not to mention the voting rights decision because the act of Congress on this about all we can do is make it more transparent and I -- that will have a limited effect, yeah, we can pass that and you'll know where the money comes from, but it's not going to change the fact that the money can just squash you like a bug.

MR. ROSEN: What is --

SEN. KLOBUCHAR: I guess I have some opinions on that so.

MR. ROSEN: That is spectacular. I will not speculate about which of your colleagues could raise even more money from their exes, but I do want to --

(Laughter)

SEN. KLOBUCHAR: No one. No one has come forward to beat my record, I have -- they're afraid to, they're afraid to.

MR. ROSEN: It's an impressive record. Very good job.

SEN. KLOBUCHAR: Yeah. Okay.

MR. ROSEN: But you raise a very fascinating possibility. There's a real chance that Citizens United could be overturned by a future court. It turns out it's a complicated question whether -- if it is overturned, the

old law would spring back to life or whether Congress would have to re-pass it and there's a division of opinion about that. Any sense of what would have to happen, would you have to re-pass the Bipartisan Reform Act or --

SEN. KLOBUCHAR: That I don't know. I mean I haven't really looked at the legality of that issue and it's a great question for your next panel --

MR. ROSEN: Yes. Yes.

SEN. KLOBUCHAR: -- but I would just like to be able to change this as soon as possible and I would hope that if they somehow struck down Citizens United that the old law would stand. I just don't know what other decisions have called that law into question, but for a while there at least we had a situation where peoples' contributions were reported, you knew what was happening, and then people -- you could raise -- you would have to raise enough money from a lot of different interests in people so that it just couldn't -- one person just couldn't come in and stop you because what happens when that happens is that people don't want to compromise or they don't want to move forward on one issue because they're so afraid of the outside money coming in. Believe me, that's what happened on some of the issues we've talked about today.

MR. ROSEN: Great --

SEN. KLOBUCHAR: Not -- immigration reform actually perhaps not being one of them, that would be the one exception to that because there's a lot of people business interests and others that are in favor of moving on immigration reform, but a lot of the other things we talked about are very much effected by the big outside money that can come in. I try not to call it dark money, but that's what it is still.

MR. ROSEN: We're going to take a few audience questions in a moment, but you've mentioned immigration, the environment campaign finance, and voting rights. Why else do you believe that the court is important in this election?

SEN. KLOBUCHAR: Well, I think our whole trust in our democracy right now is being called into question and whether it is the congress or whether it is the institution, the presidency and the court is part of that as well and you want people to believe in their country, and to believe in our democracy, and what we're seeing right now is just a decay of the feelings of the public toward it, and you can blame people for that, but I think that the rhetoric that we're seeing has made it harder to govern and much more difficult for people to come together to get things done.

It's made people believe less in our democracy. I use the example of this family I went to a mosque in Minneapolis, we also have the country's biggest Somali population in the United States of America, we have nearly a 100,000 in our state and we're pretty proud of that population and there have been some security and prosecutions and they've been very helpful in working with us on some of these issues with ISIS and Al Shabaab and other things, but the good part of that population is that they're part of the fabric of life in our state. And after 9/11, the Bush U.S. attorney and I went around to assure the community they wouldn't be victims of hate crime, that if they were, we'd stand by them.

Whatever happened after 9/11 because President Bush actually made it very clear just as President Obama did that we don't indict an entire religion. The thinking of some Americans have changed because of the rhetoric we're seeing about everything, about people, about our democracy, about our country and I heard the story at the mosque a few months ago that a family of four went out to dinner in Minnesota and it was some -- two little kids and their parents. Guy walks by and says you four go home, you go home right now, you go home to where you came from and the little girl looks at her mom and says, mom, I don't want to go home, you said we could go out to dinner tonight, I don't want to eat dinner at home. Those are the words of an innocent child, she knows no other home, Minnesota is her home, the United States of America is her home.

So if you ask why this election matters, it matters for how we think about each other as citizens, how we think about the workings of our democracy, we put these checks and balances in with the court and with Congress and executive power for a reason, and to me that trust is on the line in this election and that includes the fact that the Constitution says that the President shall nominate and the Congress will advise and consent and that through history we have followed that Constitution, amending with the Constitution for you, and we have fulfilled our obligations, that's what's at stake in this election.

(Applause)

MR. ROSEN: Thank you for that inspiring defense of the importance of the court and the Constitution. It's hard to beat that, but I think we have time for basically one question. Christie Hefner, the mic will soon be coming up to you.

MS. HEFNER: Just following up on the conversation about structural challenges to democracy like the Voting Rights Act and like campaign finance reform, I'm curious what your opinion is about changing the filibuster rule.

SEN. KLOBUCHAR: Changing the filibuster rule, so I have actually supported a lot of these reforms. When I came in we -- our class, Bernie (phonetic) included, came in during the time of this ethics travesties and we had the cash in the freezer in Louisiana. We made a number of changes that I think have been good ones to make things work better and there's no longer secret holds now and we -- I would be in favor and have been strongly in favor of changing the number of people needed to vote for the President nominees both in the district court, and the court of appeals, and the -- on the nominations for ambassador. I mean there's been crazy things going on there because it's now basically a 51-vote margin on those things and I think that's been a positive.

I've never been in favor of totally getting rid of the 60-vote margin on everything we do including the

Supreme Court and including the major pieces of legislation only because I think it's been when you look through history instead of looking at right now, there has been some advantages to the fact that you have to have the senate as a place where things cool off, you have to have 60-vote margin, you try to get a more bipartisan support. But what I have been in favor of is greatly speeding things up. People mess around with these votes and they make things last 4 days, 5 days, and it's just been a nightmare in that way. So I would much rather speed things up, make sure we have these 51-vote margins on the president nominee, whoever the president is, I'd support them with the Republican President as well so we can get things moving. So that's where I am on it.

MR. ROSEN: Ladies and gentlemen, please join me in thanking Senator Klobuchar.

(Applause)

MR. ROSEN: Bravo. That was really great. Thank you so much.

(Applause)

MR. ROSEN: All right, I'm going to call our all-star next panel up to the stage and in order to entertain you as they came and their seats are being shifted, I'm going to demonstrate this incredible interactive Constitution which you can check out at constitutioncenter.org and you can use it to frame the constitutional questions that you can ask later on during this panel. So I mentioned the Second Amendment. You can click on the Second Amendment, this is all available for free and online and see the two leading scholars of the Second Amendment in America, Nelson Lund and Adam Winkler nominated by the conservative Federalist Society and the American Constitution Society which is the liberal group, and they've written 1,000 words about what they agree that the Second Amendment means in common.

So every single word that you see there is something that both the left and the right can agree on. Then you can click down to the bottom and you can see

there are separate statements about what they disagree the Second Amendment means. But that's not all I say as (inaudible) salesman, in addition to that you can then click back and look at the origins of the Second Amendment and see the revolutionary area of state constitutions that protected it and you can also click on any country in the world and compare the way they protect the right to bear arms with the way that we do. So it's an amazing free online tool, and as we continue this discussion, if you have constitutional questions about particular amendments we can check out this remarkable nonpartisan source for information and guidance.

It is now my great pleasure, ladies and gentlemen, to introduce 1, 2, 3, 4, 5 of the greatest court watchers and scholars of the Constitution in the United States and I will do that with alacrity. Larry Lessig, professor at Harvard Law School, cyber guru, foe of corruption, constitutional profit, and my law school teacher.

(Laughter)

MR. ROSEN: Geff Stone, University of Chicago America's leading First Amendment defender. You've heard him in every venue here on the First Amendment on privacy. He is talking about marriage equality later and the professor of Senator Klobuchar. Nina Totenberg the best and most well known legal commentator in America. Judge Nancy Gertner now of Harvard Law School, heroic civil libertarian whose work on behalf of free speech and equality has inspired me and many others. And finally Neal Katyal, former acting solicitor general of the United States, Supreme Court advocate, professor at Georgetown Law School and most importantly my brother-in-law.

(Laughter)

MR. ROSEN: And those of you who've been here before, those of you who were at the Deep Dive last year know that Neal and I are determined to go on the road with a show that's going to be the school house rock for the 21st century called Brothers-in-law, and it's going to be great. Talk to us afterward if you want to support this

important educational effort.

Okay, we're going to jump right in. Nina, you heard Senator Klobuchar talk about the Garland confirmation. You have been covering it of course superbly. What were your thoughts on what the senator said and what do you think his prospects for confirmation really are?

MS. TOTENBERG: Well, actually I think this senator -- that the Secretary Clinton has said what she would do about a lame duck vote, she said she would not ask President Obama to wait or to withdraw the nomination, so I think Obama is sticking with the nomination through the time he's President and certainly there's enough time in the lame duck to confirm him because these days the senate never goes into recess because then the President might be able to do something.

(Laughter)

MS. TOTENBERG: And so whether they're technically there or not there could be a hearing. My view is that the probabilities are that there will be a hearing if Hillary Clinton wins and if -- certainly if the Democrats take the senate. Mrs. Clinton has been very obtuse about what she would do herself if Judge Garland is not confirmed by the time she were to become president. And I think it's anybody's guess, but likely she probably wouldn't stick with him. He is 63 years old, I don't know when he turns 64, he is a moderate liberal with the stress on the moderate. He's more -- probably more to the right on most issues than the liberals on the court now, closer to Breyer than any other person in the court.

On the other hand, do you really want to start out a new administration with a big fight, and that's the calculus I think that she would have to make, but in the last analysis if he's not confirmed in the lame duck we're not going to get anybody confirmed in time to really participate in the next term because there has to be hearing, let's say hearing -- nomination in February, hearing in March, maybe the person gets there by April if there's not a big fight, that's a big "if." And by the

end of the April all the cases have been argued, so you've lost another year.

MR. ROSEN: Absolutely fascinating. Neal, the senator said that Judge Garland might be part of centrist block on the court perhaps joined by Justice Kagan, Justice Breyer from (inaudible) court, the Chief Justice Justice Kennedy. Is there a possibility for a Garland court that would actually reach consensus decisions or do you believe as some have suggested that this is a polarized court of five Republicans against four Democrats and that it's all politics.

MR. KATYAL: Yeah, I do think that there's a lot of misinformation about the court and those of us who regularly appear before it really have a different perspective than I think many people, so just to take one locus for conventional wisdom, Stephen Carter, Yale Law School professor 2 days ago told an audience here the following, "There's an enormous predictably to these voting blocks, and there are lawyers who will tell you how frustrating it is to get up in front of a court with seven or eight justices who've already up their mind. What you've seen in the court over the last two decades is the loss of any sense among the justices themselves that consensus is important." And that's, you know, just wrong. So half of the cases just this last term were decided unanimously, 2 years ago it was two-thirds of all the cases decided unanimously. You'd have to go back to 1940 to find another year in which that happened.

The chief justice at his confirmation hearings spoke about the need to try and bring the court together. Justice Breyer said similar things, and you know, these aren't important cases. This is not -- you know, not every case of course a portion there's going to be divisions, but things like reversing Governor McDonald's conviction or whether we -- smartphones have -- we have privacy in our smartphones, these are unanimous cases that the Supreme Court is deciding. And in addition the supreme court particularly this term totally unusual line up. So I mean, we could go through case after case of which Sotomayor and the chief justice are dissenting against Elena Kagan, you know, and all sorts of

interesting things going on.

So, you know, when we talk about the big cases which obviously we'll do, just remember there's a lot of stuff that's going on at the court that isn't susceptible to that same kind of predictable left-right split, Judge Garland I do think will be a moderate, I think Nina is absolutely right that on some things like criminal justice he'll actually move the court in a more conservative direction because Justice Scalia, and again this is something that I think people don't always realize, Justice Scalia moved the court to the left on criminal procedures issues.

MR. ROSEN: Larry, you clerked for Justice Scalia. You were -- famously held the liberal clerk seat designed to challenge the justice and you did such a great job in swaying him on so many issues during that term.

(Laughter)

MR. ROSEN: But describe his unique role on the court. Since his passing Justice Thomas has been speaking more, the court's been searching for more consensus --

MS. TOTENBERG: Once. Once.

MR. ROSEN: He spoke once and he wrote a very interesting dissent reflecting his concerns -- really fascinating gun control dissent that I want all of you to read and the homework for this panel by the way, we've got a lot of law professors on the panel, your assignment is to read a Supreme Court opinion after it's over, read the majority, read the dissent and make up your mind and you can pick which one you choose after the discussion.

But Larry, describe his unique role in the court, what his legacy will be and what you think the effect of Justice Garland replacing him would be?

MR. LESSIG: Well, I think it's important to recognize Scalia had a long career and who Justice Scalia was at the beginning of his career I think is different from who Justice Scalia was at the end of his career. So

after he passed -- and he was an incredibly important person to me. I felt very personally close to him and --

MS. GERTNER: Me too.

MR. LESSIG: I admired him greatly although I disagreed with him fundamentally. But when I clerked with him, as I wrote in a bunch of things after he died, what was most striking to me were the number of times when there was a conflict between what the conservative would do and what the originalist would do. And every time there was that conflict when I was clerking with him and I would hold that conflict up before him, he would do what the originalist would do. Now, the last time I saw him, I had lunch with him I guess about 6 months before he died, I said to him he had ruined me as a constitutional law professor. I said I felt like Linus waiting for the great pumpkin all the time because I said, "When I started my career I had this real belief in you doing the right -- the originalist thing even when it conflicted with conservative thing," and I said, "Time after time I've been proven wrong because you've done the conservative thing instead of the originalist thing."

And then we had a long conversation about campaign finance, which was the one thing that I was really frustrated about, but I think this marks the fact that there's no such thing as Justice Scalia, there is Justice Scalia's. And I still admire the person who could be brought back to a principle -- whether you agree with the principle or not, he could be brought back to the principle and held to it if the right, you know, forces were there to do it and I'm not convinced that's who he was for his whole career.

MR. ROSEN: I had the privilege of dinner with him where I asked him about what he would do about Brown versus Board of Education which was hard to justify on originalist grounds, and he thought for a bit and then threw back his head and laughed and said, "You know what? No one's perfect."

(Laughter)

MR. ROSEN: So what was his response when you challenged him right before he died on that?

MR. LESSIG: He was the old Justice Scalia in the sense that I challenged him to what I felt the originalists should do as distinct from what the conservative was doing and by the end of the lunch he was like, "You know, you might be right -- might be right," and he laughed. He'd had a lot of wine by the end of the lunch, so I'm not sure --

(Laughter)

MR. LESSIG: -- how much that would have stuck, but that's where it was.

MR. ROSEN: That's great. All right, we need to -- we need --

MS. TOTENBERG: Can I just --

MR. ROSEN: Go ahead.

MS. TOTENBERG: One of his charms really as a person was that if you weren't personal about it, he loved it when you gave as good as you got. He really liked that and he respected you for it and would sort of, you know, you on the shoulder or whatever. He might not -- you know, I knew him best in the last 20 years of his life and I would say the last five or seven were the least like the first five or seven I knew, and -- but it was a great gift to me that I was able to have a relationship with him, a friendship with him.

MR. ROSEN: That's great. We need to talk about these blockbuster cases, abortion, affirmative action, immigration and maybe contraception. At least two of them, abortion and affirmative action, were surprises to some in that Justice Kennedy voted more liberally than some expected. Most notably affirmative action where he had not previously voted to uphold an affirmative action program and in fact joined quite a liberal decision by Justice Breyer, seeming to say that university affirmative action was safe.

Nancy, do you want to channel Justice Kennedy here? What do you think changed his mind?

MS. GERTNER: I think -- let me start with Justice Kennedy in the -- in joining the abortion case because I had followed his arguments -- his comments during oral argument, and as I said in this setting before, what the significance of the abortion case was that there was finally a sense of an abortion regulation that was a bridge too far.

In other words -- and I said this before -- the bridge too far in the past for the past 20 years was making abortions criminal. That was the only end-point that we knew, which is that since 1992 Roe v Wade was not going to be reversed and so it wasn't going to become criminal. But every manner and means of restriction had been affirmed over the course of the year and -- over the course of the years -- and one of the things that you saw in Kennedy's questionings during the argument in the case was finally skepticism about a regulation, finally a sense that when you're talking about pre-viability abortions that the state can't intone maternal health even when all the regulations had nothing to do with maternal health and even he was pushed to say, if this law -- if this right is to be meaningful, this really was a bridge too far.

Whether that wiped out his decisions in other cases which were dealing with partial birth abortion in the third trimester, those kinds of issues in which he had been famously very dismissive of women's rights, still this set of facts was finally, if you believed in this right, this was a bridge too far. I wonder with the affirmative action case whether that was really the search for consensus that Neal was talking about more than anything else, you know, that this was also just the sense that there had to be some limit to the restrictions on affirmative action, but I have less of a sense of why he switched in that case.

MR. ROSEN: Geff, your take on Justice Kennedy in affirmative action, the significance of the decision and the broad observation as Adam Liptak noted in his

round-up that this is a court that was moving in a liberal direction, why was that happening?

MR. STONE: So in the affirmative action case I think that Kennedy saved at least for the moment the possibility of affirmative action. I think that that case could easily have come out where the court essentially finally said, "Affirmative action's unconstitutional, period," and I think four of the justices could easily have gone that way had Scalia not passed and so on. So that was really at stake in this case. That happily did not happen. I think that would have been a disaster. As for Kennedy's votes once Justice Scalia was gone, I think he didn't want to be in that position. He could have let it be a 4-4 split and it would have been left to the future, but the future was likely to be a court with Judge Garland on it or some other democratic nominee.

And this gave Kennedy the opportunity to be the defining thinker about the question at this moment, and so my guess is that sort of moved him. I also think Kennedy's always hedged on affirmative action, he's never been completely comfortable with the idea that it's not unconstitutional -- that it's per se unconstitutional. If I can also by the way make a couple of comments about a few of the other statements that have been made, with respect to Nina's point about what happens with the Garland nomination, I actually would be not surprised, but disappointed if Obama and Clinton allow the Garland nomination to remain in effect past the election.

I mean, my view is what the Republicans are doing is completely unconscionable, that Obama nominated Garland as a sop to the Republicans. Very moderate, very old for a nominee, something he never would have done under other circumstances, although I think very highly of Merrick Garland, he would not have been Obama's nominee otherwise. And it was kind of, here, let's compromise on this and we'll go ahead and move forward. And they reject that compromise and now the game they're playing is heads I win, tails you lose. Basically if Trump gets elected, then he gets to appoint the nominee, if Clinton gets appointed then, okay, we'll take Garland who's the absolutely best possible scenario we could ever have had.

I don't think the Democrats should allow the Republicans to play that game and I think what they should do is basically say if you don't confirm Garland by September 15th or October 1st, then he's withdrawn and that Hillary then appoints 34-year-old William O. Douglas.

(Laughter)

MS. TOTENBERG: Well, they're not going to do that.

(Applause)

MS. GERTNER: Right. We were going to propose Amy Klobuchar actually, but that's another discussion --

MR. STONE: Amy's vice president.

(Laughter)

MR. ROSEN: Neal, I want you to jump in on this, on Garland, on Kennedy, but also tell us about the unique challenges faced by Chief Justice Roberts. As you know well, the chief's main power is the power to assign the majority opinion when he's in the majority or assign it to the judge who best reflects his views. When he's in the minority then the senior associate justice in the majority, right now Justice Ginsburg, writes the opinion or assigns it to the one she reflects her views. If Hillary Clinton were to win, Chief Justice Roberts faces the choice of being the only chief as far as I can tell really for the first time in history who wouldn't reliably be assigning majority opinions unless he decides to compromise and go over to the left. What do you think he'll do and what should he do?

MR. KATYAL: Okay, so taking these in order, first of all with Judge Garland, I think I severely doubt that Judge Garland wouldn't be the nominee if Hillary Clinton wins, and that's just because, you know, he is on paper and the President has said it, the most qualified nominee ever in the history of the United States Supreme Court. So it's a little hard I think to walk back from that. And it's particularly hard because if Secretary

Clinton wins, we all know that she's going to -- you know, this isn't her only Supreme Court fight. So she's going to have the fights that are going to occur on January 20th about the cabinet, but then she's going to have over the next 4 years at least, you know, I think we can suspect two more additional nominations.

And to start out by dumping the person who everyone says is so amazing, just strikes me as probably not the place where the new President would start. With respect to Justice Kennedy and affirmative action, the most important thing, and this picks up on your question about the chief, Justice Kennedy was in the majority in 98 percent of the opinions this term, and he's done that almost every term for the last several. Last year, for the first year Justice Breyer beat him out being in the majority 95 percent of the time, but it is very much Justice Kennedy's court. And affirmative action, you can't understand affirmative action without understanding that he played the key role. There were only seven justices hearing the case, not eight, so there would have never been a tied vote because Elena Kagan was recused.

He did something remarkable, something that many people have been fighting for for 20 years, which is to say affirmative action should be upheld if it's done in the right way. For the first time he wrote an opinion that did that and now the question is why did he do it? And I think a good part of it has to do with Justice Breyer's kind of long-term campaign. You know, when I was clerk for him, you know, his colleagues would say the meanest things about him in print and he would just always look the other way, and we as clerks would always be like, "No, you should be more like Justice Scalia," you know, "Give it back to them." Always turned the other cheek, quiet, persuasive, playing the long game. I think he --

MS. TOTENBERG: He learned -- you know, he learned that skill as counsel for the Judiciary Committee under Kennedy and he said when I interviewed him when Kennedy died, that that was the greatest thing he learned was that there are plenty of people -- give all the credit you can, give it to lots of people because there's plenty of credit to go around if you win, and none if you lose.

MR. KATYAL: So I've talked too much, so maybe I'll -- someone else can do the chief justice question.

MR. ROSEN: I teed off the chief, so your thoughts and then I'll ask the others.

MR. KATYAL: So I do think that the chief -- the Chief is an unusual person. I think during his confirmation hearings a lot of people on the left said, this guy has never ever voted for a liberal cause ever. We now know that that was really a pretty bad prediction given that he's twice voted to save the Affordable Care Act and so on. So I do suspect that what would happen if Secretary Clinton won and we could get any nominee through is that we would see the Chief Justice moving a bit more to the center of the court.

MR. ROSEN: So --

MS. TOTENBERG: In fact, when you talk about Scalia, I mean, any replacement of Scalia would make an, I mean, impact on the court. Both -- not just because he was a vote, but because he was someone who was a constellation of ideas and so that made an enormous difference. I was also interested in those people who've reported that Kennedy moved to the left in part in response to Scalia's rather strident criticisms of things that he had done notably in the gay marriage case and that Kennedy was finally coming into his own which is, yes, this is who I am. I don't know others think that's true?

MR. ROSEN: That's an interesting suggestion. He might have been reacting to the dynamics. Larry, Senator Klobuchar gets huge points for predicting the chief's vote in the Affordable Care Act case. She predicted that he would care about the institutional legitimacy of the court above his own ideological agenda. I had the honor of a long interview with him right when he was nominated and he promised to do exactly that. He said he thought it was important in a polarized time for citizens not to perceive the court as five Republicans against four Democrats, and he pledged to put institutional legitimacy at the center of his decisions

and said, I hope when people go back and look at my decisions they'll see that I cared about institutional legitimacy more than ideological purity. Obviously, he had mixed success in his first nearly decade on the court. What is your take on how effective he was in fulfilling his vision and how effective might he be on a liberal court?

MR. LESSIG: No, I think that's exactly right, and I was going to reframe a little bit what Neal had said because I don't think we see Chief Justice Roberts voting liberal. We see Chief Justice Roberts voting for the institution of the Supreme Court and both he and Breyer I think have been the -- have been the two institutional players and that is a critical role for the Supreme Court. You know, I think people like Scalia didn't feel like that was his job, his job was to say what he thought was true. And I'm not saying that institutional players don't think -- don't say what they think is true -- I think what they think is that it's just as important to build and preserve the authority and respectability of the institution than to get any particular case right. And I have enormous respect for that. I think I am with the chief in believing that is his most important role.

MS. TOTENBERG: Don't you think it's important really that both are there?

MR. LESSIG: That both he and -- yes.

MS. TOTENBERG: That both -- that you have that diversity of --

MR. LESSIG: Yeah.

MS. TOTENBERG: -- view about the role. I mean, it makes for so much more of a better court I think, a stronger court.

MR. LESSIG: It's -- that's right, that's right. Although -- you're right, it has to be both. It would be a terrifying court if it were filled with Scalias, it would be an uninteresting court if it were filled with just Breyers and Chief Justice Roberts, but this dynamic

is critical. Now what happens when it's a liberal court, it's going to be a hard thing for him because I do think he genuinely believes the conservative views which he advances and when it's really put to the test systematically of, you know, is he going to push to the institution or to his views, I'm not sure how he plays that out.

MR. STONE: I think this is giving, frankly, much too much credit to Chief Justice Roberts. I mean, with the exception of the Affordable Care Act cases, on virtually every single major ideological question he has voted hardline rightwing, whether it's affirmative action, whether it's abortion, whether it's gay rights, whether it's voting rights, whether it's campaign finance, whether it's gun control --

MR. LESSIG: But that's a different point. It's not whether he's voting conservative or not, it's whether his vote draws the integrity of the institution into doubt. And so the Affordable Care Act was the critical case because if these -- if a bunch of conservatives overturned what was perceived to be a signal legislation of this liberal President or this Democratic President, that would have been read as just a political act by the court. But when you can be conservative and it's not necessarily read as a political act, however skeptical, you know, we academics might be about it, I think that's where he gets to be conservative and this is the line that I think he's demonstrating.

MR. STONE: I don't see any difference between the Affordable Care Act and any of the other issues I mentioned.

MR. LESSIG: Well, one big difference is of course many of those were dissents and didn't have, you know, that effect on the country.

MR. STONE: Yeah.

MR. LESSIG: So if the chief justice is in dissent, in for example gay marriage and saying, I'd let that stuff happen, he doesn't have any vote, he lost. So,

you know, the question is --

MR. STONE: How about campaign finance and gun control?

MR. LESSIG: Yes, you've got --

MR. STONE: Affirmative action.

MR. LESSIG: You've got two issues -- no, affirmative action he lost as well. So you've got two issues in which, you know, his vote has been cast in a way that actually matters to people and those are hugely significant, but I don't think that 10 years ago during his confirmation hearing the left would have predicted where we are now with the chief justice by any stretch.

MR. ROSEN: Judge Gertner, as a judge do you think it is appropriate for a chief justice to take account institutional legitimacy rather than his view of the correct constitutional answer?

MS. GERTNER: I think -- I'm actually torn in this conversation. I'm more with Geff I think than I am with Larry and Neal in the sense that there have been an occasional major case like the signature achievement of the Obama administration in which Roberts has played to the -- a different audience than otherwise, but that there is nothing about his record other than that which suggests that this is regularly what he has been thinking of. I do think that institutional -- you know, it's very interesting watching the political -- presidential campaign today I was thinking that of all the institutions of government, in one sense, the Supreme Court actually now looks the best. I mean, and that institutional legitimacy may well be the most important thing to be taken into account now that the, you know, the sort of dispassionate rendering of decisions -- keeping this institution away from this lunacy seems to be an awfully good thing. So I may -- his -- if he's concerned about institutional legitimacy now, that's not a bad thing.

Also, I have to take issue, the notion that this court is going to liberal is -- it's always been a

misnomer that the court was -- had a liberal minority. The court had a moderate minority and it is not --

MR. STONE: Not (inaudible).

MS. GERTNER: -- clear to me that we can -- that we're really talking about even a Hillary Clinton candidacy proposing liberals. I just don't think that that would happen.

MS. TOTENBERG: You know, I -- first of all I don't think courts move that quickly. They just don't overnight go from one thing to the next, and the second thing is to a much a lesser extent than Scalia there are little bit two Chief Justice Roberts. There's the young Roberts who worked in the Reagan administration and if you read and you know, we got a lot of his papers, he really hated the Voting Rights Law. He thought it was an outrage. He really hates affirmative action, he really hated racial preferences of any kind. Those were his big --

MS. GERTNER: The core issues --

MS. TOTENBERG: -- core issues back then, that - - where he would object to the compromises that the Reagan administration was making like signing the Voting Rights bill, but I think that his model, and he said this privately and I think publicly that his model is Chief Justice Hughes. Now Hughes was in fact former liberal than -- I suppose for his time than Roberts is for his, but Hughes was a person who was an intuitionist and that is the person I think he seeks to modify himself after now where as when you read those early memos they're we're President, we could do anything we want, we shouldn't be dealing with this stuff.

MR. ROSEN: That is an excellent point. Hughes is his modern hero, and his greatest hero of all is Chief Justice Marshall, the great chief. When we talked, he pointed to this portrait of Marshall over his fireplace and said obviously no one can be as great as Marshall, but Marshall was effective because he cared about the team dynamic, he persuaded his colleagues to live together in

the same boardinghouse where they were drink a hogs head of madira and all the justices would get buzzed and all the cases were unanimous.

(Laughter)

MR. ROSEN: So that was his model and he really loves this model and it's much harder today I think than he expected, but that's where his heart is. Ladies and gentlemen, here is the run of show. We're going to have just a few questions I'd say one, two, maybe three and then we're going to transition to this crucial question what will the Constitution look like under President Clinton or President Trump. What would a liberal Constitution look like, what would a conservative Constitution look like and what is the future of the US Constitution? So just a few questions on the Roberts court. I gave you no warning, so if I can be a law professor and call on people or else we can -- which is always dangerous. Sitting in the front row is a good place to be.

MS. TOTENBERG: You have a hand.

MR. ROSEN: Excellent, we have a hand in the front row and there's one mic.

MS. MEYER: Thank you my name is Helen Meyer. I'm from Minnesota.

MR. ROSEN: Excellent.

MS. MEYER: Shout-out.

MR. ROSEN: Hurray.

MS. MEYER: So is our Supreme Court too elitist?

MR. ROSEN: Great question.

MS. MEYER: Is it too elitist? You know, we rejected the monarchy and it seems that more and more the Supreme Court is occupied by the intellectual elites of

our country and there are -- is it too elitist?

MS. GERTNER: Can I answer this?

MR. ROSEN: Just note Chief Justice Roberts' excellent line on this. He said people say it's elitist because -- but that's really not true at all. Some of the justices went to Yale.

(Laughter)

MS. TOTENBERG: Right. If you -- you know, I think it's important that the court have a lot -- people from a lot of different backgrounds and it does have some of that. Justice Kennedy is probably the poorest person on the court now because he hasn't written a book. His only asset is his house, but you know, the background of Justice Thomas and Justice Sotomayor are very different from any sort of an elitist background. They went to Yale, but they ended up going to Yale because they were smart and very hard working, and if you were going to have surgery, you would not want to go to somebody who'd gone to night medical school and just barely passed his medical boards, and if you want somebody to interpret the Constitution you want smart people who have gone to good schools and do represent different points of view and we don't have enough diversity in those points of view, but not because of where they went to college or law school.

MS. GERTNER: I -- let me just sort of offer an alternative model here. Senator Elizabeth Warren is my Senator, put together a committee of people to propose new nominees for the federal bench, the bench I was a part of, and her mantra to us was not just gender and race diversity and not just good qualifications, but also diversity of experience, that too often the federal bench was filled with former prosecutors, big firm lawyers, and then as you get higher up it's former prosecutors, big firm lawyers, who are also judges and I think that there is something to be said about a court that looks that has politicians, here I go again that has --

MS. TOTENBERG: Sandra Day O'Connor?

MS. GERTNER: Right, that has people from different experiences and different kinds of backgrounds. For sure the law sort of shapes is the filter through which those experiences are a go, there's no question about that and that makes people of different positions sometimes come together, but it makes a -- if you read Thurgood Marshall's dissent sometimes, you get a sense of someone who's bringing to bear, you know, when you talk about race let me tell you about race and Sotomayor is getting to that point as well, I think the different experiences matter and I also think even though I am Yale, that there were many fabulous law schools in between you know Joseph's night school and Yale that can -- best that can occupy the court, so I think diversity of experience is really important.

MR. ROSEN: Wonderful. One more question and then we're going to move to the future of the Constitution. Yes, toward the back there. Run. You've got to get exercise if you want to care out the Constitution. It's not for the fainthearted. Excellent job.

SPEAKER: Thank you.

MR. ROSEN: Are you okay?

SPEAKER: Hi.

MR. ROSEN: Hi.

SPEAKER: So speaking of Yale, are there are any free speech cases that are in the pipeline or that might come up to the Supreme Court that might be decided differently depending on who ends up on the court or that you'd like to speak about in anyway.

MR. ROSEN: Excellent question. Geff Stone is the expert. He's been talking about this. What is the answer?

MR. STONE: Well, I think the most fundamental questions have to do with campaign finance reform and whether a different court would adhere to the Citizens

United and the subsequent decisions. And I'm reasonably confident that they would not. That doesn't mean they'd directly overrule Citizens United, at least not quickly, but I suspect that they would begin interpreting those opinions narrowly. So that's one area where I think one would see a significant change.

Other than that, you know, the Roberts court has been fairly broadly protective of free speech in a way that's quite surprising, but one area in which I think again a more liberal court might begin withdrawing is the extreme protection of commercial speech that the Roberts court has recognized over the dissents almost invariably of the more liberal justices thinking that the court's gone too far in protecting corporate and commercial expression. So I could see that as an area where if those cases arose, the court might withdraw again, although I don't think that they'd overrule major decisions, but they'd begin interpreting them more narrowly.

MR. KATYAL: And just to answer your question is there anything in the pipeline coming up on free speech and the answer is no, and the answer is no for the reason just to pick up something that Senator Klobuchar said, which is the eight justice court has meant that they're not taking anything really of any, you know, of any serious national importance or very few cases, so all of these really important issues that the court has been asked to hear over the last several months, they said we're not hearing it, we're not hearing it, we're not hearing it, they get about 10,000 requests a year usually hear 67 cases or so. This year it's already far below that and certainly nothing in the free speech area.

MR. ROSEN: Great. Well, this is a good transition to our final round which raises really I think one of the most compelling issues before the country in this election which is what is our Constitution going to look like for decades to come and for many elections both sides have been warning that this is a pivotal one, but this time everyone agrees the future of the Constitution will be determined by the election. So in a completely nonpartisan way, as the head of the Nonpartisan Constitution Center, I can tell you cast your vote for

president based on the candidate whose views of the Constitution best coincide with your own because that is what the election is going to determine.

I want our dream team of panelists to imagine what the Constitution might look like if Senator Clinton wins. We have not had a liberal court at least since the 1960s and early '70s and everything that most of us here learned in law school could be transformed by the addition of a single justice in -- the Constitution Center has a great collaboration with The Atlantic where we're publishing pieces about what the future of the Constitution will look like. Erwin Chemerinsky wrote a piece saying that a liberal justice would likely uphold gun sales, strike down laws that burden abortion rights, uphold race as a factor in university admission, open access to the court, expand congressional power, narrow the interpretation of the establishment clause to strike down religious prayers, those are just some of his examples, but Larry, you are, you know, a constitutional visionary; if you just think as broadly and boldly as possible imagine it's the year 2020 and we have a liberal court that's been up and running for 20 years, how might the -- for, you know, for 5 years or so, how might the Constitution look different around a range of areas?

MR. LESSIG: Well, I've been stuck on one issue for a decade and I can't get beyond it, so let me start with that, which is the issue of the corruption of our government, I think by that I mean Congress. So campaign finance will be I think the most important possible change. I actually think the change will not be the fundamental one, reversing Buckley or reversing Citizens United. There's a smaller change which I think could be just as important and that is for the court to finally address the question whether super PACs are constitutionally mandated. This is a subtlety that is, you know, kind of law geek subtlety, but it's an important difference because the decision that created the super PACs was a D.C. Circuit opinion, the Supreme Court never reviewed it, and it's completely open and I think might be the right decision for the court to make to say in fact there's no constitutional lead for super PACs, Congress can limit super PACs, but what it can't do is limit the

ability of people to spend money on their own because the super PAC coordination issue is exactly the dynamic which the senator was describing, and I think that is the corrupting dynamic.

But I think the other important point to flag delay on the ground here is we obsess about the Supreme Court way too much when we talk about the problem of the corrupting influence of money in our government. The solution to that problem won't happen if we overturn Citizens United. You know, it's not like on January 20th, 2010, we had a healthy democracy, right, the Supreme Court may have shot the body, but the body was already cold, right, the democracy had already been corrupted by exactly the dynamic that the senator says she wants to go back to the good days of where all she did was have to spend her time calling people getting \$5,000 contributions or \$1,000 contributions, as if that were the good days. Those are terrible days, that is a terrible system and what's so striking about this election cycle is that for the first time, maybe forever, the two leading democratic candidates have expressly endorsed the idea of small dollar public funding of elections. The two leading candidates have -- Hilary Clinton and Bernie Sanders were in an Iowa session where she said she would introduce that in the first 100 days and Bernie said maybe in the long term, so she is on the record being even stronger about public funding of congressional elections.

The House of Representatives has gone far in endorsing the very same idea, only the senate democrats have in their latest, you know, description of what reform is refused to endorse that which I think is a terrible thing. What we need is to recognize the court may have made the problem worse, but the view of what a great constitution in 2020 would like is a constitution supported by an institution of congress we could actually believe was not corrupted in the way that we now believe it is deeply corrupted by money.

(Applause)

MR. ROSEN: A powerful vision. Geff Stone, you have been an advocate for a liberal constitution for

decades. It's the year 2020, imagine the addition of one or two or three liberal justices. What are some big areas of the Constitution that would look different than they do now?

MR. STONE: Guess I'd make three points. First thing it's important to recognize that it's now been 45 years-plus that we've had a Supreme Court that's been dominated by Republican-appointed nominees. That is the last time we've had a majority of justices who were appointed by Democrat presidents was basically when Richard Nixon was elected. That's number one. Number two, as Nancy said earlier, we don't even know what a liberal justice is any more, what we call liberal justices today are not liberal justices. They're not like William Douglas or William Branden or Thurgood Marshall or Arthur Goldberg, or Abe Fortas, none of them is a liberal justice, these are very moderate liberals, everyone of them.

So even if we added a fifth, say Merrick Garland, they'd still be a very moderate liberal court. So it's hard to imagine what a liberal court would be because we haven't even thought about that for half a century. And the third thing I'd say is that because of the fact that the court has been dominated for so long by conservatives, almost all we could imagine a more liberal court doing is overturning the decisions of those justices, so what we could imagine is overturning some of the campaign finance decisions, overturning the gun control decisions, overturning the decisions holding the affirmative action unconstitutional, overturning the Voting Rights Act decisions and what's interesting about this is we used to think of conservatives as people who believed in judicial restraint.

But almost every decision that's today regarded as conservative that needs to be overturned was a activist decision of these justices holding all sorts of things unconstitutional because they were inconsistent with conservative agenda. So basically what I would say is what's easy to imagine is that a court that would begin to chip away and over time overrule some of these very conservative decisions. What's almost impossible to

imagine is what a liberal court would do in the kind of Warren Court fame, that is what would they reach out to hold unconstitutional. The only real example we have of this court doing that is probably in the area of gay rights. And those were of course 5-4 decisions, but those were activist judicial liberal decisions, and we could imagine a lot of that in the future with a really liberal court, but I don't know anybody is -- be able to figure out what that would be.

MR. ROSEN: Well, that -- we've got just a few more minutes to try to imagine it. So Nina, you said that Hillary Clinton might appoint a liberal William O. Douglas, any nominees about who that would be and what would be consequences be.

MS. TOTENBERG: Well, if you compare the courts of let's say 50 years ago, returning to the question of experience, we had for example Earl Warren had been the attorney general and the most popular governor in the history of California to the point that nobody ran against him at one point. We had William O. Douglas who'd been the architect of the nation's security laws. We had people you never heard of who were senators. We had people you never heard of who are very distinguished judges. We had Thurgood Marshall who was the architect of the battle for civil rights. I mean, you look at that court and the courts before it, it had nobodies who were very smart people or not and we had people who were incredible some bodies, but we have this sort of -- I think it's a strange fiction now that the only way you can be a good Supreme Court justice is to have been a judge and we are getting a sort of a European model of judging that you come up through the ranks that way.

And I hope personally that Hilary Clinton appoints somebody who is not a judge, but I don't expect that she will appoint William O. Douglas or somebody like that because we live in an incredibly divided world, political world, and no matter what, she has to get that person through the senate.

MR. ROSEN: Nancy, if the senate went Democratic, why couldn't Hilary Clinton appoint Elizabeth

Warren and the Democrats blow up the filibuster rule and confirm it?

MS. GERTNER: She could or Obama was the other one that one would imagine --

MR. ROSEN: Or President Obama.

MS. GERTNER: -- or president Obama. That would be interesting, but I want to get back to -- very interesting. I also would put my name in, I want you to know, but that's an another issue.

(Laughter)

MR. ROSEN: So noted.

MS. GERTNER: Right. Way too old.

MR. ROSEN: Yeah. Hilary Clinton is watching the live feed of the Aspen Ideas Festival, so I'm sure --

SPEAKER: Sure, judge.

MS. GERTNER: But I do think that the -- I mean there's an interesting question along the lines of what Geff was talking about, which is given the complex of the court over these years, advocacy has changed. So liberal groups will not be -- except for the gay marriage stuff, liberal groups for the most part were avoiding the Supreme Court. So the issues of what the left would be bringing to the court, we don't -- we really haven't seen that because advocacy has changed and so when a more liberal court that was more responsive to discrimination issues, to woman rights issues, to abortion issues, you may see the court being asked more. It's been the left advocacy community has been in a defensive posture for the most part. In addition a more liberal court has a an effect that nobody ever talks about which is the effect on the lower federal courts. As you said, I was a district court judge and I was living in a 5-4 universe, so many decisions about which I cared where 5-4 decisions of the Supreme Court and what I and others began to see was that even moderate to liberal judges would be anticipating the

rightward movement of the court and the lower court decisions were likewise much more conservative than they otherwise would have been.

I'm not going to rule X way because that is likely to be thrown out, I didn't follow that mantra ever, but that's another issue. And so to some degree a more liberal court would also privilege more liberal decisions in the lower federal courts, the district courts, and the court of appeals. I would love to see a court, and this would actually be something that Elizabeth Warren might be interested in, something we never talk about because it's really not remotely sexy is the access to justice decisions of the court. All of the procedural rules that the court liberals and conservatives on the court have affirmed that have essentially enabled the dismissal of civil rights cases that are higher rate than we have ever seen before, a huge number of important decision being deferred to private arbitration and private decision-making which is not precedential.

Access to justice issues, perhaps a different court that had been civil rights litigators would care about, that would make a difference. But I agree with Geff that there is an incredible inertia to a court, we call that precedent and so that the next generation of the court will be slowly and we'd want it that way actually, we don't want the kind of swings that you would otherwise see, that inertia will mean a sort of incremental change no matter who is on the next Supreme Court.

MR. ROSEN: Neil, last word on the liberal court, President Obama has appointed lots of very able progressives like Nina Pillard on the D.C. Circuit, imagine two or three of those appointments, what are the big areas of constitutional law that look different in 2020?

MR. KATYAL: So I think the first thing to say about is, it's not actually constitutional law that looks that different as much as the lion's share of what the Supreme Court does which is statutory law, so 90 percent, you know, a huge number of important things are statutory, not constitutional. A lot of stuff that the senator was

talking about, the immigration cases, not constitutional; environmental protection, you know, labor, employment, protection of women, privacy, you know, patents and technology, all of this stuff is lion's share of what the courts does and it's not actually susceptible, you know, to constitutional interpretation. So, you know, what happens there I think is an interesting thing. Now there are some things that liberals want that I think regardless of what happens with the Supreme Court they're going to get.

So here's a good example, the death penalty; I think that on the current composition of the court that, you know, you bring me a case and we can win that the death penalty is unconstitutional with the current eight member, just eight members of the court, Justice Kennedy siding with those who were appointed by Democratic presidents as cruel and unusual punishment and violation of the Constitution. I think that is totally feasible right now regardless. Now what else might we see happening? Well, I think privacy is a really interesting one and that's one on which the court is really struggling with, you know, how do we think about new technologies and so on and so forth? The courts issued some unanimous decision in this area, but I think over the next 15 to 20 years we are going to see a robust massive debate breakout in the Supreme Court about when we turn information over to third parties, for example, do we lose any expectation of privacy in it.

MR. ROSEN: Fascinating, we have a great intervention from Senator Klobuchar, so let's -- come on down, absolutely.

SEN. KLOBUCHAR: I just wanted two things. Number one, I really don't love raising \$5,000 a person, and there is a great campaign finance law that I support of Senator Durbin's and others that we have in Minnesota that really evens the playing field, so you don't even have to do that with public financing. I'm just being pragmatic with what's happening. And then there's one other thing I wanted to way early on, if you rewind, when Professor Stone was talking about what the senate would do if Hillary Clinton won and I think I was more where Nina

was on this, is that if Hillary Clinton won -- wins or even before she wins in the fall, if the Republicans allow hearings and a vote before the next president comes in on Merrick Garland, that will happen, like no one is going to say, oh no, Hillary Clinton won now, so we don't want to have our hearings anymore after we had a hashtag, do your job all year politically and I just want to be clear that that vote will happen and those hearings will happen. I don't know who she would nominate, but during the lame duck if they agree to do the hearings, we will have the hearings.

MR. ROSEN: Great, thank you very much for that. We -- why don't we have some questions because there are a lots that can be about the future of the --

MS. TOTENBERG: You didn't ask about Trump.

MR. ROSEN: Well, okay, you know what, that was a total violation of the nonpartisan mandate of the National Constitution Center. Thank you Nina.

MR. STONE: You are fired.

MS. TOTENBERG: I'm not -- (inaudible) do that.

MR. ROSEN: Thank you for doing that. The reason I didn't is because we've had a conservative court, but you're absolutely right, Larry, if President Trump wins, we could have not only a replacement for Justice Scalia that would keep the current balance of the court, but a court that swings much further to the right, what would a Trump court look like, it's the year 2020, what areas of the law would be different, Larry Lessig. Thank you Nina, I appreciate that.

MR. LESSIG: I've had -- there's a perfectly good nonpartisan reason not to take up this question because there's no sensible plausible way to understand what the answer could be, right? I mean, he -- I mean, this is just not where he's been, not where he has spoken seriously. He floated a bunch of names which was more to make senators happy than it was to be serious about anything. I don't understand what his serious philosophy

would be.

MS. TOTENBERG: He doesn't have one.

MR. ROSEN: Well, let's imagine for the sake of nonpartisan argument that he appoints some of the judges on that list who are familiar to the conservative people and were well -- were embraced by the Republican establishment.

MS. TOTENBERG: What --

MR. ROSEN: Imagine that we had those judges, what would the Constitution look like in 2020?

MR. LESSIG: Well, even there there's a conflict between Trump and those judges, right? I mean, Trump has a view of the executive power that, you know, maybe Scalia would have been interested in that view of the executive power, but it's not really a conservative view of the executive power. You know, so I think that there's a -- those judges, many of those judges, not -- you know, I disagree with many of them, but I think there are serious jurists and the serious jurists have a lot of places where they're going to run against what Trump would be.

MS. TOTENBERG: Also a funny thing happened on the way to modern history. When I was a younger reporter and I'm still very young, but when I was a younger reporter, most of the conservatives were for executive power, very strong executive power, Cheneysque executive power. And then they started losing the presidency, 8 years of Clinton, okay, then 8 years of Bush, but there were a lot -- some things here that troubled even that court, and then 8 years of Obama. And you add those up, I do not -- you have somebody who's not particularly appealing as far as I can tell to a great many conservatives and on the question of executive power, I think he'd have a pretty hostile court.

On anything else, all bets are off, on the social issues, on agency power, regulation, all of that all bets are off, but courts do tend to move more slowly than people realize when Sandra Day O'Connor retired and

was replaced by somebody who disagreed with her on many, many issues, it made a huge, huge difference in many, many instances. But it didn't prevent same sex marriage from becoming legal, it didn't prevent now the knocking down of the biggest restrictions on abortion. So nothing moves as fast as people expect.

MR. STONE: If you imagine two new justices like Alito, one replacing Scalia, one replacing one of the liberals or Kennedy, then I think within 5 years you would have Roe v Wade overruled, you would have affirmative action declared per se unconstitutional.

MS. TOTENBERG: Might well.

MR. STONE: Right, those are two I think that are absolutely going to be happen. On that scenario.

MR. LESSIG: There is one interesting place though for Trump, again there's two Trumps, right, the early Trump like August September, the anti-super PAC --

(Laughter)

MR. LESSIG: -- the anti-super PAC Trump, the guy who said he thought super PACs were outrageous, that we should, you know, where would he be on Citizens United? And then there's the current Trump of course who has welcomed \$100 million super PACs. So this later Trump doesn't seem to have much trouble with it, but on -- you know, again this is the way of saying, it's not even clear who he is, what the positions would be.

MR. ROSEN: Nancy, one interesting strain we're hearing is one that has also been reported which is that there are libertarian scholars from Richard Epstein to Randy Barnett who say that President Trump would threaten constitutional values and exceed executive power. Do you agree that Trump's own appointees might challenge a President Trump on executive power?

MS. GERTNER: I really agree more with Larry that I don't think we know. I just -- in preparation for this I just sort of looked at one name on his list which

of course was William Pryor who has called Roe V Wade, the worst Obama nation in the history of constitutional law who supported Judge Moore's efforts to display the 10 Commandments, who said that the second worst constitutional decision was Miranda. So who knows, I mean, if he is on the list, then he is on a list, and President Trump gets two of him, who knows what would happen.

MR. ROSEN: Neil, last word on the Trump court?

MR. KATYAL: Well, you know, I'll be deported, so it's your countryman. Enjoy it.

(Laughter)

(Applause)

MR. ROSEN: Thanks. We're really going to miss you at Thanksgiving dinner.

MR. KATYAL: I've got till January 20th man.

MR. ROSEN: That's fine, November is all that matter.

MS. TOTENBERG: Maybe some president, you'll be -- you know, your kids are American citizens, but you can come out of the shadows later.

(Laughter)

MR. ROSEN: All right. Nice dodge. Questions from the audience about anything and if you want to ask about the Constitution, we have it waiting to answer your questions. Yes sir.

SPEAKER: What about gerrymandering? We haven't -- I mean, this was Baker and car and the liberal court at the state level and now we've got this complete mess, (inaudible) Baker from Washington D.C.

MR. ROSEN: Let me repeat this excellent question. The gentleman asked what about gerrymandering

and he points to gerrymandering, remember, is when voting districts are drawn in ways that guarantee the election of Republicans or Democrats because the legislators know exactly who the voters are, the Supreme Court so far has said we're not going to strike down anything as unconstitutional gerrymandered, but come back to us, maybe we'll change our mind in the future, that's what Justice Kennedy has said. Could you imagine Larry, a liberal court actually striking down gerrymandering?

MR. LESSIG: Yeah, I think they're on their way to political gerrymandering being a justiciable issue. I wish Congress would do it more directly. Congress has the power under Article 1 Section 4 to deal with its own districts and it could solve gerrymandering tomorrow if it wanted to. Of course it doesn't want to because it plays into exactly the political infrastructure of the existing system, but that I think is the solution to gerrymandering, but the court I think will get to a place where we could be litigating and in states like Pennsylvania and Michigan and North Carolina that would be incredibly important to be able to challenge those unpolitical gerrymandering grounds.

MR. ROSEN: Fascinating, great. Yes man, sort of towards -- I'm so sorry we have just one mic and I would leap out if I could, but --

MS. AVENT: Thank you very much. Hi, my name is Nia Avent (phonetic) and I'm coming from the National Women's Law Center. Many of you teach and have students. So my question is, do you see any generational differences in the way that your students are approaching the law and interpreting the law compared to your interpretations, general interpretations, how are you seeing millennial lawyers bring new ideologies, new approaches, and new visions to the work?

MR. KATYAL: So I think one thing that I see is a real lack of faith in the court and how it resolves things and how important it is. Just to give you one example, my very first argument was against the Bush administration on Guantanamo and I was scared out of my mind and -- to do the argument and I remember sitting in

the courtroom after enlisting the decision coming down, and it's 180 pages long, Justice Stevens saying we won, that the Guantanamo tribunals were getting struck down and we went out to the media and like everyone is asking what does it mean, there's thousands of reporters on the -- hundreds of reporters on the Plaza steps saying, you know, what does it mean? You know, the decision is so long, we had no time to review it, but here is what I said to them; I said, you know, here is what happened today.

The lowest of the low, this man who was accused of being Osama Bin Laden's driver sues someone, not just anyone, but the nation's most powerful man, the world's most powerful man, the President of United States and not in some lower court, but in the highest court of the land, the Supreme Court of the United States and he wins. That's something remarkable about this country. In other countries Mr. Hamdan, my client would have been shot for bringing his case, more to the point his lawyer would have been shot --

(Laughter)

MR. KATYAL: -- but that's what makes America special and you know, it reminded me what the chief justice said at his confirmation hearings, which was the great thing about the Supreme Court is on the one side you can have that fancy Corporation and all their law firms and law books piled up high, and on the other side of the courtroom you've got the little guy with none of that, but if the little guy has a good argument, sometimes he wins. That we've lost, that view of the court, but it is still there, it still happens and I think it's important on all of us to remember that's the role of the court.

MS. GERTNER: One of the things that I saw was students who knew that I had had a background in employment discrimination work would come in and talk to me and say, you know, I came to law school thinking that I would be a discrimination lawyer, but in the courses that I've been taught, all I've been taught is how many impediments there are to anybody winning, all of the procedural pitfalls, all of the ways in which people lose, and I've lost faith in the area of the law. That's what

we have to undo. The constitutional cases are quite remarkable and they certainly make possible this mythology of the court as the last bastion of rights, but it seems to me and this may be something that a new court would do, we have to open up the court in other ways as well so that people can envision candidly the kind of career that I had, the kind of career that my husband John Reinstein had where you went into court for the purpose of vindicating rights and judges would deal with what you brought to them in a substantive way rather than a thousand ways of dismissing the case.

MR. ROSEN: Ladies and gentlemen, Aspen Deep Dives, like Supreme Court oral arguments must end on time, so wait, first your homework, read a Supreme Court opinion, go to supremecourt.gov, read the majority, read the dissent and make up your mind and/or go to constitutioncenter.org, click on any part of the Constitution, hear what the best liberals and conservatives have to say about what they agree and disagree and then make up your own mind. What was so great about this session is it reminds us that the Constitution is indeed at stake, the election will determine its future, it belongs to all of us, you've heard how important it is, so go vote and please join me in thanking our panelists.

(Applause)

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