



**STATEMENT OF KRISTEN CLARKE
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LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
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My name is Kristen Clarke, president and executive director of the Lawyers' Committee for Civil Rights Under Law. Thank you for the opportunity to present testimony in connection with the nomination of Judge Neil M. Gorsuch to be an Associate Justice of the U.S. Supreme Court. The Lawyers' Committee is one of the nation's historic, non-partisan civil rights organizations and has the unique mission of mobilizing lawyers across the country to provide critical pro bono support to advance our work. Founded in 1963 at the behest of former President John F. Kennedy, we work to protect and defend the civil rights of African Americans and other minority communities in the areas of voting rights, economic justice, education, criminal justice, employment, and fair housing across our nation.

The Supreme Court occupies a central place in American democracy. For African Americans and other disenfranchised minority groups, it has been the primary forum for seeking equal justice under the law. For the last several decades, minority groups have looked to the Court to vindicate their constitutional and civil rights.

The Lawyers' Committee has reviewed the civil rights record underlying Judge Neil Gorsuch, as we have consistently done for Supreme Court nominees over the last several decades. I am not able to support his nomination to serve on the Supreme Court based on the current record. We have grave concerns about his commitment to upholding the Constitution and his ability to fairly interpret and apply civil rights laws. I have attached the Lawyers' Committee's March 2017 report to this testimony and ask to have it included as part of my testimony.

Voting Rights

The Lawyers' Committee's concerns are especially pronounced with respect to the question of whether Judge Gorsuch will fairly interpret and apply the Voting Rights Act and other voting rights laws. These concerns are based on Judge Gorsuch's identification as an "originalist" and his criticism of the use of courts to vindicate civil rights violations as well as issues that arose when he oversaw the Civil Rights Division of the Department of Justice as Deputy Associate Attorney General.

The Supreme Court's 2013 decision in *Shelby County, Alabama v. Holder*, which gutted a core provision of the Voting Rights Act, has proven to be one of the most devastating rulings of the last decade. At issue in this case was the Section 5 preclearance provision of the Act and Section 4 of the Act, which determined the jurisdictions across the country that were subject to preclearance. Prior to the decision, these Section 5 covered jurisdictions had to demonstrate to federal officials that any voting changes they proposed did not have a discriminatory purpose or effect. The effect of the opinion was to essentially render Section 5 – which had been perhaps the most effective civil rights provision of the modern era -- inoperable. The Supreme Court held that Congress did not satisfy the normally-deferential rational basis test even though it had conducted dozens of hearings and compiled a voluminous record supporting the reauthorization of Section 5 and Section 4's coverage formula in 2006.

Throughout this hearing, we have heard witnesses draw parallels between Judge Gorsuch and the late Justice Scalia. These parallels are troubling. During oral argument in the *Shelby County* case, Justice Scalia referred to Congress's renewal of the Voting Rights Act as the "perpetuation of racial entitlement." That startling perspective aside, the Court ruled unconstitutional the coverage provision of the Act, a decision which eviscerated the Voting Rights Act. What is perhaps most troubling about the Court's decision in *Shelby County* is that the considered judgment of Congress was set aside. In 2006, Congress voted to renew Section 5 by a vote of 98-0 finding overwhelming evidence of ongoing voting discrimination across the country, demonstrating the continuing need for the strong protections of the Voting Rights Act.

Congress passed the Voting Rights Act pursuant to its powers to enforce the Fourteenth and Fifteenth Amendments, the Reconstruction amendments that provide Americans the rights of equal protection, due process, and the fundamental right to vote, amongst others, against state and local government action. The Reconstruction amendments provide protections against state-sponsored discrimination. It is unclear whether Judge Gorsuch appreciates the broad enforcement powers that Congress holds under the Fourteenth and Fifteenth Amendments and whether he appreciates one of our nation's most important federal civil rights laws – the Voting Rights Act. Judge Gorsuch's identification as an originalist underscores this concern. Self-professed originalists, such as Justices Scalia and Thomas, have typically interpreted the Fourteenth and Fifteenth Amendments narrowly as well as Congress's enforcement powers under those amendments. The *Shelby County* decision is but one of many examples of this. In addition, Judge Gorsuch's 2005 article in the *National Review*, "Liberals N' Lawsuits," criticized liberals for relying on the courts, as opposed to elected officials, to vindicate their rights. That stance is consistent with his apparent view that the application of the Fourteenth and Fifteenth Amendments should be limited.

Overall, Judge Gorsuch has a very limited record as a judge in voting rights cases. He has not authored any opinions in any voting rights cases and the one voting rights case in which he served on the panel was a straightforward case that did not raise the kind of jurisprudential issues which merit Supreme Court review. See *Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012) (a case arising under the National Voter Registration Act ("NVRA") that was litigated by the Lawyers' Committee and others).

Tenure at the U.S. Department of Justice

Judge Gorsuch's tenure as Principal Deputy to the Associate Attorney General and Acting Associate Attorney General at the Department of Justice from 2005 to 2006 also raises concerns regarding his commitment to robust civil rights enforcement. Judge Gorsuch has described a component of his role at the Department of Justice as assisting in the management of the Justice Department's Civil Rights Division. As a career attorney at the Civil Rights Division during this time, I am personally aware of the inappropriate politicization of the Civil Rights Division that was ongoing in 2005 and 2006. A July 2008 report of the Department of Justice's Office of Inspector General, "An Investigation of Allegations of Politicized Hiring and Other Improper Personnel Actions in the Civil Rights Division," found that political appointees in the Division engaged in inappropriate hiring and personnel practices while Judge Gorsuch was overseeing the Division.

The Voting Section of the Civil Rights Division was particularly problematic. The Voting Section was one of the sections that were the subject of the politicized hiring practices. In addition, the substantive decisions of the Section were controversial and highly politicized. Perhaps the most prominent of those decisions was the August 2015 decision to grant Section 5 preclearance to Georgia's voter identification law despite the majority view amongst career staff that it would have a discriminatory effect on minority voters. A federal court later found the law to be unconstitutional, and the Georgia General Assembly amended the law the next year.

A central figure in the Department of Justice's decision to preclear Georgia's law was Hans von Spakovsky, who had direct oversight over the Voting Section. Von Spakovsky is widely known for his assertions that strict voter identification laws and similar provisions are needed to prevent voter fraud and has consistently downplayed the disenfranchising effects of such measures on African Americans, Latinos, and other minority groups. I am deeply troubled by the recent disclosure of a December 16, 2015 email showing that Judge Gorsuch praised von Spakovsky in connection with his appointment to the Federal Election Commission. The Senate would later decline to act on von Spakovsky's nomination, largely based on his actions while at the Justice Department, and he ultimately withdrew his nomination. We must not turn a blind eye to the fact that Judge Gorsuch oversaw the Division during this problematic period. His praise for one of the primary people responsible for the politicization of the Division's work and his frequent communications with those individuals implicated in the Inspector General's report raises questions that must be answered.

Moreover, the actions of the Justice Department in relation to voting rights during that period and Judge Gorsuch's praise for von Spakovsky raise serious questions about how he would assess and weigh arguments regarding voter fraud prevention as a justification for voting laws that impair the right to vote. There are ongoing challenges to such laws passed by North Carolina, Texas, and Wisconsin that have been the subject of recent lower federal court decisions. These cases have the potential to be among the most significant cases the Supreme Court may decide in the next term or two.

Criminal Justice

Finally, I want to speak briefly on Judge Gorsuch's record with respect to criminal justice issues. Criminal justice concerns remain at the forefront for many African American, Latino, and minority communities across our country. Judge Gorsuch generally takes a "law and order" approach to his criminal docket, adopting a narrow view on constitutional rights (particularly the Fourth Amendment). In particular, his views on issues such as police misconduct present cause for concern. In many cases that we reviewed, Judge Gorsuch showed undue deference to police officers who were alleged to have used excessive force. Our review also shows that he rarely votes to reverse criminal convictions. In many of these cases, Judge Gorsuch was writing in dissent to an opinion or to the denial of *en banc* review.

With respect to cases concerning on the constitutionality of searches and seizures, Judge Gorsuch typically affirms district court findings of probable cause. *See, e.g., United States v. Martin*, 613 F.3d 1295 (10th Cir. 2010) (holding that officers had probable cause to arrest defendant); *United States v. Rochin*, 662 F.3d 1272 (10th Cir. 2011) (holding that the officer did not exceed the scope of a permissible protective frisk). He has criticized the exclusionary rule, which is settled law, and has dissented in a number of cases where the panel found a constitutional violation and ordered evidence suppressed.

Judge Gorsuch has deferred to police in a number of excessive force decisions holding that officers enjoyed qualified immunity where the Tenth Circuit panel was divided. For example, in an unpublished wrongful death decision, Judge Gorsuch (over dissent) held that an officer had qualified immunity when they tased a suspect in the head at close range. *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013). Similarly, Judge Gorsuch joined a dissent from a decision to deny *en banc* review where a panel found that an officer was not immune from suit when they returned fire by firing multiple shots. *Pauly v. White*, 817 F.3d 715, 719 (10th Cir. 2016)(Moritz, J, dissenting) (arguing that the court's decision would "second-guess[] officers' split-second judgments" and "create[] new precedent with potentially deadly ramifications for law enforcement officers"). And Judge Gorsuch dissented in part from the *en banc* decision in *Cortez v. McCauley*, 478 F.3d 1108 (10th Cir. 2007), where he concluded that the officers should have qualified immunity for the seizure and excessive force claims but concurred that there was not immunity for the wrongful arrest claim.

Moreover, in two cases where Judge Gorsuch has participated on a panel that agreed that there was no qualified immunity, Judge Gorsuch has written specially – and without support from the other judges – to question whether Section 1983 and federal court litigation is the proper way to advance claims of police misconduct. For example, in a concurrence in *Cordova v. City of Albuquerque*, 916 F.3d 645 (10th Cir. 2016), which concerned allegations that police officers filed charges in bad faith, Gorsuch suggested that malicious prosecution may not entail a constitutional violation that would allow recovery under Section 1983. *Id.* at 661-66 (Gorsuch, J. concurring). Similarly, in *Browder v. City of Albuquerque*, 787 F.3d 1076 (10th Cir. 2015), where the panel affirmed a wrongful death decision concluding an officer did not have qualified immunity where an off-duty officer crashed into the plaintiff at high speed, Judge Gorsuch took the unusual steps of writing a concurrence (to his own majority decision) commenting that "a state court could provide relief using established tort principles . . . [and] there's no need to turn federal courts into common law

courts and imagine a whole new tort jurisprudence under the rubric of Section 1983.” *Id.* at 1083-84 (Gorsuch, J., concurring).

Conclusion

In closing, we must observe that the nomination of Judge Neil Gorsuch arises at a tumultuous moment in our nation’s history. We have seen heightened efforts to impair the civil rights of minority communities, ongoing efforts to restrict the rights of minority voters, unconstitutional policing practices, rising xenophobia, and other issues that make clear the fragile state of our democracy. Our nation deserves a Supreme Court justice who will be truly committed to interpreting the Constitution and federal civil rights laws in a manner that recognizes that discrimination is both ongoing and a threat to democracy and a justice who brings a commitment to ensuring equal justice under law for all Americans. For these reasons, I am not able to support the nomination of Judge Gorsuch to the Supreme Court based on the current record.