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House of Representatives

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Opening Statement, As Prepared For Delivery
Democratic Roundtable on “High Court, Low Standards, and Dark Money:
Flagging a Supreme Ethics Crisis in America”
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The crisis on the Supreme Court today has multiple dimensions—it’s not just the ethical crisis, which the whole country is talking about today, it’s the doctrinal and political crises as well. They’re interlocked and mutually reinforcing. It all adds up to a crisis of constitutional legitimacy.

The seminal moment for understanding our current situation took place in 2000 with the unprecedented 5-4 decision by the Supreme Court in *Bush v. Gore* to intervene in Florida’s electoral process to stop the counting of ballots, thereby handing George W. Bush, who was the national popular vote loser, the presidency on the most fallacious and dubious of grounds. The Court never explained why blocking the counting of hundreds of thousands of ballots vindicated equal protection, a constitutional principle it had completely abandoned when it came to the rights of racial minorities and women, nor did the right-wing justices show much faith in the logic or integrity of their own decision when they said: “Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.”

That inscrutable reasoning, of course, is the precise opposite of the rule of law, which depends on clarity, logic, reason and precedent, but it led to the exquisite logical paradox that, if you follow *Bush v. Gore*, you cannot treat the case as a precedent, but since you cannot treat it as a precedent, then the passage saying it cannot be precedent itself should not be followed. In practice, hundreds of federal and state decisions have cited various aspects of this outrageous decision.

For our purposes of understanding why the Supreme Court’s public reputation is in the gutter, the key point is that George W. Bush’s 5-4 victory in that decision allowed him not only to name John Roberts Chief Justice but to replace the fairly moderate Justice Sandra Day O’Connor with Samuel Alito, a hard-driving anti-union, pro-NRA Federalist Society lawyer and judge. Everything would have been different if Gore had not been denied the presidency by the Court and we had in their place as Justices, speaking hypothetically, Larry Tribe and Sherrilyn Ifill.

That new right-wing 5-4 majority—which included Justice Clarence Thomas, who astonishingly replaced Thurgood Marshall and was the appointee of George Herbert Walker Bush, George W. Bush’s father—proceeded to dramatically erode the voting rights of the people and set the stage for a resurgence of political white supremacy.

There are many relevant cases but consider this central one. In 2013, in *Shelby County v. Holder*, the 5 right-wing Justices cut the heart out of the Voting Rights Act of 1965 by essentially nullifying the central Section 5 federal preclearance procedure by finding that the Section 4 coverage formula was now obsolete and dysfunctional because there was no more racism in the political system. In dissent, Justice Ginsburg likened it to someone deciding to throw away their umbrella in a rainstorm because they weren't getting wet at the time.

This decision, within weeks and months, led to a dramatic rise in voter suppression and disenfranchisement tactics throughout the South and in other areas, with 15 states cancelling on-line voter registration, early voting, mail-in balloting, same-day voter registration and other recent reforms and imposing serious new obstacles to participation, including photo ID laws, regular mass purges in the voting rolls of voters who miss a single election, criminal laws against giving water or food to someone waiting in line to vote, and the closure of 868 polling places, predominantly in African-American communities, all in the three years after the decision leading up to the 2016 presidential election.

Although Hillary Clinton beat Trump by more than 2 and a half million votes nationally, he still eked out an electoral college victory in 2016. So that popular vote loser and electoral college winner then came to name three right-wing Supreme Court Justices of his own, Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett, all three of them under radically questionable circumstances.

Neil Gorsuch got the seat that President Obama had nominated Judge Merrick Garland to, Garland being the Chief Judge of the D.C. Circuit Court of Appeals and indisputably one of the most qualified people ever to be nominated to the Supreme Court. The vacancy was created by the death of Justice Antonin Scalia in February of 2016. President Obama nominated Merrick Garland to fill the vacancy on March 16, 2016 but Senator Mitch McConnell said there would be no hearings or votes because nine months before the new presidency was too close and "the people should decide." Of course, the people had decided when President Obama was nominated to one of those genuine bona fide constitutional four-year terms. But McConnell blocked any hearing and any consideration. The seat remained vacant when President Obama left office. Then when Trump got in, he nominated Gorsuch immediately, another right-wing conservative.

To demonstrate how devil-may-care and arrogant the right-wing has gotten about running roughshod over all principles and norms that might interfere with their determination to control the judiciary, including the ones they made up in the past, consider that when Ruth Bader Ginsburg died on September 18, 2020, less than two months before the general election when early voting had already started in some states, McConnell laughed at the idea that he would be bound by the precedent he created in the Senate with the Merrick Garland nomination and the Scalia vacancy. The Senate proceeded to ram through Amy Coney Barrett's nomination like a thief in the night.

I don't have time to even get into Brett Kavanaugh's nomination but everyone here presumably understands what happened there and a new documentary is coming out on the brutal miscarriage of justice that took place.

Donald Trump is bragging all over America that, "After 50 years of failure, with nobody even coming close, I was able to kill *Roe v. Wade*. Much to the shock of everyone." He and Mitch McConnell packed and stacked the Court.

Now this right-wing corporate Court, carefully designed to destroy *Roe v. Wade* and marry right-wing religion to untrammelled corporate power, has been demolishing women's abortion rights and contraceptive rights, civil rights law, voting rights law, civil liberties, environmental law, workers' rights and consumer rights, enshrining government power over people and corporate power over government.

The Court has been behaving like a rabid partisan actor. A few weeks ago, in *Alexander v. South Carolina NAACP*, another 6-3 ruling, the right-wing majority upheld a congressional redistricting plan that the plaintiffs described as a blatant racial gerrymander designed to thwart and dilute black voting rights. But the right-wing majority held that the African-American challengers had failed to show that the majority-white legislature was motivated by race when it relocated thousands of black voters out of the First Congressional District, dramatically changing the political balance of power in the district. Justice Alito held for the Majority that the legislature was merely seeking to make the seat a lot safer for Republicans, which is a legitimate goal, Justice Alito said, that does not violate Equal Protection, the principle violated in *Bush v. Gore*.

Constitutional doctrine has been reduced to a series of these blatantly unjust and thoroughly ideological decisions upholding political white supremacy, racial inequality, corporate power and right-wing political control. All of the preening lectures about “textualism” and “originalism” are a fraud on the public.

Consider *Citizens United*, where the Supreme Court transformed every corporate treasury in America into a political slush fund for the CEOs. Corporations had no constitutional rights when the Constitution was written and no one even tries to make the argument that the purpose of the First Amendment was to allow private corporations to spend money in public elections, an idea utterly foreign to the Founders. This Supreme Court has even extended the twisted logic of *Citizens United* to give private for-profit corporations like Hobby Lobby religious free exercise rights under the Religious Freedom Restoration Act.

In sum, the six right-wing justices, five of them named to the Court by Bush and Trump, the two presidents in this century who came to power after losing the popular vote, now act entirely like the judicial arm of the Republican Party, which represents a small minority of the American people.

It’s no coincidence that Justice and Mrs. Alito brandish the flag symbols of insurrection, disunion and Christian white nationalism. It’s no coincidence that Justice Thomas takes millions of dollars from his right-wing corporate sugar daddies.

After all, if you can decide presidential elections with 5-4 votes in *Bush v. Gore*, if you can pack, stack and gerrymander not just Congress but the Supreme Court by denying the other party a hearing, why can’t you have some friend of the Court, some *amicus curae*, fly you to Bali or pay for family member’s private tuition or buy you a Recreational Vehicle or send you on a lavish all-expense paid vacation? Why the hell not?

The highest Court in the Land has the lowest ethical standards. And yet they are the only jurists in the federal system who are traditionally given the honorific “Justice” rather than “Judge.” And yet, with their lopsided ideological jurisprudence assaulting the rights of the people and with their obscene ethical transgressions, they have completely forfeited their right to be called Justice.

Unless I forget to do it, from now on, they’re just “Judge Alito” and “Judge Thomas” to me.

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