THE ASPEN INSTITUTE

ASPEN IDEAS FESTIVAL 2016

AFTERNOON OF CONVERSATION:
ELLIOT GERSON, STEPHEN CARTER,
NINA TOTENBERG AND NANCY GERTNER

Benedict Music Tent
225 Music School Road
Aspen, Colorado

Wednesday, June 29, 2016

LIST OF PARTICIPANTS

STEPHEN CARTER
Professor of Law, Yale University
Cultural Critic
Novelist

NINA TOTENBERG
American Legal Affairs Correspondent
National Public Radio (NPR)

NANCY GERTNER
Former Federal Judge
Professor, Harvard Law School
Advocate for Women's Rights, Civil Rights and Civil Liberties

ELLIOT GERSON
American Secretary, Rhodes Trust
Executive Vice President, The Aspen Institute

* * * * *

AFTERNOON OF CONVERSATION: ELLIOT GERSON
STEPHEN CARTER, NINA TOTENBERG AND NANCY GERTNER

MR. GERSON: Wow, what a great conversation between Yuri and Ross. And I hope I will have a chair. I'm Elliot Gerson of The Aspen Institute and we have asked three terrific panelists to join us for a conversation about this most recent Supreme Court term and its significance.

Stephen Carter, distinguished professor of law, cultural critic and a wonderful novelist to boot; Nina Totenberg, simply one of the country's most celebrated Supreme Court analysts; and Nancy Gertner, a former federal judge, now at Harvard Law School and a passionate advocate, particularly for women's rights and civil rights and civil liberties.

Justice Byron White once said that the loss -- that the addition of a single member to the Supreme Court creates essentially a wholly new court. And perhaps it should also now be said that the simple loss of a member on the court creates a wholly different court, especially when the person lost is someone as profoundly influential as Justice Scalia.

The term that just ended with some decisions that were radically different from those that were widely predicted just nine months before when a nine-member court set the calendar for the year. What many thought would represent a possibly transformative move further to the right due to the loss of Justice Scalia and due to the evolving views of Justice Kennedy instead turned to a term that at least in some care key areas perhaps represent a transformative turn to the left, notably in areas that have really been at the heart of American cultural wars for decades, specifically abortion and affirmative action.

And we also saw the implications of 4-4 deadlocked court in areas as important as immigration and labor law where frankly conservative blockbuster decisions were expected in each case and instead that 4-4 deadlock left lower court decisions in place, one celebrated by unions and one reacting with heartbreak for President Obama.

So let's just start at really the highest level and how would -- what would you say, Nancy, about this post Scalia eight-member court and this term?

MS. GERTNER: I'm going to take a page from Nina's book what she says, she's going to say it's much more boring. But I think that it's noteworthy for what it decided as well as what it ducked. And it ducked the Union case, it ducked the Affordable Care Act, the challenge to some of the contraception provisions to the Affordable Case Act. And then in a sort of odd way in that decision, it literally invited the parties to try to settle, which was very interesting and very unusual. So it's noteworthy for what it ducked and then it is tremendously noteworthy for what it finally decided in numbers in which Scalia wouldn't have made a difference. We'll be talking about that.

MR. GERSON: Nina?

MS. TOTENBERG: Well, I look at a little bit like that as if it's a court of what it was and what it wasn't. It was not the court of the previous year with huge landmark decisions most notably on same-sex marriage or in a previous term on the ACA. It was perhaps -- and I say perhaps -- the beginning of the end of the Regan revolution era on the Supreme Court depending on what happens in a presidential election.

It was a strong affirmation of previous decisions on abortion and affirmative action. It showed really that there is a liberal to moderate core, which consists of Kennedy, Kagan and Breyer who voted together the most of any group on the court, 90 percent of the time, this term. Of course, this was not your typical term and of course Justice Kennedy was again a key player.

He voted in the majority in 97 percent of the cases. That's like a Soviet election.

(Laughter)

MS. TOTENBERG: And it was a paler term. Without Justice Scalia, it was for reporters not the most dramatic and interesting and beautifully written and infuriatingly interesting court that it had been for nearly three decades. And as a reporter and I have to say as a human being, I really miss him.

MR. GERSON: Stephen?

MR. STEPHEN: I don't entirely disagree with what Nancy and Nina have said, but I have a slight dissenting view. I think that court is in a tragic moment right now. When I say tragic, I'm not referring to the tragic death of Justice Scalia, I mean the court itself. Think of the way that we talk about it, we always know there is this person is going to vote this way, this person is going to vote that way. There might be a swing justice in this or that issue, but there's an enormous predictability to these voting blocks. And there are lawyers who will tell you how frustrating it is to get up and argue in front of a court where seven or eight justices have already made up their minds and you wonder what -- whom you are arguing to.

And what you've seen in the court over the last two decades is a loss of any sense among the justices themselves. The consensus is important that if you look at the court for most of its history, there were some very great and important 5-4 decisions in the past, but over it's own history the hammering out of hard compromise in order to get a significant number of votes was a big part of what the justices thought their job was because they thought that the country is more persuadable when you have a significant majority or unanimous court then with a constant string of 5-4 or 5-3 decisions.

So whichever way, whoever wins the election, whoever is the next justice and so on, that tragic moment I think is going to continue. There are people who will cheer the next justice, there are people who will boo the next justice, but this process of really not trying on the court to find ways to actually find consensus I think will continue. I think it's very unfortunate.

MR. GERSON: I hope we'll have time actually to return to that theme, but let's actually drill down in some of the key cases here. Whole women's health, the abortion case out of Texas, one that many thought could have almost gutted Roe against Wade and had a significant effect on the other critical case, the Casey case. This was a 5-3 case. Nancy, just how important is this case?

MS. GERTNER: I thought it was one of the most important decisions in a long time, particularly on women's rights issues. It was almost as if the court was saying that the regulations that had come out of Texas were finally a bridge too far.

For the course of the past 20 years, it was this regulation and this restriction on abortion, this restriction for the most part, you know, upheld by the lower courts and upheld by the courts of appeals and certainly upheld by the Supreme Court. And this was a bridge too far, we all thought that bridge too far would be the criminalization of abortion, that is to say that it would be the only thing that would be left to Roe v. Wade would be you may not make it criminal, but you didn't have to fund it, you didn't have to provide facilities for it, et cetera.

So it was very interesting that the court and in particular Kennedy finally said enough, the Texas regulations which required that abortion facilities which had one of the safest records of any medical facilities, needed to have the kinds of requirements for an ambulatory care clinic, you know, the doorways of a certain size and a certain kind of staffing and that the members of the staff had to have admitting privileges to a hospital within 30 miles from the clinic. The combination of the two shut down half of the abortion clinics in Texas and threatened to leave only six or seven remaining.

And this was now with respect to first to pre-viability abortion. This was sort of the irreducible minimum of the right. If you could essentially eliminate facilities that serviced pre-viability medical abortions, et cetera, then there really was nothing left to the right, except you may not be thrown in jail for it.

So I thought it was extraordinary, it was also differential to the findings of the court, it invited the court to -- it wasn't enough for the Texas legislature to somehow intone women's health. That was the other fear. If you said women's health, you didn't have to say anything more. And the lower court examined this. Justice Ginsberg in a famous concurrence said the notion that this is remotely related to women's health is out of the question. Not this had nothing to do with women's health, this had to do with burdening the right to choose. So I thought it was quite extraordinary.

And Kennedy's change from the really extraordinary decisions he had brought, the negative positions he had taken with respect to abortion in the past was telling. And Scalia wouldn't have made a difference. This is a 5-3 decision.

MR. GERSON: Nina, you've gotten some of the biggest tips from the impenetrable court over the decades and have some special insights, and I wonder if you have any thoughts particularly about the evolution of Justice Kennedy's thoughts vis-à-vis abortion and also any thoughts about how it is that this case was assigned to a man to write, Justice Breyer.

MS. TOTENBERG: Well, Justice Kennedy was the senior justice in the majority, so he had the duty of assigning the opinion. And he didn't assign it to himself, he assigned it to Breyer who wrote a just-the-facts-ma'am decision. And I suspect the reason that he was assigned the case and not Ginsberg is that very concurrence that she wrote that Kennedy and Breyer understanding this didn't want that kind of a women's rights kind of passionate decision that the facts mattered here. This was a sham law -- they never said it was a sham law, but in everything they said in this decision that Breyer wrote, he said I asked it at oral argument, we asked the state of Texas, "Give me one case where having privileges made a difference in Texas or anywhere else in the country" and the state of Texas couldn't come up with one.

And so those were the kinds of facts that I think were determinative, the entire medical profession was on one side and I think that's why Kennedy voted that way and I think that, you know, somebody I know who knows him pretty well said once that he -- this is not his issue. He is a very devout catholic. He is against abortion, genuinely against abortion. It's hard for him to vote in a case like this this way.

But you'd have to be blind to the fact that you are telling poor women especially that they will have no opportunity to terminate a pregnancy. And that, I think, he saw.

MR. GERSON: Nancy, let me just come back to you about this. What do you think the implications of this will be in abortion litigation going forward? Could this be, especially perhaps if Hillary Clinton wins, the beginning of the end or are we going to continue to see Republican state legislatures staying ahead of the game with new legislation about -- with requiring sonograms or talking about fetal pain or parental involvement?

MS. TOTENBERG: On the one hand, I don't think the press to come up with regulations limiting abortion will stop. I think that that's sort of part of the DNA of the Republican Party or at least has been.

I do think though there is some -- it is enormously significant, I keep on getting back to the concept of a bridge too far, it's so significant. Up until now, the litigation has all been about this regulation is okay, this regulation is okay, this -- the significance of finally saying you know there's an end to that, there's a limit and that's certainly, that definition will affect, I think, the litigation of these case because now courts will be able to say well, if that didn't pass muster, then surely this doesn't.

And without that model, the only thing that didn't pass muster was throwing women in jail. So I think that the -- conceptually it makes a big difference, but I don't think it will stop the efforts to pull -- just basically withdraw -- you know, to overturn Roe v. Wade.

MR. GERSON: Stephen, we'll get back to the more ideologically fraud cases in a minute, but instead I want to talk about a unanimous case you talked a little bit about. And historically the court tries to become unanimous. We just had a case involving corruption of the governor of Virginia.

MR. CARTER: Apparently involving alleged corruption.

MR. GERSON: Alleged, I'm sorry, alleged corruption. But --

MS. GERTNER: The alleged governor of Virginia.

MR. GERSON: And that the -- at a time --

MS. TOTENBERG: Former.

MR. GERSON: -- when, you know, the nation and apparently the world fed up with politics as usual and the perception that the system is corrupt, either a small C or a big C, here the Supreme Court unanimously says that some behavior that's clearly unsavory is such that it still led to a reversal of what happened below. What's going on here?

MR. CARTER: Well, I want to separate two issues when we think about the case. The case as most people know involved Bob McDonnell, the former Republican governor of Virginia, who was accused of taking gifts in exchange for official favors. Part of the problem was the federal statutes under which he was prosecuted were statutes that require that there be an official act in exchange. And the government in prosecuting him vested the official act as basically arranging meetings for this constituent who gave these various loans in the hope -- who was hoping if he could have these meetings, he might be able to push his -- he had some kind of nutritional supplement that was trying to push.

Nothing came out of the meetings, that by far was a silly idea. So the government took this case to trial and the problem is I think as the Supreme Court correctly noted that the definition of official act the government used was just too broad. We all hate corruption, but it's not the job of the Supreme Court to make it easy to put people in jail. You've got to read the statute the way that it's written.

And it's striking to me that a number of former White House counsel from both Republic and Democratic administrations, a number of law professors who teach in a criminal justice field.

MS. GERTNER: Me, I was one.

MR. CARTER: Yeah, including Nancy. And also a number of State Attorney's General. In fact, I think 44 State Attorney's General all signed briefs saying this was government overreach and I think it was.

I think we have to separate in all these cases and this one it matters a jam (phonetic) as in all these cases, we have to separate the notion that we don't like corrupt politicians to the notion that whenever the government -- a prosecutor says, "I've got him", that the courts have to go along with that. I think the Supreme Court was right in suggesting that official act ought to involve a decision you make about something, that there's an actual exercise of power or pressuring someone else to exercise power in a particular way.

MR. GERSON: Let's move back to some of the controversial cases. And Fisher against the University of Texas, by the way, what is it about Texas? I mean, I'm not quite sure.

MS. GERTNER: You know, a few years ago, it was Arizona. A few years before that, it was Alabama. It depends a large on the political leadership of the state and whether they want to bring these kinds of -- pass these laws and then very actively challenge something that they see is not fair to them.

MR. GERSON: Well, I'll stay with you than Nina. This case, of course, came back a second time. It involves race conscious university admissions. And this is a case where there's no question, I think, that were Scalia still alive there would have been a different outcome.

MS. GERTNER: It would have been tied.

MR. GERSON: So what are -- tell us about this case and it's implications and is the affirmative action battle at the Supreme Court over now?

MS. GERTNER: You're asking me?

MR. GERSON: You wanted to talk about Texas.

MS. GERTNER: Well, nothing's ever over. But I think depending on who's president next, there are certain groups that have brought these cases. The same -- this is the same organization that brought the challenge to voting rights act, brought this case, brought a challenge that failed earlier this term to the how you view the concept of one person, one vote.

The court will no longer be hospitable to those challenges if Hillary Clinton is elected and it will be very hospitable to those challenges if Donald Trump is elected. So it matters, elections do matter. But in general, I think this was a reaffirming of the idea of affirmative action at least in one area, that's higher education.

And it just seemed to me that this was a much more broadly written decision than I expected and even though the Texas plan is different than most plans, this was an opinion that seemed to buy into the idea that this is necessary, at least for now, in the country we live in and with a history that we have.

MR. GERSON: And the -- I'd like to ask maybe you, Stephen, about the practical implications. What is the -- and by the way this is another case where Justice Kennedy, I think it was the first time he ever voted to support affirmative action.

MS. GERTNER: Yes.

MR. GERSON: So Stephen, what does this mean for universities now, given the majority opinion? How is race able to be considered and what do you think the court is saying?

MR. CARTER: Well, there's -- again, there's these two important points here. One is, as I think your question suggested and as Nina has mentioned, this issue is not going to go away. The issue is going to rise again and again. And that was your point. For just that reason, I think it's important that the court write good opinions.

And I don't want to step on anyone's toes here, but we tend to think about the justices, "Oh, they ruled this way, ra, ra or they ruled that way. I hate them." But I think it's very important they write good opinions. And the problem with a lot of these opinions and the problem with the jurisprudence even now on the affirmative action is it's very confusing -- it's very confusing.

And I would prefer the world that Nina just described, that is where the courts will be willing to say that the reason for these programs is because of a recognition of a need to correct a great historical injustice.

But the courts have long ago dismissed this. So that's not a rational that we can live with. And so litigants and universities have come up with various other rationales. And when I emphasis -- so, for example, they talked about diversity. And what I'm emphasizing: I'm not talking about diversity the way that, say, corporations talk about it. I'm talking about the way the admission officers talk about it.

And, well, you have to go into court and say, "That's the reason." Then you run into this risk that, you know, there always will be another professor turning and saying, "Well, Mr. Cater gave us the black view of that." That's not what corporations mean when they say diversity. But that's what universities have been forced to mean or to pretend they mean when they have to defend these programs.

I think the most straightforward defense and one that universities should always press is the notion of some sort of corrective justice. I do think you will see universities being slightly more open, slightly, about the way that they consider race in admissions -- except in the states where they can't, where it's not allowed. But they will be slightly more open about it.

But even in Texas it is a -- the so-called holistic program that Texas ran is a -- gives a slight advantage, but a relatively small one to black -- and it's only for -- applicants who didn't finish in top 10 percent of their classes have a very slight advantage over white applicants who didn't finish in top 10 percent of their classes. That's really all that it is.

And I think you will see universities defending these little incremental programs. And that's fine. That seems to me that's perfectly reasonable. I still think what you still will not see is -- and I hope you won't see -- is university expressly saying, "We're going to have a quota. We need this many," and so and so on. I think that ship sailed a long time and it's good that it sailed.

But I think all of us -- when we look around the Aspen Institute, we all talk, look at panels of everything, we all recognize that there is something that is -- there is a different dynamic that you get when you have different groups of people. It's not because there's a black way to look at things or female way to look at things. It's just because -- it's in a sense because we recognize -- we construct panels this way and we construct entering classes this way and other things -- that there are a lot of different ways in which there's a need to correct for imbalances that have happened because of actual historical events as opposed to because, you know, we want left handed pipe welders or something like that.

MS. TOTENBERG: I want to -- can I just say one --

MR. GERSON: Please, Nina.

MS. TOTENBERG: -- sort of interesting historical irony about the affirmative action case, which the justices voted to grant once Scalia was still alive and the four conservative members of the court -- and it only takes four votes to grant a case -- I think they granted it because they thought it was their best chance to win, that they were very close to winning and this was their best chance to win. And they didn't care that one member of the court was actually recused -- Elena Kagan was recused -- so it was not going to be a nine person court no matter what. And she of course would know more about the admission systems than anybody else because since she was dean of the Harvard Law School.

So they sort of -- they forced -- I think that they actually forced this case down Kennedy's throat. This is Nina speaking. I don't have any special knowledge. And then Scalia died and it was a seven person court. And Kennedy -- Scalia wasn't there. I don't think they would have been able to force it down his throat anyway. This was its second visit to the court and he finally had it I think.

MR. GERSON: Stephen, I want to just get back just briefly if we can to the points you made at the beginning about consensus as opposed to four-four decisions, five-four decisions. Do we have to have these four-four decisions and what are some -- talk to us a little bit more about the implications of this divided court?

MR. CARTER: You know, it's really interesting, a lot of editorials in recent years, a lot of op-ed columns have complained that because the Republican controlled Senate won't vote on Merrick Garland we have all these four-four decisions. But the court can fix this itself. It's not a big deal.

In the British common law there was a very long tradition that if the court was tied, the junior justice would recuse himself -- well, that time it was always a he -- out a matter of comedy and respect for the other judges and say, "We have to have an opinion. I will step back. And therefore" -- now, you say that -- not my opinion -- so I don't want that because then Elena Kagan will be recused.

But when I think about procedural rules, the issue shouldn't be: well, what's going to get us the best outcome? The question is: what's going to get us around these various procedural roadblocks? And having four-four courts -- which we will have in the future -- is a procedural roadblock. It's a real problem when the Supreme Court of the United States can't muster a majority. And it ought to treat its own internal rules in ways that will try to get majority in every case.

And one simple way to do that, even if not a matter of a rule, a matter of tradition -- which it was in the British common law, there was no requirement; it was just a tradition that developed -- was the junior justice or any justice can say, "I will recede in order that the court not be embarrassed. Or as one judge wrote back in 19th century, in order --

MS. TOTENBERG: Fat chance.

MR. CARTER: Well --

MR. GERSON: No, I agree.

MR. CARTER: But the lack of comedy is part of the problem. That's another reason it's a tragic age.

MS. TOTENBERG: So it's not even comedy. I mean really we did revolt against the British. We don't have to do everything they did.

(Laughter)

MS. TOTENBERG: I just think that's unlikely

MR. GERSON: Well, you know, we're so lucky. We have a very distinguished Federal District judge -- a former Federal District judge with us. Nancy, how did -- speaking as a judge, how do you react to four-four decisions, even five-four decisions?

MS. GERTNER: Well, you know, it's interesting, I'm trying to write now what it was like to be a District Court judge in a divided time and what has happened is that if you have multiple decisions or a plurality with actually no legitimate decision commanding the majority of everyone, the District Court begins to predict the direction that the court is going to go in. And over the past -- I was on the bench for 17 years -- I'd say for 20 years, District Courts predicted a more conservative turn to the Supreme Court and you frequently had -- in fact one scholar described it "over ruling from below," where essentially the courts had very crabbed views of the direction of abortion rights, the directions of affirmative action, predicting that that's what the Supreme Court is going to do.

So the question now is whether the winds of change will change the District Court as well and have a sense of new sort of jurisprudential movement. But I do want to go back one thing because I think that this audience would be interested.

I think the seeds of the McDonald case, by the way, was Citizens United. Justice Kennedy talked about the importance of constituent services even for those who had -- particularly for those who had contributed to a politician. You give your money and in exchange you get access to the candidate, a seat at the table in the governor's mansion. And McDonald is ultimately about that.

And I think that that's the reason why there was suddenly an eight-zip court. It was a very -- because all of a sudden it privileged a view of politics, which the court said was dodgy (phonetic). But it was a view of politics that it's really okay to give money in exchange for access and ingratiation.

MR. GERSON: We just have a few minutes left. And, Stephen, you mentioned Merrick Garland, who has been in the batter's box for months and maybe in the batter's box longer than anyone in history. But I would like to ask each of you as sort of concluding remarks about what next. I mean we've had a relatively stable conservative leaning court really since Justice Alito, so for 10 years.

Obviously, if Trump is elected and the Republicans retain control of the Senate, it's reasonably apparent what might happen. If Hilary Clinton wins, talk to us about what happens in the lame duck session and what happens after that -- sort of take us forward?

MR. CARTER: And it's important to emphasis that when we refer to justices -- it's common ground among us I think as liberal or conservative -- we're talking about a very tiny number of cases, the ones that make the headlines. Lots of other cases -- you look at evidence law or something like that, which I happen to teach. And they are all over the map. I mean the biggest allies in evidence law, you know, was this coalition of Scalia and Ginsburg against this coalition of Alito and Sotomayor. Those were the big evidence law coalitions.

And it's important to bear that in mind, because a lot of the court's work isn't going to change no matter what happens. But on the issue of Merrick Garland, I can't -- whoever wins -- the question is not whoever wins. Assuming Democrats win the presidential election, without regard to who holds the Senate I have to believe that Garland is confirmed in the lame duck session. Because if the Republicans lose the Senate, they will think, one, we might get someone we like even less; but two, we have to build up some comedy -- that word again -- with the Democrats before they take over.

If the Republicans hold the Senate even and lose the election, they remain exactly at the same position. They will have to confirm because otherwise President Clinton is going to appoint someone if they ultimately defeat him who they are going to like a lot less and she will be fresh with election victory, full of political capital. So --

MS. TOTENBERG: Well, my chance is on the quarter shot. I just wanted to make this clear.

(Laughter)

MR. CARTER: Now, wait a minute --

MS. TOTENBERG: So --

MR. CARTER: -- you're my favorite nominee.

MS. TOTENBERG: I agree. I think the odds are that Garland will be confirmed in a lame duck if the Democrats win the presidency. I do -- and I certainly think it would be Garland. I do not think that the president would withdraw the nomination.

On the other hand, if they don't do that -- and you never know -- then I think Hilary Clinton likely would name somebody else, if for no other reason that Garland is 63. There is a chance she might not -- she might not want to have a fight as her first thing that she's going to do, a fight -- even though it's a fight that's easily winnable over somebody like this.

And finally, as a matter of personal privilege, I just want to say one thing. I've been sitting here -- I wasn't going to do this, but I grew up not in this tent but in its -- one of its original predecessor because my father was a great concert violinist. And I realize as I was sitting here that I spent my childhood sitting in those rows with him right there in front of the orchestra playing the Tchaikovsky Violin Concerto and the Beethoven Violin Concerto.

(Applause)

MS. TOTENBERG: And I -- daddy, I'm finally here.

(Laughter)

(Applause)

MR. GERSON: That's really wonderful. Nancy, we have time for a last word. What next?

MS. GERTNER: At this point I think the court has changed fundamentally because no one would replace -- Scalia is totally irreplaceable. I do agree that I think Merrick Garland is going to wind up on the court in a lame duck session. And I think some -- I don't think that people realize how much the jurisprudence of the court has changed and moved dramatically so that the notion of moderates and liberals and conservatives really have a very different meaning today than it had years ago.

I don't think you're going to see even dramatic changes on a Clinton court, if Hilary Clinton wins. I don't think you're going to see dramatic changes on a Trump court either with respect to some of the issues we've been talking about.

MR. GERSON: Let me thank our three panelists. Thank you all.

(Applause)

* * * * *