

**CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED FIFTEENTH CONGRESS
SECOND SESSION

SEPTEMBER 4, 5, 6, 7, and 27, 2018

Serial No. J-115-61

PART 1 OF 2

Printed for the use of the Committee on the Judiciary



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**CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

TUESDAY, SEPTEMBER 4, 2018

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in Room SH-216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Graham, Cornyn, Lee, Cruz, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. I welcome everyone to this confirmation hearing on the nomination of Judge——

Senator HARRIS. Mr. Chairman?

Chairman GRASSLEY [continuing]. Brett Kavanaugh——

Senator HARRIS. Mr. Chairman?

Chairman GRASSLEY [continuing]. To serve as Associate Justice on the Supreme Court of the United States.

Senator HARRIS. Mr. Chairman, I would like to be recognized for a question before we proceed.

Senator HATCH. Regular order, Mr. Chairman.

Senator HARRIS. Mr. Chairman, I'd like to be recognized to ask a question before we proceed. The Committee received just last night, less than 15 hours ago, 42,000——

Senator CORNYN. Mr. Chairman, regular order.

Senator HARRIS [continuing]. Pages of documents that we have not had an opportunity to review, or read, or analyze.

Chairman GRASSLEY. You are out of order. I will proceed.

Senator HARRIS. We cannot possibly move forward, Mr. Chairman, with this hearing——

Chairman GRASSLEY. I extend a very warm welcome——

Senator HARRIS. We have not been given an opportunity——

Chairman GRASSLEY [continuing]. To Judge Kavanaugh——

Senator HARRIS [continuing]. To have a meaningful hearing——

Chairman GRASSLEY [continuing]. To his wife, Ashley——

Senator HARRIS [continuing]. On this nominee.

Chairman GRASSLEY [continuing]. Their two daughters—
 Senator KLOBUCHAR. Mr. Chairman, I agree with my colleague,
 Senator Harris.

Chairman GRASSLEY [continuing]. And their family and
 friends—

Senator KLOBUCHAR. Mr. Chairman, we received 42,000 docu-
 ments—

Chairman GRASSLEY [continuing]. Judge Kavanaugh's many law
 clerks—

Senator KLOBUCHAR [continuing]. That we have not been able to
 review last night.

Chairman GRASSLEY [continuing]. And everyone else joining us
 today.

Senator KLOBUCHAR. And we believe this hearing should be post-
 poned.

Chairman GRASSLEY. I know this is an exciting day for all of you
 here—

Senator BLUMENTHAL. Mr. Chairman.

Chairman GRASSLEY [continuing]. And you are rightly proud of
 Judge—

Senator BLUMENTHAL. Mr. Chairman, if we cannot be recognized,
 I move to adjourn.

Chairman GRASSLEY. The American people—

Senator BLUMENTHAL. Mr. Chairman, I move to adjourn.

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. Will hear directly from Judge
 Kavanaugh later this afternoon.

Senator BLUMENTHAL. Mr. Chairman, I move to adjourn.

[Disturbance in the hearing room.]

Senator BLUMENTHAL. Mr. Chairman, we have been denied—we
 have been denied real access to the documents we need to advise
 and consent—

Senator CORNYN. Mr. Chairman, regular order is called for.

Senator BLUMENTHAL [continuing]. Which turns this hearing into
 a charade and a mockery of our norms.

Chairman GRASSLEY. Well—

Senator BLUMENTHAL. And, Mr. Chairman, I, therefore, move to
 adjourn this hearing.

Chairman GRASSLEY. Okay.

[Disturbance in the hearing room.]

Senator BLUMENTHAL. Mr. Chairman, I ask for a roll call vote on
 my motion to adjourn.

Chairman GRASSLEY. Okay.

Senator BLUMENTHAL. Mr. Chairman, I move to adjourn. I ask
 for a roll call vote.

Chairman GRASSLEY. We are not in executive session. We will
 continue as planned.

Senator BOOKER. Mr. Chairman, may I be recognized, sir? Mr.
 Chairman, I appeal to the Chair to recognize myself or one of my
 colleagues.

Chairman GRASSLEY. You are out of order.

Senator BOOKER. Mr. Chairman, I appeal to be recognized on
 your sense of decency and integrity. Even the documents you have
 requested, Mr. Chairman, even the ones that you said, the limited

documents you have requested, this Committee has not received. And the documents we have, you, sir, have——

Senator CORNYN. Mr. Chairman, I would ask for regular order.

Senator BOOKER [continuing]. Should be transparent. This Committee, sir, is a violation of even the values I have heard you talk about time and time again, the ideals that we should have. What is the rush? What are we trying to hide by not having the documents out front? What is with the rush? What are we hiding by not letting those documents come out?

Sir, this Committee is a violation of the values that we, as the Committee, have striven for, transparency. We are rushing through this process in a way that is unnecessary. And I appeal for the motion to at least be voted on.

Senator CORNYN. Mr. Chairman——

Senator BOOKER. At least let us have a vote because when we wrote you a letter on August 24th——

Chairman GRASSLEY. Senator——

Senator BOOKER [continuing]. Asking to have a meeting on this issue, you denied us even the right to meet, so here we are having a meeting. Let us at least debate this issue. Let us at least call this for a vote.

Chairman GRASSLEY. Senator——

Senator BOOKER. I appeal to your sense of fairness and decency, your commitments that you have made to transparency. This violates what you have even said and called for, sir. You have called for documents, you yourself, limited documents. We thought there should be more. We have not received the documents that you have even called for. So, sir, based upon your own principles, your own values, I call for, at least, to have a debate or a vote on these issues and not for us to rush through this process.

[Disturbance in the hearing room.]

Senator WHITEHOUSE. Mr. Chairman.

Senator HIRONO. Mr. Chairman. Mr. Chairman.

Chairman GRASSLEY. Senator——

Senator HIRONO. I have heard calls for regular order.

Chairman GRASSLEY. I would like to respond. I would like to respond to Senator Booker. Senator Booker, I think that—I respect very much a lot of things you do, but you spoke about my decency and——

[Disturbance in the hearing room.]

Chairman GRASSLEY. You spoke about my decency and integrity, and I think you are taking advantage of my decency and integrity, so.

[Disturbance in the hearing room.]

Chairman GRASSLEY. Okay.

Senator HIRONO. Mr. Chairman, I heard calls for regular order. It is regular order for us to receive all the documents—to receive all the documents that this Committee is entitled to.

[Disturbance in the hearing room.]

Chairman GRASSLEY. Okay.

Senator HIRONO. Mr. Chairman, it is also——

Chairman GRASSLEY. I think I——

Senator HIRONO. Mr. Chairman, it is also not regular order for the Majority to require——

Chairman GRASSLEY. Senator Hirono—

Senator HIRONO [continuing]. The Minority to pre-clear our questions, our documents, and the videos we would like to use at this hearing. That is unprecedented. That is not regular order. Since when we do have to submit the questions and the process that we wish to follow to question this nominee—

Chairman GRASSLEY. Senator—

Senator HIRONO. I would like to have clarification. I would like your response on why you are requesting—

Chairman GRASSLEY. Senator Hirono, I would ask that you—

Senator HIRONO [continuing]. The Minority to submit our questions—

Chairman GRASSLEY. I ask that you stop so we can conduct this hearing the way we have planned it. Maybe it is not going exactly the way that the Minority would like to have it go, but we have said for a long period of time that we were going to proceed on this very day.

[Disturbance in the hearing room.]

Chairman GRASSLEY. And I think we ought to give the American people the opportunity to hear whether Judge Kavanaugh should be on the Supreme Court or not. And you have heard my side of the aisle call for regular order, and I think we ought to proceed in regular order. There will be plenty of opportunities to respond to the questions that the Minority is legitimately raising.

Senator HATCH. Have her thrown out of here.

Chairman GRASSLEY [continuing]. And we will—we will proceed accordingly.

Senator WHITEHOUSE. Mr. Chairman, under regular order, may I ask a point of order, which is that we are now presented with a situation in which somebody has decided that there a hundred thousand documents protected by executive privilege, yet there has not been assertion of executive privilege before the Committee. How are we to determine whether executive privilege has been properly asserted if this hearing goes by without the Committee ever considering that question? Why is it not in regular order for us to determine—before the hearing at which the documents would be necessary—whether or not the assertion of privilege that prevents us from getting those documents is legitimate, or, indeed, is even an actual assertion of executive privilege? I do not understand why that is not a legitimate point of order at this point, because at the end of this hearing it is too late to consider it.

Senator LEAHY. Mr. Chairman, if I might add to this, on the integrity of the documents we have received, there really is no integrity. They have alterations. They have oddities. Attachments are missing. Emails are cut off halfway through a chain. Recipients' names are missing. They are of interest to this Committee, but it is cut off. The National Archives has not had a chance to get us all that we want even though you said on your website, the National Archives would act as a check against any political interference.

[Disturbance in the hearing room.]

Senator LEAHY. But a check after the hearing is over is no check. I think we ought to at least have the National Archives finish it. And to have for the first time certainly in my 44 years here, to

have somebody say there is a claim of executive privilege when the President has not made such a claim just puts everything under doubt. What are we trying to hide? Why are we rushing?

Chairman GRASSLEY. I can answer all the questions that have been raised, but I think if I answer those questions, it is going to fit into the effort of the Minority to continue to obstruct, and I do not think that that is fair to our Judge. It is not fair to our constitutional process. But let me—let me respond to those now, and then maybe we can proceed.

My colleagues on the other side are accusing the administration of using executive privilege to hide documents from the Committee. I want to say why they are wrong. Unlike President Obama's assertion of executive privilege during Fast and Furious, as one example, this assertion is not legitimate. Judge Kavanaugh was a senior lawyer in the White House. He advised the President on judicial nominations, provided legal advice on separation of powers issues, and handled litigation matters.

[Disturbance in the hearing room.]

Chairman GRASSLEY. As a—as the Supreme Court has put it, “Unless the President can give his advisors some assurance of confidentiality, a President could not expect to receive the full and frank submissions of facts and opinions upon which the effective discharge of his duties depends.” The issues Judge Kavanaugh worked on are exactly the sort of issues that require, according to the Supreme Court, some assurance of confidentiality.

We in the Senate and everyone else in America expects exactly the same sort of confidentiality. Most Senators would not agree to turn over their staffs' communication to anyone. For example, we did not ask for Judge Kagan's records for her service with then-Senator Biden to be turned over during her nomination. And because of attorney-client privilege, everybody has a right to keep communications from their lawyers out of Government's hands. We, therefore, did not ask for Justice Ginsburg's documents from her time with the ACLU. We did not ask for Judge Sotomayor's confidential documents from her time in private practice. It cannot be that the Senate and the ACLU are entitled to more protection than the President of the United States.

And then I will speak to the fact about the 42,000 pages. Last night, we received additional documents for the Committee's review. These were documents we requested before the hearing, and we received them before the hearing just as we requested. The Majority staff began reviewing the documents as soon as they arrived and has already completed its review. There is, thus, absolutely no reason—that is no reason to delay the hearing.

We have received and read every page of Judge Kavanaugh's extensive public record. This includes 12 years of his judicial service on the most important Federal circuit court in the country where he authored 307 opinions and joined hundreds more, amounting to more than 10,000 pages of judicial writing. We all—also received and read more than 17,000 pages of his speeches, articles, teaching materials, other documents that Judge Kavanaugh submitted with his questionnaire, the most robust questionnaire this Committee has ever issued. And, of course, we received and read more than 483,000 pages of documents from Judge Kavanaugh's extensive ex-

ecutive branch service. This is more pages than the last five Supreme Court nominees combined.

In short, this Committee has more materials for Judge Kavanaugh's nomination than we have had on any Supreme Court nominee in history. Senators have had more than enough time and materials to adequately assess Judge Kavanaugh's qualifications, and so, that is why I proceed.

I know that this is an exciting day for all of you in the family and all the people that are close to Judge Kavanaugh, and you are rightly proud of the Judge. The American people get to hear directly from Judge Kavanaugh later this afternoon. After this confirmation hearing and process is finished, I expect Judge Kavanaugh will become the next Associate Justice of the Supreme Court. Welcome again, Judge. Before I begin, I would want to give you, Judge, an opportunity to introduce your family.

Judge KAVANAUGH. Thank you, Mr. Chairman and Senator Feinstein and—

Chairman GRASSLEY. Push the red button if it is not on. Yes, we are going to—yes.

Judge KAVANAUGH. Thank you, Mr. Chairman, and Senator Feinstein, and Members of the Committee. I am honored to be here today with my family: my wife, Ashley, proud West Texan, graduate of Abilene Cooper High School, now the town manager of our local community where we live, our daughters, Margaret and Liza. I thank the Committee for arranging a day off from school today.

[Laughter.]

Judge KAVANAUGH. My mom and dad, Martha and Ed Kavanaugh; my aunt and uncle, Nancy and Mark Murphy; and my first cousins, Rosie and Elizabeth Murphy. I am very honored to be here, honored to have my family here. I am here because of them. Thank you, Mr. Chairman.

Chairman GRASSLEY. We are delighted to have your family here. Before I make my opening remarks, I want to set out the ground rules for the hearing. I want everyone to be able to watch the hearing without obstruction. If people stand up and block the view of those behind them or speak out of turn, it is not fair or considerate to others. So, officers will immediately remove those individuals, and I thank the officers for doing the work that they have to do.

We will have 10-minute rounds of opening statements with each Member. The Ranking Member and I may go a little over 10 minutes, but I am going to ask everyone else to limit your remarks to those 10 minutes. I hope everyone will respect that. We plan on taking a 15-minute break after Senator Cruz's opening statement. After all the opening statements by Senators are complete, we will take another 15-minute round break to turn to our introducers, who will formally present the Judge. After that, I will administer the oath to the Judge, and we will close that portion of today's hearing with his testimony.

Tomorrow morning—

Senator HARRIS. Mr. Chairman? Mr. Chairman, when will we review Senator Blumenthal's motion to adjourn?

Chairman GRASSLEY. What is your motion?

Senator BLUMENTHAL. I renew my motion to adjourn, Mr. Chairman. I think we are entitled to a vote on it. The responses that,

Mr. Chairman, you have given, with all due respect, really fly in the face of the norms of this Committee, our traditions, and our rules.

Senator COONS. Mr. Chairman, if I might add an additional point, I agree with my colleague. It is striking, given your long history of encouraging the executive branch to treat Minority requests equal with Majority requests, that you discouraged the National Archives from responding to Ranking Member Feinstein's request, which she tried to craft with you to be identical to the request for records for Justice Kagan. We should not proceed until we have the full documents that allow us to review the Judge's records.

Senator KLOBUCHAR. And, Mr. Chairman, last Friday we learned that nearly 102,000 pages of documents from Judge Kavanaugh's work in the White House Counsel's Office are being withheld from the Committee and the public based on a claim of constitutional privilege. Executive privilege has never been invoked to block the release of Presidential records to the Senate during a Supreme Court nomination. This includes when Justice Kagan was nominated to the Supreme Court as well as Justice Roberts.

Yesterday my colleagues and I sent a letter to the White House Counsel asking that the President withdraw his claim of privilege over these documents so that they can be made available to this Committee and to the American people. We have not yet received a response to that letter, so we should not be proceeding until we have a response and these documents have been available. It is 102,000 documents.

Senator BOOKER. And, Mr. Chairman—

Senator BLUMENTHAL. My motion to adjourn, Mr. Chairman, would raise this issue of executive privilege and whether it has been properly asserted for reasons that have been outlined well by my colleague, Senator Whitehouse. There is no valid claim here of executive privilege. Even if there were one, it has not been properly asserted. The question is, what is the administration afraid of showing the American people? What is it trying to hide?

Senator BOOKER. And, Mr. Chairman, using your own words in the statement you just read, you said, I quote, "We have had more than enough time to review the documents." Sir, we just got a document dump last night of over 40,000 pages. I would venture to say not one Senator here has had time to read through those 40,000 pages, and so, we are continuing to rush through this process, a process that deserves to be scrutinized. I support Senator Blumenthal's motion to adjourn, and I hope that we can at least have a vote on that motion.

Senator WHITEHOUSE. Mr. Chairman, I think you would be hard pressed to find a court in the country that would not give a party litigant a continuance when the party on the other side did a 42,000-page document dump after close of business the night before trial.

Senator DURBIN. Mr. Chairman, we waited for more than a year with a vacancy on the Supreme Court under the direction of your Leader in the United States Senate, and the republic survived. I think the treatment was shabby of Merrick Garland, President Obama's nominee. The fact that we cannot take a few days or weeks to have a complete review of Judge Kavanaugh's record is

unfair to the American people. It is inconsistent with our responsibility under Article II, Section 2, of the Constitution to advise and consent on Supreme Court nominees.

Chairman GRASSLEY. Senator Cornyn, do you want to speak?

Senator CORNYN. Mr. Chairman, thank you. I will be very brief. I would just say that Senator Whitehouse has suggested that we handle this hearing like a court of law. But I would suggest that if this were a court of law, that virtually side—every Member on the dais on that side would held in contempt of court because this whole process is supposed to be a civil one where people get to ask questions and we get to get answers. And that is the basis upon which we are to exercise our constitutional responsibilities of advice and consent. So, I would just suggest we get on with the hearing.

Chairman GRASSLEY. If my colleagues—

Senator BOOKER. Mr. Chairman, if I could just respond. Mr. Chairman, if I could just respond.

Senator BLUMENTHAL. Mr. Chairman.

Senator BOOKER. If we could just respond to that—

Chairman GRASSLEY. Sir, you can respond, but just a minute. If people wonder why the Chair is so patient during this whole process, I have found that it takes longer to argue why you should not do anything than let people argue why they want it. These things are going to be said throughout this hearing. We are going to be in session Tuesday, Wednesday, Thursday, Friday, Saturday, until we get done this week, so however long people want to take. We are going to not necessarily accommodate all obstruction, but if people have got something to say, this Chairman is going to let them say it, but it gets pretty boring to hear the same thing all the time. Senator Booker, make it quick, please.

Senator BOOKER. I really appreciate the deference, Mr. Chairman. The question was why would we want to delay this, and this is not an attempt to delay. This is an attempt to be fully equipped to do our constitutional duty, which everybody, Republicans and Democrats, on this Committee take seriously. It is very hard to perform our role of advice and consent when we do not have a thorough vetting of the background of the candidate in areas which he—the candidate himself has referred to as the most formative part of his legal career, where he himself has talked about how important this period of his life is.

We are denied the full vetting. And, sir, this is not something that Democrats are asking for. I remind you that you yourself asked for a limited set of documents for when he was in the White House Counsel's Office. You yourself set that standard, and even on that limited standard, sir, we have not received the documents. And then even the documents—we've received 7 percent of them—almost half of those have been labeled "committee confidential." They cannot be put before the American people, which further undermine and inhibit our ability to ask questions to thoroughly vet this candidate and advise and consent the President of the United States.

So, sir, just on the basic ideals of fairness, the traditions of this body, we should have a thorough understanding of the nominee that is put before us so that we can vet them. To go into this hear-

ing without those documents is an undermining of the constitutional role to which we have all sworn an oath to uphold.

Senator BLUMENTHAL. Mr. Chairman, I have great respect for my colleague from Texas—

Chairman GRASSLEY. I would like to respond to Senator Booker, and then Senator Feinstein has asked for the floor. I would like to—

Senator BLUMENTHAL. Mr. Chairman, I ask to respond to my colleague from Texas.

Chairman GRASSLEY. I would like to respond to Senator Booker.

Senator BLUMENTHAL. Mr. Chairman.

Chairman GRASSLEY. Senator Booker, using a standard set by two Members of your political party in the caucus, and I am going to paraphrase because I do not have the exact quotes in front of me, but recently Senator Schumer said from the floor, the best judge of whether or not somebody should be on the Supreme Court is decisions that they have made at lower courts. Senator Leahy said something similar to that when Judge Sotomayor was before us, that we know—we know how many—we know what you have done in a lower court. That is the best basis for knowing whether or not you ought to be on the Supreme Court.

So, we have 307 cases that this nominee has written decisions on, as a basis for that, and we have got 488,000 other pages, and maybe the Senators have not read them, but their staff is fully informed because last night before 11 on the 42,000 pages that have come to our attention, the staff on the Republican side has gone through that.

Senator BOOKER. But, sir, then why did you ask for the White House Counsel documents?

Chairman GRASSLEY. Senator—

Senator BOOKER. If they were not germane to this hearing, why would you even ask for them?

Chairman GRASSLEY. Senator Feinstein.

Senator WHITEHOUSE. For the record, that is a rate of 7,000 pages per hour. That is superhuman.

Senator KLOBUCHAR. Yes.

Senator LEAHY. They are amazing. They are amazing.

Senator FEINSTEIN. Mr. Chairman.

Chairman GRASSLEY. Yes, go ahead.

Senator FEINSTEIN. If I may, I have been through nine Supreme Court hearings, and—

Chairman GRASSLEY. Is this your opening statement?

Senator FEINSTEIN. It is part of it.

Chairman GRASSLEY. Well, why do you not make your opening statement?

Senator FEINSTEIN. Shall I?

Chairman GRASSLEY. Yes, would you please?

[Laughter.]

Senator KLOBUCHAR. There is a motion pending.

Senator BLUMENTHAL. Mr. Chairman, I asked for an opportunity to respond to my colleague from Texas because he has directly challenged us with—

Chairman GRASSLEY. I said you are out of order.

Senator BLUMENTHAL. Well, Mr. Chairman—

Chairman GRASSLEY. Senator Feinstein.

Senator BLUMENTHAL. I ask in the process of regular order an opportunity to respond to what I believe was a personal attack—

Senator FEINSTEIN. Well, let me—

Chairman GRASSLEY. I would like to have you give Senator Feinstein the courtesy of listening to her opening statement.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Well, I was just going to say some things, and you heard that this is my ninth hearing, and I think we have got to look at this. These are very unique circumstances. Not only is the country deeply divided politically, we also find ourselves with a President who faces his own serious problems. Over a dozen Cabinet members and senior aides to President Trump have resigned, been fired, or failed their confirmations under clouds of corruption, scandal, and suspicion. The President's personal lawyer, campaign manager, deputy campaign manager, and several campaign advisors have been entangled by indictments, guilty pleas, and criminal convictions. So, it is this backdrop that this nominee comes into when what we are looking is, is he within the mainstream of American legal opinion and will he do the right thing by the Constitution.

We are also experiencing the vetting process that has cast aside tradition in favor of speed. When Justice Scalia died, Republicans refused to even meet—even a meeting in their office—with President Obama's nominee, and held the seat open for 1 year. Now with a Republican in the White House, they have changed their position. The Majority rushed into this hearing and is refusing to even look at the nominee's full record. In fact, 93 percent of the records from Kavanaugh's tenure in the White House as counsel and staff secretary have not been provided to the Senate, and 96 percent have not been given to the public.

We do know what the White House thinks of this nominee. Don McGahn, the White House Counsel, spoke to the Federalist Society and made clear Brett Kavanaugh is exactly the kind of nominee the President wanted. In his speech, Mr. McGahn discussed President Trump's two lists of potential Supreme Court nominees. One he said was filled with mainstream candidates. The other list included "candidates that are kind of too hot for primetime, the kind that really—would be really hot in the Senate, probably people who have written a lot, we really get a sense of their views, the kind of people that make people nervous." That is a quote.

Now, what I am saying, this is the backdrop into which we come into this situation, so, yes, there is frustration on this side. We know what happened with the prior nominee, the last one President Obama presented to us. He never even got a meeting. He never got a hearing. He never got a vote. And now the rush to judgment and the inability to really have a civil and positive process ends up being the result. I really regret this, but I think you have to understand the frustration on this side of the aisle.

Everyone on this side of the aisle wants to do a good job. They want time to be able to consider what the findings are, and there are tens of thousands of pages of emails and other items which

could constitute findings on a whole host of major subjects that this nominee may be faced with, and they are serious. The torture issues, all of the Enron issues that he has been through, all of the kinds of things that we want to ask questions about.

So, I mean, understand where we are coming from. It is not to create a disruption. It is not to make this a very bad process. It is to say, Majority, give us the time to do our work so that we can have a positive and comprehensive hearing on the man who may well be the deciding vote for many of America's futures.

Senator BLUMENTHAL. Mr. Chairman, I renew my motion to adjourn and Senator Harris' motion to postpone. I ask for a second.

Senator WHITEHOUSE. Second the motion.

Senator BLUMENTHAL. Mr. Chairman, I ask for a vote. I ask that we—

Chairman GRASSLEY. I do not—

Senator BLUMENTHAL [continuing]. Reconvene in executive session.

Chairman GRASSLEY. I should not have to explain to you we are having a hearing. It is out of order. We are not in executive session. That would be the proper forum for entertaining motions, so—

Senator BLUMENTHAL. I ask that we reconvene in executive session.

Chairman GRASSLEY. So, we will not—we will not vote on Senator Blumenthal's suggestion. We will not follow your suggestion to—

[Disturbance in the hearing room.]

Senator BLUMENTHAL. Well, it is a motion, Mr. Chairman.

Chairman GRASSLEY [continuing]. To go into executive session. Motions will not be proper at this time.

[Disturbance in the hearing room.]

Senator KLOBUCHAR. Mr. Chairman, it is a pending motion before the Committee.

[Disturbance in the hearing room.]

Senator BLUMENTHAL. Mr. Chairman, if there is no vote on this motion which has been properly seconded and which could be given a vote in executive session, this process will be tainted and stained forever. I am asking as a Member of this Committee—it is my right to do so—that we vote on my motion to adjourn and Senator Harris' motion to postpone, and that we do it in executive session which can be easily and quickly convened right now.

Chairman GRASSLEY. Yes, the motion is out of order.

Senator BOOKER. Sir, then I make a very clear and simple motion to move into executive session so that Senator Blumenthal's motion may be considered.

Chairman GRASSLEY. The motion is out of order.

Senator BLUMENTHAL. Well, they are not out of order, Mr. Chairman. They are properly before this Committee. Simply saying so, with all due respect, and I have great respect for the Chairman, does not make them so. It does not make them out of order just because the Chairman rules that they are out of order. We have a number of excellent lawyers in this room, and I ask that this body now do what its responsibility is to have an executive session so we can vote on a motion to adjourn, and then we can delib-

erately and thoughtfully consider the documents that have been presented, and also review the Committee documents that have been marked confidential without any reason or rationale.

Chairman GRASSLEY. The motion is denied.

Senator BOOKER. Sir, how long would that take, 10 minutes for us to have a motion and a vote on this process? I do not understand what the rush is that we cannot even let Senators vote on what is a very important motion germane to our constitutional duties before this—before this body before we proceed. I do not understand. It will not take that much time. What is the rush? What are we afraid of to hold a vote on the motions before us?

Senator KENNEDY. Mr. Chairman. Mr. Chairman.

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. I have a question about the process. I understand my colleagues' point, and I understand they feel strongly about this, but what are going to be the ground rules today? Are we going to be allowed to interrupt each other, interrupt the witness? Are we going to—should we seek recognition from the Chair? I just want to understand the ground rules.

Chairman GRASSLEY. Proper respect and decorum, plus how we normally have done business in a hearing like this. We would not be having all these motions. You are new to the Senate, so this is something I have never gone through before in 15 Supreme Court nominations that I have been since I have been on here. And every Member—I was interrupted before I got a chance to say what—the agenda for today, but every Member is going to get 10 minutes to make their remarks, and then we will go to the introducers of Judge Kavanaugh. There will be three of those. Then we will take the usual time of introducer, and then we will have the swearing in of Judge Kavanaugh, and then we will have his opening remarks, and then we will adjourn for today.

We will reconvene at 9:30 on Wednesday and Thursday. Each Member will have 30 minutes to ask questions or make all these points they are making right now for the first round, then there will be a second round of 20 minutes each. So, every Member is going to get 50 minutes to ask all the questions or make all the statements that they want to make in regard to anything about this candidate or anything about how this meeting is being conducted.

And then we will—we will go late into Wednesday night or Thursday night until we get done with the questioning of Judge Kavanaugh. And then on Thursday we are going to have three panels of six each, evenly divided for people that think Judge Kavanaugh should be on the Supreme Court and people that think he should not be on the Supreme Court. And we hopefully get that done Friday, but if we have to go Saturday and Sunday, we will go Saturday and Sunday until we get it all done.

Senator HARRIS. Mr. Chairman, how can we possibly talk about—

Chairman GRASSLEY. Does that answer your question, Senator Kennedy?

Senator KENNEDY. Well, if I want to—yes, Mr. Chairman. I appreciate it. If I want to say something, do I need to be recognized by the Chair?

Chairman GRASSLEY. That would be the way that it is handled. I have tried to explain to you I want to be patient because sometimes if you are not patient and you argue why something should not be done, it takes longer than it does just to listen to people. But I do not think we should have to listen to the same thing three or four times.

Senator KENNEDY. Well, patience is good, Mr. Chairman, but I just want to understand the rules. If I want to be recognized—

Chairman GRASSLEY. Yes, you should be recognized—

Senator KENNEDY [continuing]. I have—

Chairman GRASSLEY. You can understand that I have been patient and listened to people not be recognized and speak anyway, because I would like to have this be a peaceful session.

Senator KENNEDY. Well, before I try your patience, I am done.

Senator HIRONO. Mr. Chairman, I have a question about ground rules.

Chairman GRASSLEY. Go ahead.

Senator HIRONO. The question is, before we can proceed, I would like to know whether the Majority is still requiring of all of the Democratic Members of this Committee to pre-clear the questions, documents, and videos that we would like to use at this hearing?

Chairman GRASSLEY. If the—I was hoping that on the subject that you just brought up that we would have some clarification of what you want, to approach that. And I am not prepared to answer that question because I do not know what the answer has been, and I do not want you to give me what you think the answer has been of discussion between our staff on that subject.

Senator HIRONO. Mr. Chairman, I do not think it has ever been the case in a hearing like this that the Members of this Committee have to pre-clear what we propose to query the nominee about. I think that is totally unprecedented.

Senator KLOBUCHAR. And, Mr. Chairman, if we do not even know what the rules are, how can we proceed with this hearing?

Chairman GRASSLEY. I would like to respond—I would like to respond to Senator Hirono. The reason why we are having that discussion is, at least in my time on this Committee and for 15 nominations, we have never had a request for a video. So, it seems to me to be courteous to all the Members of the Committee, it would be nice to know the purpose and what it might contain. You do not—any questions you want to ask, you can ask questions. It is not about what questions you were going to ask. It is about the presentation of something that has never been part of a Supreme Court hearing in the past.

Senator HARRIS. Mr. Chairman—

Chairman GRASSLEY. Who wanted—

Senator DURBIN. Mr. Chairman.

Chairman GRASSLEY. I think I will go back and forth.

Senator TILLIS.

Senator TILLIS. Mr. Chairman, I am confused because I heard earlier that this was a reaction to the document releases last night. But I am reviewing a tweet from NBC that said “Democrats plotted

coordinated protest strategy over the holiday weekend. All agreed to disrupt and protest the hearing, sources tell me, and subsequent Dem Leader, Chuck Schumer, led a phone call and Committee Members are executing now." So, I just want to be clear, none of the Members on this Committee participated in that phone call or that strategy before the documents were released yesterday? Is this a—are you suggesting that this allegation is false?

Senator HARRIS. This is outrageous.

Senator DURBIN. Mr. Chairman, may I respond?

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Mr. Chairman, there was a phone conference yesterday, and I can tell you at the time of the phone conference, many issues were raised. One of the issues was the fact that over a hundred thousand documents related to Judge Kavanaugh had been characterized by the Chairman of the Committee as "committee confidential." I have been a Member of this Committee for a number of years. Committee confidential documents have been really limited to extraordinarily circumstances, as an example, if someone is accused of taking drugs during the course of an investigation.

I'm not making any suggestion that that is even the case or close to it here. It was done in a confidential setting in fairness to the nominee, and the same thing on DUIs and the like. We used it in extremely rare circumstances where we would meet after this Committee hearing and sit down, and it usually related to a handful of pages or a handful of document references. Instead what we have found now is that we are seeing hundreds of thousands of documents characterized as "committee confidential" unilaterally. It is not done on a bipartisan basis. It is being done by the Chairman.

So, one of the discussions yesterday was this whole question of whether this Committee is going to hear a nominee for a lifetime appointment to the highest court in the land without access to basic information about his public record—his public record as secretary to the President of the United States, staff secretary. Thirty-five months of public service, we have been told, cannot even be considered. The documents of that service cannot even be considered.

So, I would say to the gentleman—the Senator from North Carolina, there was a conversation yesterday about these documents. I had no idea that at 11 o'clock last night 42,000 more documents would be put on top of us and we would be asked to take them up today. So, it added insult to injury.

Senator HARRIS. Mr. Chairman—

Senator BLUMENTHAL. Mr. Chairman—

Senator HARRIS [continuing]. We are in a hearing—

Senator BLUMENTHAL. Mr. Chairman, I ask to be recognized under Rule IV. Rule IV states, "The Chairman shall entertain a non-debatable motion to bring a matter before the Committee to a vote. If there is objection to bring the matter to a vote without further debate, a roll call vote of the Committee shall be taken, and debate shall be terminated if the motion to bring the matter to a vote without further debate passes with eleven votes in the affirmative, one of which must be cast by the minority."

I ask for a vote on my motion to adjourn under Rule IV, Mr. Chairman. These are rules that we are obligated to follow. The Chairman has no right, with all due respect, to simply override them by fiat.

Chairman GRASSLEY. We are—

Senator BLUMENTHAL. I ask for a second.

Senator WHITEHOUSE. I second the motion.

Chairman GRASSLEY. We are obligated by that rule in executive session. We are not in executive session.

[Disturbance in the hearing room.]

Chairman GRASSLEY. I would respond to the issues brought up by Senator Durbin about confidential documents. I was criticized for my decision to receive some documents on “committee confidential,” but I am doing exactly what I did during Judge Gorsuch’s confirmation and what Chairman Leahy did during Justice Kagan’s. This is another example of treating regular Committee practices as somehow out of the ordinary.

Presidential records that we receive often contain highly sensitive advice to the President as well as personal privacy information, like full names, date of birth, Social Security numbers and bank account numbers. Like my predecessor, I agreed to receive some Presidential records as “committee confidential” so that both Democrats and Republicans could begin reviewing Judge Kavanaugh’s materials much earlier. I do not know why my Democratic colleagues object to receiving documents faster, but not all of these Presidential documents remain confidential. In fact, nearly two-thirds already became public.

These records are posted on the Committee’s public website and are available to the American people. As a result, we have provided unprecedented public access to a record number of Presidential records, and do it—did it in record time. The most sensitive Presidential records remain committee confidential under Federal law, just as they were during the nominations of Kagan or Gorsuch.

But we have expanded access to these documents also. Instead of just providing access to Committee Members, we have provided access to all 100 Senators. Instead of just providing access to a very few Committee aides, we have provided access to all Committee aides. And instead of just providing access to physical binders of paper, we have provided 24/7 digital and searchable access. This is unprecedented access to committee confidential material.

I would also like to add that my staff set up workstations and have been available 24/7 to help Senators who are not on—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. Confidential materials, but not one—but not one Senator showed up. I guess Senators complaining about lack of access to confidential documents were not really interested in seeing them in the first place, but I want to emphasize more documents are widely available than in any prior Supreme Court nomination.

And then to the issue about hiding committee confidential documents, some colleagues, and you have heard it this morning, accused of hiding documents. They are suggesting that some of the committee confidential documents contain information that would be of great interest to the public. Well, just as I did last year dur-

ing Justice Gorsuch's confirmation, I put a process in place that would allow my colleagues to obtain the public release of confidential documents for use during the hearing. All I asked was my colleagues to identify the documents they intended to use, and I would work to get the Department of Justice and former President Bush to agree to waive restrictions on the documents. Senator Feinstein secured the public release of 19 documents last year under this process, and Senator Klobuchar secured the release of four documents this year.

If my colleagues truly believed that other committee confidential documents should have been made public, they never told me about them and requested the ones that they wanted. Instead of scaring the American people by suggesting that we are hiding some incriminating documents, they should have made a request that I work to get the "committee confidential" designation removed. This year I received no such request except from Senator Klobuchar, which was honored and resulted in the disclosure of documents that she wanted to use during this hearing.

[Disturbance in the hearing room.]

Senator LEAHY. Mr. Chairman, you stated what I did and you stated it inaccurately. I think I have the right—

Chairman GRASSLEY. I said I was paraphrasing. You can correct me any way you want to.

Senator LEAHY. It was one heck of a paraphrase when you—

Chairman GRASSLEY. Give me the exact quote.

Senator LEAHY [continuing]. When you speak about doing the same thing as with Elena Kagan. I was Chairman when Elena Kagan was here. We had 99 percent of her records from the White House that were made public 12 days—12 days—before the hearing. With Judge Kavanaugh, we have 7 percent, and only 4 percent are public. You can talk about the numbers of pages. The fact is 99 percent for Elena Kagan 12 days before the hearing. It was all available. For Judge Kavanaugh, it is 7 percent, and only 4 percent made public.

So, you know, if we are going to argue what was precedent, I would—I would point out that I have been in the Senate for 19 Supreme Court nominations. What is being done here is unprecedented, and I keep coming back to the same question I asked. What are we trying to hide? What are we hiding? What is being hidden? Why not have it open like all others? The only other time we heard a President invoke executive privilege was President Reagan during the Justice William Rehnquist hearing, and Republicans and Democrats together went to him and said do not do that. He said, okay, you are right, and he withdrew his request of executive privilege and released the documents.

Senator HIRONO. Mr. Chairman—

Senator LEAHY. I am just sorry to see the Senate Judiciary Committee descend this way. I have felt privileged to serve here under Republican and Democratic leadership for over 40 years. This is not the Senate Judiciary Committee I saw when I came to the U.S. Senate.

Senator KLOBUCHAR. Mr. Chairman, since my name was invoked by you, could I please respond?

Chairman GRASSLEY. After I get done. I want to give the exact quote that I was paraphrasing. Chairman Leahy said, “We have Judge Sotomayor’s record from the Federal bench. That is a public record that we had even before she was designated by the President. Judge Sotomayor’s mainstream record of judicial restraint and modesty is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been.” And so, that is why my answer to “gold standard,” of whether Judge Kavanaugh ought to be on the Supreme Court, based upon what Democrats themselves have said, is the best judge of whether you should be on the Supreme Court.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you. Mr. Chairman—

Senator LEAHY. Wait a minute. You mentioned what I said. Let me just finish on that on Justice Sotomayor. I did say that we should look at her cases just as we should on Judge Kavanaugh’s. But you neglect to mention—carefully neglect to mention, and I think erroneously neglect to mention—that the Republicans asked for board minutes from her work at a civil rights group in the 1980s, long before she was ever even considered as a judge. You asked for that, and we got it for you. That’s the difference.

Senator KLOBUCHAR. Mr. Chairman.

[Voice off microphone.] Mr. Chairman.

Senator KLOBUCHAR. Mr. Chairman, you called on me.

Chairman GRASSLEY. Before Senator Klobuchar speaks, so we have 488,000 pages of documents.

Go ahead, Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. A few points here. Number one, Justice Sotomayor never worked in the White House, so none of these issues of executive privilege or other things that we have been discussing are relevant. Number two, while I appreciate you granting my request, Mr. Chairman, on these campaign finance documents, this is all they were. This is it. This is how many pages.

Yet we have 148,000 documents that we cannot talk about publicly, and I will say they are illuminating. It shows that the nominee has a limited view of campaign finance reform. In his own words, he says that his views on the First Amendment are pure when it comes to this very important issue, and we can talk about that more in the future. But I do have a question, and that is, yes, I asked for these documents, but I have also joined several letters led by Senator Feinstein asking that all the documents that we have in the Committee be made public so that we can ask questions.

And then finally, my initial point that I am so focused on, the 102,000 pages of documents from Judge Kavanaugh’s work in the White House Counsel, I would like to know, Mr. Chairman, if you have another example of a time when executive privilege was invoked to block the release of Presidential records to the Senate during a Supreme Court nomination. As far as my research shows, this was not done for Justice Kagan or Justice Roberts, and I would like to know if you have another example of that during a Supreme Court nomination hearing.

Chairman GRASSLEY. Yes, it was done for Justice Roberts and it was the Solicitor General position he had.

Senator KLOBUCHAR. When he was a Solicitor General, that is correct, but during the time that they worked in the White House, that is my question.

Senator BLUMENTHAL. Mr. Chairman, I would like to bring to the attention of the Chair—

Senator CORNYN. I believe I have the floor.

Chairman GRASSLEY. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman, for recognizing me. I have not been in as many confirmation hearings as some of my colleagues, but this is the first confirmation hearing for a Supreme Court Justice I have seen basically according to mob rule. We have rules in the Senate. We have norms for decorum. Everybody, as you pointed out, Mr. Chairman, is going to get a chance to their say.

Chairman GRASSLEY. Yes.

Senator CORNYN. You have given everybody a chance to ask questions for up to 50 minutes. You have given them a chance to make an opening statement. Any one of our colleagues can step out here and talk to the press and make whatever comments they want to the press and tell the world how they feel about this. But the fact is it is hard to take it seriously when every single one of our colleagues in the Senate Judiciary Committee on the Democratic side have announced their opposition to this nominee even before today's hearing. So, it is hard to take seriously their claim that somehow they cannot do their job because they have been denied access to attorney-client or executive privilege documents when they have already made up their mind before the hearing. There is nothing fair about that.

And we were just asked for an opportunity for the American people to be able to listen to this nominee answer the questions that we have. And I think that is how we ought to proceed, and I hope we will.

Senator DURBIN. Mr. Chairman.

Senator BLUMENTHAL. Mr. Chairman, can I be recognized to respond specifically to that comment? There is precedent here. There are rules that can guide us. We are asking for those rules to be followed. In the past, our colleagues on the Republican side have asked for a postponement of these Committee proceedings on nominations when documents have been denied on two occasions from Senator Sessions—then-Senator Sessions, and Senator Kyl. Those requests were granted. We are asking simply that that precedent be followed, Mr. Chairman. Far from mob rule, far from contempt of the process, we are simply asking for respect here to the normal, regular order.

Senator DURBIN. Mr. Chairman.

Chairman GRASSLEY. Yes, go ahead.

Senator DURBIN. Mr. Chairman, I would like to address this “committee confidential” issue one more time because you have explained your point of view. Here is what we know. The Chairman, Chairman Grassley, who is my friend and I respect, said his reason for unilaterally designating 147,000 pages of Burck documents as “committee confidential” is because that was the condition that Bill

Burck imposed on the provision of the documents. When Judge Kavanaugh was in my office meeting with us, I asked him, "Who is Bill Burck? By what authority can he restrict the information given to the Senate Judiciary Committee and to the American people? Is he a Government employee?" No one knew this mysterious Bill Burck who is filtering these documents.

So, I figured since the nominee carries the Constitution in his pocket, there must be some reference to Bill Burck in Article II, Section 2, but it just says "advice and consent of the Senate." It does not include Mr. Burck. By what authority is this man holding back hundreds of thousands of documents from the American people? Who is he? Who is paying him? So, "committee confidential" is being determined by a man, a private attorney, and we do not know who he works for, or to whom he is accountable.

Mr. Chairman, in the past when we went into committee confidential, it was in a discrete, specific area of concern involving a handful of words or accusations that have made in a document, and we were very careful to do it on a bipartisan basis. That has not been the case here where 147,000 pages have been designated by Bill Burck as outside the reach of the American people in the Senate Judiciary Committee. That is a further example of why this whole process has gone astray, and I think your explanation ignores that.

[Voice off microphone.] Mr. Chairman.

Senator KENNEDY. Mr. Chairman. Mr. Chairman.

Chairman GRASSLEY. Who wants the floor?

Senator KENNEDY. The new Senator.

[Laughter.]

Chairman GRASSLEY. Go ahead.

Senator KENNEDY. Thank you, Mr. Chairman. Mr. Chairman, can you tell me again how many documents have been produced?

Chairman GRASSLEY. Four hundred and eighty-eight thousand, minus—or, I mean, other than 28,000 pages that Justice Kavanaugh has submitted including his own judicial opinions.

Senator KENNEDY. Number two, are we in executive session or not?

Chairman GRASSLEY. We are having a hearing on the nomination of the—of a nominee for the Supreme Court.

Senator KENNEDY. Yes, sir, I got—

Chairman GRASSLEY. We are not in executive session.

Senator KENNEDY. All right. Number three, at some point are we going to get to hear from the nominee?

Chairman GRASSLEY. Hopefully it was going to be before 2:30. It will probably be later this afternoon now.

Senator KENNEDY. All right. Thank you, Mr. Chairman.

Chairman GRASSLEY. Yes.

Senator COONS. Mr. Chairman?

Chairman GRASSLEY. Can I ask my colleagues on the other side of the aisle how long you want to go on with this because I am not going to entertain any of the motions you are making. We are not in executive session, and I think we ought to level with the American people. Do you want this to go on all day because I have been patient. I have been accused of having a mob rule session. Now, if we have a mob rule session, it is because the Chairman is not run-

ning the Committee properly, but since every one of you on that side of the aisle, except Senator Booker and Senator Harris, new to the Committee, said during Justice Gorsuch's hearing, every one of you prefaced your comments on how fair I was in running that hearing. Now, this is the same Chuck Grassley that ran the Gorsuch hearing. I would like to run this hearing the same way if you will give me the courtesy of doing it.

Senator COONS. Thank you, Mr. Chairman.

Chairman GRASSLEY. How long do you want to go on?

Senator COONS. Mr. Chairman, I would like to make one more point before we proceed, if I might.

Chairman GRASSLEY. Senator Coons.

Senator COONS. The accusation that this is a mob rule hearing was made by your colleague from the State of Texas. I think you have been conducting this in a respectful, appropriate, and deliberate way. My concerns that I want to renew given the exchange you just had with Senator Leahy, who has participated in or presided over more Supreme Court confirmations than any currently serving Member, I believe, was over how the document request was handled for now-Justice Kagan.

A request was sent to the National Archives. Ranking Member Feinstein tried to work with you to send an identical request to the National Archives. And before we proceed with the questioning, Mr. Chairman, I simply would like to have a settled heart about why you chose to communicate directly to the Archives, and not to respond to the Ranking Member's request.

Members of this Committee have raised issues about an unprecedented Committee process by which documents were blocked, by which they were considered classified, and by which we have been blocked from being able to share them with the American people or ask questions based on them. This is unprecedented. That is why, as you put it, this side seeks to raise issues to establish ground rules before we proceed.

Chairman GRASSLEY. You asked an appropriate question. I have an answer. I do not know whether it will satisfy you or not. Those documents are the least useful in understanding his legal views and the most sensitive to the executive branch, and let me emphasize—the most sensitive to the executive branch.

The staff secretary serves as an inbox and outbox to the Oval Office. And you are going to have opportunities to ask the nominee himself what he did then, but I am giving you my judgment about being a person that primarily was responsible for managing the paper that crosses the President's desk. His job—and if I am wrong, he can satisfy you otherwise in your questions you want to ask him. But his job was to make sure the President sees the advice of other advisers, not, as staff secretary, providing his own advice.

One of President Clinton's staff secretaries, Todd Stern, described the job this way. I quote, "The staff secretary's job is not to influence the President, but to ensure he gets a balanced diet of viewpoints from all relevant people on the staff. You are certainly not trying to put your thumb on the scale between options."

Reviewing Judge Kavanaugh's staff secretary documents would teach us nothing about his legal views. For that, we have the 307

opinions that he wrote and the hundreds more joined, totaling more than 10,000 pages of judicial writings. We also have more than 17,000 pages of speeches, articles, teaching materials, and other materials that Judge Kavanaugh attached to his 120-page written response, which I think was—Judiciary’s questionnaire was probably the most robust questionnaire ever submitted to a Supreme Court nominee.

We also have more than 480,000 pages of emails and other documents from Judge Kavanaugh’s service as an executive branch lawyer. This is a half million pages of paper, more than the last five confirmed Supreme Court nominees combined. In addition to not shedding light on Kavanaugh’s legal views, the staff secretary documents are very sensitive to the executive branch.

Let us emphasize that word “sensitive.” These documents contain highly confidential advice, including national security advice, that went directly to the President from his advisers. It would threaten the candor of future advice to Presidents if advisers knew their advice would be broadly disclosed.

Senators have more documents for Judge Kavanaugh than any nominee in Senate history. Democratic leaders insistent on getting staff documents I think was a way of not having this hearing take place at this particular time.

So can I proceed, Members of the Democratic Caucus?

Senator HARRIS. Mr. Chairman, if I may be recognized for one final point?

Chairman GRASSLEY. After you are done, can I proceed to my opening statement?

Senator HARRIS. I will defer to my colleagues. But I would just, as a point of information, we sent a letter to you, Mr. Chairman, 7 days ago regarding the “committee confidential” nature of the documents and asked if they would not be designated “committee confidential.” As another point of information, it is my understanding there are 6 million to 7 million pages of documents regarding this nominee, and it is my understanding, with all due respect, Mr. Chairman, that you have only requested 10 to 15 percent of the total.

I appreciate that there are a lot of pages of documents, but we have to have this conversation in the context of the total and the fact that we have only been given by your request 10 to 15 percent of those documents.

And my final point is this. This is a hearing about who will sit on the highest court of our land. This is a hearing that is about who will sit in a house that symbolizes our system of justice in this country.

And some of the most important principles behind the integrity of our system of justice is that we have due process and we have transparency. That is why we have public courtrooms. That is why we have requirements in courts of law in our country that there will be transparency, that both parties will be given all relevant information. We can argue then as to the weight of the documents and the significance, but not as to whether or not they are admissible.

So I object. I ask that we renew and revisit Senator Blumenthal's motion to suspend or my motion to postpone this hearing. Thank you.

Chairman GRASSLEY. Okay. Thank you.

Senator BLUMENTHAL. Mr. Chairman?

Chairman GRASSLEY. I appreciate the courtesy of the Democrats for me to proceed.

Senator BLUMENTHAL. May I just have one last opportunity regarding my motion?

Chairman GRASSLEY. Please go ahead. Please, please go ahead.

Senator BLUMENTHAL. Thank you, Mr. Chairman. I appreciate your giving me the floor.

I have made a motion that is properly before this Committee. The Chairman said earlier that he has never been through a confirmation process like this one. The reason is that no administration in the past has engaged in this kind of concealment. That is the reason, very simply.

It is not the Chairman's doing necessarily. It is this administration that has concealed and hidden documents from us and from the American people. And so I renew my motion that we adjourn so that we can access the documents we need, review them in a deliberate and thoughtful way. Much has been done for colleagues in the past when they have requested it, and as is required under Rule IV of our rules, there is no requirement that we be in executive session to follow this rule, Mr. Chairman.

And I respectfully ask that we follow our rules, that we proceed in accordance with those norms, and I know the Chairman has great respect for open government, for whistleblowers, for sunlight as the best disinfectant. We need some sunlight in this process.

Thank you, Mr. Chairman. And I again renew my motion to adjourn, which has been seconded by Senator Whitehouse.

Chairman GRASSLEY. Denied because we are not in executive session.

I will proceed with my—

Senator HIRONO. Mr. Chairman, before you proceed, I would just like to make one correction. There is a misconception as to what White House staff secretaries do. And, in fact, two past staff secretaries, Todd Stern and John Podesta, wrote an op-ed in the July 30, 2018, Washington Post titled, "Staff Secretaries Aren't Traffic Cops. Stop Treating Kavanaugh Like He Was One."

And, in fact, Judge Kavanaugh himself has acknowledged the importance of the time that he was White House staff secretary. So why, Mr. Chairman, you and the others on your side, keep saying that this is kind of a nothing kind of a job? Nothing could be further from the truth. And this is why we are so adamant about requesting these documents that the Judge himself, the nominee himself, has said were among the most formative times of his adult life.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Of course, that is why we have this hearing. Judge Kavanaugh—

Senator HIRONO. We do not have the documents.

Chairman GRASSLEY. Judge Kavanaugh will have an opportunity to answer every question about his role in almost anything he has done in his lifetime, I assume.

Senator BOOKER. Mr. Chairman? One—Mr. Chairman, may I be recognized, sir?

Chairman GRASSLEY. Yes. Will you be the last one, or do you want to go on all afternoon?

Senator BOOKER. I cannot speak for my colleagues. But a lot of people I have a lot of respect for on this Committee, especially some of the new folks—I just want to answer in the most plain-spoken way I can possibly do—who are expected to evaluate a nominee who has a vast record, and if you look—and a lot of numbers have been cited—10,000 here, 40,000 here, 100,000 here. But an entire body of his record, sir, we only have 10 percent of his record that we have been able to evaluate.

Ninety percent of it has been withheld from Senators, 90 percent of his records. So we are asking to evaluate a candidate, to have intelligent questions and insights into his record, but we only have 10 percent of that record.

We can go on and on about the numbers of documents—100,000, 10,000—but the fact is we are about to proceed with a historic hearing. We are about to proceed toward having a hearing on someone having a lifetime appointment on the most important court in the land that will effectuate so many of the areas of American life, from civil rights to women's rights, to access to healthcare. All of this stuff is being decided, and we are going into this only having 10 percent, access to 10 percent of the body of work of this man's career.

That seems to me just common sense—90 percent is missing right now. Just common sense says we should have access to thoroughly evaluate this person. We are not asking for anything out of the ordinary.

Other candidates have come before. People can talk about tens of thousands here, hundreds of thousands here. But we have gotten far more for every Supreme Court Justice that has been mentioned here, far more than just 10 percent just to scan a bit.

My colleagues talk about what our duty to the American public is. Our duty to the American public is to evaluate a candidate on their body of work, but we are not even getting released that, and why? Because some political person, not a person who holds public office, not because—I mean, it is unprecedented to think that this Committee has ceded its role to a partisan outside lawyer.

And so here we are about to go forward with just 10 percent of this person's record to evaluate, to base our questions on, to investigate. Ninety percent is being withheld. Just common sense would say that that is not fair, that is not right. It undermines our ability to do our job. It is just plain wrong.

[Disturbance in the hearing room.]

Chairman GRASSLEY. One of the Senate's most solemn constitutional duties is to provide advice and consent to the President on the nomination of Supreme Court Justices. We are here this week to hear from Brett Kavanaugh, to hear about his exceptional qualifications, his record of dedication to the rule of law, and his dem-

onstrated independence and his appreciation of the importance of the separation of powers.

Indeed, to protect individual liberty, the Framers designed a Government of three co-equal branches, strictly separating legislative, executive, and judicial powers. The Framers intended for the judiciary to be immune from the political pressures the other two face. That is so that judges would decide cases according to the law and not according to popular opinion.

Now, 230 years after ratification, our legal system is the envy of the world. It provides our people stability, predictability, protection of our rights, and equal access to justice. But this is only possible when judges are committed to the rule of law.

Our legal system's success is built on judges accepting that their role is limited to deciding cases and controversies. A good judge exercises humility and makes decisions according to the specific facts of the case and, of course, according to the law.

A good judge never—

[Disturbance in the hearing room.]

Chairman GRASSLEY. A good judge never bases decisions on his preferred policy preferences. A good judge also has courage, recognizing that we have an independent judiciary to restrain judges when that Government exceeds lawful authority.

President Andrew Jackson said, "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous judiciary."

Confirmation hearings for Supreme Court nominees are an independent—are a very important opportunity to discuss the appropriate role of judges. As I see it, and I expect many of my colleagues will agree, the role of the judge is to apply the law as written, even if the legal result is not one the judge personally likes.

Justice Scalia has often been quoted because he was fond of saying if a judge always likes the outcome of the cases he decides, he is probably doing something wrong. I do not want judges who always reach a liberal result or a conservative result. I want a judge who rules the way the law requires.

Judges must leave the lawmaking to Congress, the elected representatives of the people. Judges and Justices have lifetime appointments. They cannot be voted out of office if they legislate. Whereas if Congress legislates something that people do not like, then you can vote them out of office. That is why they are to interpret law and not make law.

Now some have a very different view of what a judge's role should be. According to this view, judges should decide cases based upon particular outcomes in order to advance their politics. But the American people do not want their judges to pick sides before they hear a case. They want a judge who rules based upon what the law commands.

This is the reason why all Supreme Court nominees since Ginsburg have declined to offer their personal opinions on the correctness of precedent. Seeking assurances from a nominee on how he will vote in certain cases or how he views certain precedent undermines judicial independence and essentially asks for a promise in exchange for a confirmation vote.

It is unfair and unethical. Indeed, what litigant could expect a fair shake if the judge has already pre-judged the case before the litigant even enters the courtroom?

I expect Judge Kavanaugh—in fact, it is my advice to him to follow the example set by Justice Ginsburg, and all the nominees that followed her, that a nominee should offer “no hints, no forecasts, no previews” on how they will vote.

Justice Kagan, when asked about *Roe v. Wade*, said the following, “I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future.”

Senators were satisfied with these answers on precedent. So Senators should be satisfied if Judge Kavanaugh answers similarly.

This is my fifteenth Supreme Court confirmation hearing since I joined the Committee in 1981. Thirty-one years ago, during my fourth Supreme Court confirmation hearing, liberal outside groups and their Senate allies engaged in an unprecedented smear campaign against Judge Robert Bork.

As Mark Pulliam said, in an op-ed over the weekend, “The borking of Robert Bork taught special interest groups that they could demonize judicial nominees based solely on their worldview. Worse, character assassination proved an effective tactic, nearly sinking Justice Clarence Thomas’ appointment 4 years later.”

But he also said, continuing to quote, “By confirming Judge Kavanaugh, the Senate can go some way toward atoning for its shameful treatment of Justice Robert Bork 31 years ago.”

Judge Kavanaugh is one of the most qualified nominees, if not the most qualified nominee that I have seen. A graduate of Yale Law School, clerking three Federal judges, including the man he is nominated to replace. He spent all but 3 years of his career in public service and has served as a judge for 12 years on the D.C. Circuit, the most influential Federal circuit court.

He has one of the most impressive records for a lower court judge in the Supreme Court. In at least a dozen separate cases, the Supreme Court adopted positions advanced by Judge Kavanaugh.

The American Bar Association, whose assessment Democratic leaders have called the “gold standard” of judicial evaluations, rated Judge Kavanaugh unanimously “well qualified.”

A review of Judge Kavanaugh’s extensive record demonstrates a deep commitment to the rule of law. He has written eloquently that both judges and Federal agencies are bound by the law Congress enacts. And he has criticized those who substitute their own judgment about what a statute should say for what the statute actually says.

After the President nominated Judge Kavanaugh, I said this would be the most thorough and transparent confirmation process in history. I say that statement even regarding all the discussion we have had this morning. It has proven to be, from Judge Kavanaugh’s authoring 307 opinions, joined hundreds more, amounting to more than 10,000 pages. He submitted 17,000 pages of speeches, articles, and other materials to the Committee, along

with his 120-page written response to the questionnaire that the Committee set out.

These add up to 27,000 pages of Judge Kavanaugh's record already available to the American people. And we received just shy of half a million pages of emails and other documents from Judge Kavanaugh's service as an executive branch lawyer, which is more than we received for the last five Supreme Court nominees. Every one of these more than 483,000 pages of executive branch records are available to any Senator, 24/7.

I pushed for Federal officials to significantly expedite the public disclosure process under Federal law, so that all Americans have online access to more than 290,000 pages of these records right now on our Committee website. In short, the American people have unprecedented access and more materials to review Judge Kavanaugh than ever have had for a Supreme Court nominee. And to support the review of Judge Kavanaugh's historic volume of material, I have worked to ensure that more Senators have access to more material than ever.

Since so much of the rest of my statement has been discussed this morning by what the Democrats have said, and I have answered a lot of it, I am going to put the last seven pages of my statement in the record.

[The prepared statement of Chairman Grassley appears as a submission for the record.]

Chairman GRASSLEY. And I am going to ask Senator Feinstein if she has more to say on her opening statement. And if she does not, I will go to Senator Hatch.

Senator FEINSTEIN. Thank you. I do, Mr. Chairman. I will probably truncate it even so.

But I think it is really important that people, as well as the Judge, the nominee, understand how strongly we feel and why we feel that way. I want to talk a little bit about one of the big decisions that we have the belief that although you told Senator Collins that you believed it was settled law, the question is, really, do you believe that it is correct law? And that is *Roe v. Wade*.

I was, in the '50s and '60s, active, but first, as a student at Stanford. I saw what happened to young women who became pregnant. And then subsequently, I sat, as an appointee of Governor Brown's, on the term-setting and paroling authority for women in California who had committed felonies. And so I sentenced women who had committed abortions to State prison and granted them paroles.

And so, came to see both sides: the terrible side, and the human and vulnerable side. And when you look at the statistics during those days, those statistics that the Guttmacher Institute has put out, are really horrendous. For you, the President that nominated you, has said, "I will nominate someone who is anti-choice and pro-gun." And we believe what he said. We cannot find the documents that absolve from that conclusion.

So what women have won through *Roe* and a host of privacy cases—to be able to control their own reproductive system, to have basic privacy rights—really extraordinarily important to this side of the aisle and I hope the other side of the aisle as well.

Last year, you drafted a dissent in *Garza v. Hargan*, and that is a case where a young women in Texas, I believe, was seeking an

abortion. In that dissent, you argued that even though the young woman had complied with the Texas parental notification law and secured an approval from a judge, she should nonetheless be barred.

In making your argument, you ignored and I believe mischaracterized a Supreme Court precedent. You reasoned that Jane Doe should not be unable to exercise her right to choose because she did not have family and friends to make her decision. The argument rewrites Supreme Court precedent and, if adopted, we believe would require courts to determine whether a young woman had a sufficient support network when making her decision, even in cases where she has gone to court.

This reason, we believe—I believe—demonstrates that you are willing to disregard precedent. And if that is the case because just saying something is settled law, it really is, is it correct law?

The impact of overturning *Roe* is much broader than a woman's right to choose. It is about protecting the most personal decisions we all make from Government intrusion. *Roe* is one in a series of cases that upheld an individual's right to decide who to marry. It is not the Government's right. Where to send your children to school. The Government cannot get involved. What kind of medical care you can receive at the end of life, as well as whether and when to have a family.

And I deeply believe that all these cases serve as a bulwark of privacy rights that protect all Americans from over-involvement of the Government in their lives. And to me, that is extraordinarily important.

Next, I would like to address the President's promise to appoint a nominee blessed by the NRA. In reviewing your judicial opinions and documents, it is pretty clear that your views go well beyond simply being pro-gun, and I would like to straighten that out.

It is my understanding that during a lecture at Notre Dame Law School, you said you would be the "first to acknowledge" that most other lower court judges have disagreed with your views on the Second Amendment. For example, in *District of Columbia v. Heller*, you wrote that unless guns were regulated either at the time of the Constitution was written or traditionally throughout history, they cannot be regulated now. In your own words, gun laws are unconstitutional unless they are "traditional or common in the United States."

You concluded that banning assault weapons is unconstitutional because they have not historically been banned. And this logic means that even as weapons become more advanced and more dangerous, they cannot be regulated. Judge Easterbrook, as you know, a conservative judge from the Seventh Circuit, concluded that that reasoning was absurd, and he pointed out that a law's existence cannot be the source of its own constitutional validity.

In fact, I am left with the fact that your reasoning is far outside the mainstream of legal thought and that it surpasses the views of Justice Scalia, who was clearly a pro-gun Justice. Even Scalia understood that weapons that are like M-16 rifles or weapons that are most useful in military service can, in fact, be regulated. And there is no question that assault weapons like the AR-15 were specifically designed to be like the M-16.

The United States makes up 4 percent of the worldwide population, but we own 42 percent of the world's guns. Since 2012, when 20 first graders and 6 school employees were killed at Sandy Hook Elementary, there have been 273 school shootings. This is an average of 5 shootings every month and a total of 462 children, teenagers, teachers, and staff shot, and 152 killed.

I care a lot about this. I authored assault weapons legislation that became law for 10 years, and I have seen the destruction. If the Supreme Court were to adopt your reasoning, I fear the number of victims would continue to grow, and citizens would be rendered powerless in enacting sensible gun laws. So this is a big part of my very honest concern.

You are being nominated for a pivotal seat. It would likely be the deciding vote on fundamental issues. So during your time in the White House when you were staff secretary, some people regard it as kind of a monitor, monitoring things going in and going out. But I think it is much more. And you yourself have said that that is the period of "my greatest growth."

And so we try to look at it, and the only way we can look at it is to understand the documents. And it is very, very difficult.

I do not want to take too much time, but we have heard a lot of noise. Behind the noise is really a very sincere belief that it is so important to keep in this country, which is multi-ethnic, multi-religious, multi-economic, a Court that really serves the people and serves this great democracy. And that is my worry. That is my worry.

So I look forward to your statement and answering the questions. Thank you, Mr. Chairman.

[The prepared statement of Senator Feinstein appears as a submission for the record.]

Chairman GRASSLEY. Senator Hatch for 10 minutes.

**OPENING STATEMENT OF HON. ORRIN G. HATCH,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Well, thank you, Mr. Chairman.

I would first like to thank you for your tremendous work in organizing this hearing. This has been the most thorough Supreme Court confirmation process that I have ever participated in. We have received more than twice as many documents for Judge Kavanaugh as for any Supreme Court nominee in history.

This is a big deal. We have tens of thousands of pages of Judge Kavanaugh's opinions, speeches, and other writings. This has been an exhaustive process, and I want to thank you for your leadership on it.

Now to our witness, Judge Kavanaugh, it is good to see you. I have known you for a long time. This is my fifteenth and final Supreme Court confirmation hearing. I participated in the confirmation of every current Justice on the Court. I have participated in the confirmation of over half of all Federal judges now serving in the Federal system or who have ever served in the Federal system.

I know a good nominee when I see one, and you are a great nominee. I do not think there is any question about it. I have known you for a long time.

I remember when you first came before this Committee back in 2004 for your first confirmation hearing. I was the Chairman of this Committee at the time. I got to know you well. I was impressed by your intellect, your legal ability, and your integrity, all of which were very much notable. At only 39 years of age, you knew more about the law than most lawyers who have practiced for a lifetime.

And you have been an outstanding judge. You have earned the respect of your colleagues, and you have earned the respect of the Supreme Court as well. As you know, the Supreme Court has adopted the positions in your opinions no less than 13 times. That is something nobody can really argue against. You have authored landmark opinions on the separation of powers, administrative law, and national security.

You served as a mentor to dozens of clerks and hundreds of law students, male and female. And some of whom did not share your philosophy. Your student reviews are off the charts favorable, even by those who may not have completely agreed with your philosophical approaches on some matters.

You volunteer in your community.

[Disturbance in the hearing room.]

Senator HATCH. Mr. Chairman, I ask for order.

Chairman GRASSLEY. Just go ahead.

Senator HATCH. You volunteer in the community. You coach youth basketball. You are the sort of person many of us would like to have as a friend and a colleague. You also apparently like to eat pasta with ketchup, but nobody is perfect.

Now this being politics and this being—this being a Supreme Court confirmation hearing, my Democratic colleagues actually—

[Disturbance in the hearing room.]

Senator HATCH. I have got to admit this is—

My Democratic colleagues can admit that you are actually a good judge and a good person as well. They have to turn the volume up to 11 and try to paint you as one of the four horsemen of the apocalypse. Anyone who actually knows you knows that is ridiculous, and the American people will see soon enough that you are a smart, decent, normal person that just so happens to have been nominated to the highest court in our land.

So here are the facts. Judge Kavanaugh is one of the most distinguished judges—

[Disturbance in the hearing room.]

Senator HATCH. Mr. Chairman, I think we ought to have this loudmouth removed. I mean, we should not have to put up with this kind of stuff. I hope she is not a law student.

Chairman GRASSLEY. I—now that we have quiet, I would like to explain that I advised 2 years ago that at my hearings I expected the police to do their job, and I expected the Committee to go on. But if you do not want to continue, we will—

Senator HATCH. I am going to continue.

Chairman GRASSLEY. Okay. Go ahead.

Senator HATCH. Okay. So here are the facts. Judge Kavanaugh is one of the distinguished judges in the entire country. He has served for over 12 years now on the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit is often referred to as the second—

[Disturbance in the hearing room.]

Senator HATCH [continuing]. Second-highest court in the land because it hears many critically important cases involving agency action and the separation of powers. During his time on the bench, Judge Kavanaugh has heard over 1,000 cases. He has written more than 300 opinions. His opinions span nearly 5,000 pages in length.

What is remarkable about Judge Kavanaugh's judicial record is not just its length, but its depth and its quality. Judge Kavanaugh has been a true thought leader. He has written powerful opinions on the separation of powers and administrative law. He has shown that he brings a fair-minded approach to questions of criminal law and employment law.

On almost every issue of consequence, Judge Kavanaugh has made a significant contribution to our Nation's jurisprudence, and he has won respect from both sides of the political spectrum. The Committee has received letters from former clerks, former colleagues, former students, and former classmates, all attesting to Judge Kavanaugh's sterling character and qualifications, some of whom are Democrats.

Eminent members of the Supreme Court bar and legal academia have all written in strong support of Judge Kavanaugh's nomination. The authors of these letters emphasize that they have different political views and that they do not agree on every subject. But to a person, they speak of Judge Kavanaugh's integrity and judgment, and they enthusiastically endorse his nomination.

I would like to highlight one letter in particular from 18 of Judge Kavanaugh's former women law clerks. That is all of his former women clerks, all of them, who were not precluded by their current or pending employment from signing the letter. They write that "Judge Kavanaugh has been one of the strongest advocates in the Federal judiciary for women lawyers." They detail the mentoring and encouragement Judge Kavanaugh has given them in their careers, and they say that is it "not an exaggeration to say that we would not be the professors, prosecutors, public officials, and appellate advocates we are today without his enthusiastic encouragement and unwavering support."

It bears emphasis that these former clerks span the political divide. A number went on to clerk for liberal Justices. That itself shows you the high regard Judge Kavanaugh has across the ideological spectrum. Republican- and Democratic-appointed judges alike have hired his former clerks.

Judge Kavanaugh is no ideologue. He is no extremist. He is a highly respected, thoughtful, fair-minded judge who is well within the judicial mainstream. Look no further than the letter the Committee received from over 40 members of the Supreme Court bar supporting Judge Kavanaugh's nomination. Among the signers are people like Lisa Blatt, Deanne Maynard, and Kathleen Sullivan. These are nationally renowned attorneys who practice frequently before the Supreme Court and the Federal courts of appeals, and they are not conservatives.

To the contrary, they are among the most prominent liberal attorneys at the bar today and in the country. But they know Judge Kavanaugh. They know his work. They know his character. And

they know that he is an outstanding judge, and they know that he will make an outstanding Justice.

If we could just get the politics out of this, I think we could all agree that Judge Kavanaugh is an indisputably qualified nominee with strong backing in the legal community who is well within the judicial mainstream. Go ask anyone who practices regularly before the Supreme Court who does not have a partisan agenda, and they will tell you Judge Kavanaugh is exactly the kind of person we should have on the Court or we should want on the Court.

Indeed, no less than Bob Bennett, Bill Clinton's personal lawyer during Clinton's Presidency, wrote to the Committee urging support for Judge Kavanaugh's nomination. Here is what he intended to say: "As a Washington attorney, I can attest to the high esteem in which the bar holds Judge Kavanaugh. Lawyers love arguing before him for good reason because they know he will approach every case with an open mind." Bennett continues, "Brett is the most qualified person any Republican President could possibly have nominated."

[Disturbance in the hearing room.]

Senator HATCH. "Were the Senate to fail to confirm Brett, it would not only mean passing up the opportunity to confirm a great jurist but would also undermine civility in politics twice over, just in playing politics with such an obviously qualified candidate and then again in losing the opportunity to put such a strong advocate for decency and civility on our Nation's highest court."

Again, this is President Clinton's personal lawyer during Clinton's Presidency who litigated against Judge Kavanaugh. Those who know Judge Kavanaugh hold him in highest regard. This is true of both Republicans and Democrats.

Unfortunately, we have all these interest groups streaming from the sidelines and putting pressure on my Democratic colleagues to make this hearing about politics, to make it about pretty much anything except Judge Kavanaugh and his qualifications. We have folks who want to run for President, who want their moment in the spotlight, who want that coveted TV clip. Frankly, I wish we could drop all of the nonsense.

Judge Kavanaugh is unquestionably qualified. He is one of the most widely respected judges in the country. He is well within the judicial mainstream. Anyone who wants to argue otherwise wants to banish half the country from the mainstream.

So, Judge, I am glad you are here today. I am sorry you are going to have to go through some of this nonsense that is about to come your way, but I hope you do it well. You are smart. You are smart, and you are a fundamentally decent, good person.

[Disturbance in the hearing room.]

Senator HATCH. Anyone who actually knows you knows that to be true. Now, Mr. Chairman, I do not know that the Committee should have to put up with this type of insolence that is going on in this room today. And frankly, these people are so out of line they should not even be allowed in the doggone room.

Now, Judge Kavanaugh, I am proud of you. I know how good you are. I know you deserve this position. I am proud of the President for nominating you, and frankly, I wish you the best because we are going to confirm you.

Chairman GRASSLEY. Out of courtesy to Ranking Member Feinstein, she wants to introduce people who are in the audience, and so she can take what time she wants right now.

Senator FEINSTEIN. Thank you. I will be very fast.

I would like to recognize Marc Morial, the president of the National Urban League; Melanie Campbell, the president and CEO of the National Coalition on Black Civic Participation; Reverend Al Sharpton, the president of National Action Network; Vanita Gupta, president and CEO, Leadership Conference of Civil and Human Rights; Derrick Johnson, president and CEO, NAACP; Sherrilyn Ifill, president, NAACP Legal Defense Fund; Kristen Clarke, president and executive director, Lawyers' Committee for Civil Rights; and Fatima Goss Graves, president and CEO, National Women's Law Center.

I would also like to recognize Fred Guttenberg, the father of Jaime, one of 17 killed in the Parkland shooting; Kelly Gregory, former Airman First Class, single mother, business owner, living with stage IV metastatic breast cancer; Sarah McBride, an advocate for LGBT rights and protections for patients; Tia Nelis, who works on behalf of people with disabilities; Angel Young, an enrolled member of the Standing Rock Lakota and a veteran; Kim Jorgensen Gane, who advocates for a woman's right to choose; Bobby Jenkins, a longtime resident of Randolph County, Georgia, and a voting rights advocate; Kerry Chen, who has been fighting for marriage benefits for same-sex couples; and Carlotta LaNier, a member of Little Rock Nine.

Thank you for this courtesy. I really appreciate it.

Chairman GRASSLEY. Thank you.

Senator Leahy.

**OPENING STATEMENT OF HON. PATRICK J. LEAHY,
A U.S. SENATOR FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman. And I was perfectly happy to yield to Senator Feinstein for that.

Mr. Chairman, the last few minutes we have heard a lot of rhetoric. I think it might serve the Committee well to have some reality. I have served in the Senate for 44 years. During that span, I have been able to vote on 19 nominations to the Supreme Court.

I mention this because I have a sense of history. Now I have never seen in that 44 years so much at stake with a single seat, but I have also never seen such a dangerous rush to fill it. President Trump promised he would only nominate judges to the Supreme Court who would overturn *Roe v. Wade*, judges who would dismantle the Affordable Care Act, judges who would reshape our judiciary.

Now if that is not judicial activism, I do not know what is. And Judge Kavanaugh, with your nomination, the President has made it very clear that he is following through on his promises, and many of us feel he is.

It seems that you may have intrigued him for another reason, your expansive view of Executive power and Executive immunity. You have taken the unorthodox position that Presidents should not be burdened with a criminal or civil investigation while in office. This is for now we have a President who has declared in the last

24 hours that the Department of Justice should not prosecute Republicans.

It is “Alice in Wonderland,” and I find it difficult to imagine that your views on this subject escaped the attention of President Trump, who seems increasingly fixated on his own ballooning legal jeopardy. When questioning you about these concerns, we will certainly look to your record on the bench. All of us, Republicans and Democrats, agree that we should.

Indeed, your 12 years on the D.C. Circuit Court of Appeals will loom large during these hearings. But the unknown looms even larger. Before sitting on the bench, you were a political operative involved in the most political and partisan controversies of our time.

During this time, you shared your personal view on contentious issues without regard to restrictions imposed by precedent or stare decisis. And it is precisely those views that are being hidden from us today. The Judiciary Committee’s Supreme Court hearings are meant to be an unsparing examination of a nominee to a lifetime appointment to our highest court.

They are intended to give the American people—all, all, all the American people a genuine opportunity to scrutinize the nominee’s judicial philosophy, beliefs, and character because if confirmed with a stroke of a pen, a nominee may impact their lives for a generation or more. And how far we have fallen. Judge Kavanaugh, there are so many things wrong with this Committee’s vetting of your record that it is hard to know where to begin.

I have been on this Committee under both Republican and Democratic leadership. I never thought the Committee would sink to this. In fact, you should not be sitting in front of us today. You should be sitting in front of us only after we have completed a review of your record. Your vetting is less than 10 percent complete.

In critical ways, our Committee is abandoning its tradition of exhaustively vetting Supreme Court nominees. First, inexplicably, my Republican friends refused to request records from your 3 years as White House staff secretary, even though you describe those as the most formative for you as a judge, when you provided advice on any issue that may cross the President’s desk.

Now we know those issues include abortion, same-sex marriage, and torture. And torture. But 6 weeks ago, Senate Republicans huddled in a private meeting with the White House Counsel who is here today, and hours later, the American people were told those records would be off limits.

And second, in a stark departure from Committee precedent, certainly the Committee precedent I have seen for 44 years, Chairman Grassley sent a partisan records request to the National Archives. Not only did it omit all 1 million records from your 3 years as staff secretary, it did not even request a privileged log.

That means this Committee is in the dark as to what specific documents are being withheld and why. We do not even know what is being hidden. Such a move is simply incompatible with transparency.

And third, the Archives told us it could not even produce this partial records request until the end of October. That is the non-partisan Archives. Surely, I would—

[Disturbance in the hearing room.]

Senator LEAHY. Mr. Chairman, I do not intend at any point to continue what I have to say with such interruptions. I do not care whose side they are on.

Now the Archives have said they could not produce this partial records request until the end of October. Surely I would think that the United States Senate could wait until then, even if it means a Supreme Court with eight Justices for a short time.

After all, Senate Republicans established a tradition of having just eight Justices. They did that with their treatment of Chief Judge Merrick Garland that showed they were willing to have patience with filling Supreme Court vacancies when the first time ever they refused to have a vote on a Supreme Court nominee either up or down during a Presidential election year. And I have been here when they have had in the past such votes.

But Republicans instead cast aside the Archives. They swapped the nonpartisan review process used for every nominee since Watergate for a partisan one. And I think you only have to look at Watergate to see why we have that nonpartisan process. It is followed by every nomination since Watergate until today, and my question still recurs. What is being hidden and why?

Every White House record that we have received was handpicked by your deputy in the Bush White House, a hyper-conflicted lawyer who also represents a half dozen Trump administration officials who are under investigation by prosecutors in the Russia investigation. And this partisan lawyer decided which of your records the Senate, but more importantly, the American people, the American people get to see.

Fourth, countless documents that have been provided to the Committee contain apparent alterations and omissions with zero explanation. No court in this country, certainly no court that I ever argued cases before would accept this as a legitimate document production, and the United States Senate should not either.

And fifth, more than 40 percent of the documents we have received, almost 190,000 pages, are considered "committee confidential" by Chairman Grassley. For the vast majority of them, there is not even a conceivable argument to restrict them.

Compare this to the mere 860 documents that were designated "committee confidential" for Justice Kagan. In that, the request was made by the nonpartisan Archives, not by this Committee, and we still had 99 percent of her records.

And six, on Friday, we learned that President Trump is claiming executive privilege over an additional 102,000 pages of your records. Such a blanket assertion of executive privilege is simply unheard of in the history of this country, and the reason it is unheard of is because it is so outrageous.

The last time a President attempted to hide a Supreme Court nominee's record by invoking executive privilege was when President Reagan did this for Justice William Rehnquist. But then Republicans and Democrats came together. We demanded the documents be released, and President Reagan said okay, and they were released. Boy, how times have changed.

And seven, to date, we have received less than half of Chairman Grassley's partial records request, meaning we are moving forward

even though we have received a fraction of the records even Republicans claim they needed to vet your nomination just a few weeks ago. And then we received an additional 42,000 pages from your record a few hours ago. The notion that anyone here has properly reviewed them or even seen them at all is laughable. It is laughable. It does not pass the giggle test.

That alone would be reason to postpone during normal times, but nothing about this is normal. All told, only 4 percent, 4 percent of your White House record has been shared with the public. Only 7 percent has been made available to this Committee. The rest remains hidden from scrutiny.

Compare this to the 99 percent of Justice Kagan's White House record that was available to all Americans as a result of the bipartisan process I ran with then-Ranking Member Jeff Sessions. When Senator Sessions and I requested it, we got 99 percent. What is being hidden and why?

And if I have not been clear, I will be so now. Today, the Senate is not simply phoning in our vetting obligation, we are discarding it. It is not only shameful. It is a sham.

I felt, on the day when I took my oath of office the first time 44 years ago, I was told by both the Republican and Democratic leadership of the Senate, people I highly respected, that the Senate should be and can be the conscience of the Nation. I represented Vermont here for 44 years. I served with pride here, believing that the Senate can be and should be the conscience of the Nation.

Today, with this hearing, it is not being the conscience of the Nation. And from the bits and pieces of your record that we have received, it appears you have provided misleading testimony about your involvement in controversial issues at the Bush White House during your previous confirmation hearing, misleading testimony. I asked you about these concerns last month, and I want to alert you that I will return to those concerns when you are under oath and I am asking you questions.

What I fear is the American people will not know the full truth until your full record is public. And unfortunately, Republicans have done their best to ensure that will not happen. So we begin these hearings with gaping holes spanning multiple years of your career that deeply influenced, by your own words, your thinking as a judge.

And any claim that this has been a thorough and transparent process is downright Orwellian. This is the most incomplete, most partisan, least transparent vetting for any Supreme Court nominee I have ever seen, and I have seen more of those than any person serving in the Senate today.

So, Judge Kavanaugh, this hearing is premature. I hope you will use it, though, to answer our questions directly, clearly, and honestly because the American people have real concerns about how your confirmation would affect their lives.

Now I will conclude with this. The Supreme Court is a guarantor of our liberties and our republic. Few, I would argue, are worthy of taking a seat. Only those with unimpeachable integrity. Only those who believe that truth is more important than party. Only those who are committed to upholding the rights of all Americans, not just those in power.

As you know, inscribed in Vermont marble above the Court's entrance are the words, "Equal justice under law." For the millions of Americans fearful that they are on the verge of losing hard-fought rights, that aspiration has never been more important than it is today. Frankly, as a member of the Supreme Court bar and as a United States Senator, I feel it has never been more at risk.

Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman GRASSLEY. Chairman Grassley. Before I call on Senator Cornyn, how ridiculous it is to say that we do not have the records that it takes to determine this person qualified to be on the Supreme Court when all the documents we have add up to more than we have had for the last five Supreme Court nominees. How did we make those decisions for those other five?

Senator BOOKER. Mr. Chairman?

Chairman GRASSLEY. Senator Cornyn.

Senator BOOKER. Mr. Chairman, if I could just respond to that point, because you are not giving the whole picture, sir. Ninety percent of the documents we have not seen. It is not the number of documents.

Chairman GRASSLEY. And I will be glad to respond to that, but I—

Senator BOOKER. We would not hire an intern, sir, without 90 percent of their résumé.

Chairman GRASSLEY. Senator—

Senator BOOKER. We are putting somebody on the Supreme Court.

Chairman GRASSLEY. Senator Cornyn. Senator Cornyn.

**OPENING STATEMENT OF HON. JOHN CORNYN,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

Judge Kavanaugh, welcome to you and your family and friends. I am amazed at the poker faces I have seen on the front row during all of this pandemonium, unlike anything I have seen before in a confirmation hearing.

In my view, it is not because your opponents do not know enough about you. It is because they do know all they need to know, apparently, to oppose your nomination. And even before you have had a chance to answer our questions, including their questions, many of them have made up their minds. But the American people have not been introduced to you before. This is an opportunity for all of us to engage in a question-and-answer format that will hopefully illuminate why it is so important to have judges who actually are tethered to the text of the laws passed by Congress, signed by the President, as well as the Constitution of the United States.

The Senate Judiciary Committee undertakes few more important tasks than the one before us today. Last year, the Committee considered and advanced the nomination of Justice Neil Gorsuch, who was just one of many outstanding judicial nominees by President Trump. This Congress has proudly confirmed not just Judge Gorsuch but 26 judges to the appellate courts across the Nation.

This includes three outstanding Texans to the Fifth Circuit Court of Appeals.

Historically, the confirmation of judges to our highest courts was somewhat routine. Routine. Justice Gorsuch was unanimously confirmed by a simple voice vote to the Court of Appeals. Not one Senator voted against Justice Kennedy who both you and Justice Gorsuch clerked for and who you will succeed on the Court. Not one Senator voted against Justice Scalia's confirmation, who you have called a "role model" and a "hero."

But that was before judges were viewed as policymakers rather than fair and neutral interpreters of the Constitution and the laws drafted by Congress. Today, as I suggested, is a wonderful opportunity to re-examine the proper role for judges under our Constitution and the difference between legislators and judges.

As Justice Gorsuch wrote before he joined the Supreme Court: "Upholding and enforcing this distinction between legislators and judges was the great project of the late Justice Scalia's career. Justice Scalia would always remind us that legislators may appeal to their own moral convictions and to claims about social utility. But judges instead should strive to apply the law as it is, looking to the text, structure, and history, not to decide cases based on their own moral convictions or the policy consequences."

[Disturbance in the hearing room.]

Senator CORNYN. So this hearing is an outstanding way to remind the American people the proper role of judges under our Constitution. Our Constitution provides for a Federal Government of limited and delegated powers with a Bill of Rights to further protect our individual liberties.

To that end, the Framers—

[Disturbance in the hearing room.]

Senator CORNYN [continuing]. Created three coequal branches, as you know: the legislature to enact laws, the executive to enforce them, and the judicial branch to settle disputes about the meaning of those laws and the Constitution.

[Disturbance in the hearing room.]

Senator CORNYN. Of course, the legislature could change the laws, but only an amendment can change the Constitution. For this reason, Alexander Hamilton wrote in the Federalist Papers—

[Disturbance in the hearing room.]

Senator CORNYN. Mr. Chairman, could I pause there until the room is cleared?

Chairman GRASSLEY. Yes.

Senator CORNYN. Thank you.

For this reason, Alexander Hamilton wrote in the Federalist Papers that the judiciary will always be the least dangerous branch because, as he famously wrote, "judges would have neither force nor will but merely judgment."

Today the Judiciary Committee is gathered to consider whether Judge Kavanaugh will honor that limited role for judges under our Constitution and whether he will properly exercise the modest and humble power of judgment entrusted to him under our Constitution.

I am confident that the Senate will find that Judge Kavanaugh will faithfully and fairly interpret the Constitution and the laws of

this great Nation, and I look forward to him succeeding Justice Kennedy. One reason for that is because I have been acquainted with Judge Kavanaugh for about 18 years and I can personally attest to his skills as a lawyer.

[Disturbance in the hearing room.]

Senator CORNYN. When I was Attorney General of Texas, as the Judge will recall, he helped me get ready for a Supreme Court argument.

[Disturbance in the hearing room.]

Senator CORNYN. May I proceed, Mr. Chairman?

Chairman GRASSLEY. Yes.

Senator CORNYN. As I was saying—

[Disturbance in the hearing room.]

Senator CORNYN [continuing]. When I was Attorney General of Texas, I had a chance to argue a couple of cases in front of the United States Supreme Court. One case Judge Kavanaugh helped me prepare for was one involving the question of school prayer at a high school football game at the Santa Fe Independent School District High School.

After that, I was pleased to introduce Judge Kavanaugh to the Judiciary Committee when President Bush first nominated him to be a judge on the D.C. Circuit. What I said back then still stands the test of time today. Judge Kavanaugh has an unparalleled academic and professional record of service. Many will cite his education, his clerkships, his time arguing cases before the court, his experience working for the executive branch. But I think one of the most important factors to me is he has already exercised excellent judgment in marrying a Texan, Ashley, from Abilene. So I know he is a good judge. In fact, Judge Kavanaugh is one of the most respected and thoughtful judges in the country.

I am disappointed that, despite his exemplary qualifications and outstanding record, so many of our colleagues across the aisle have announced their opposition even before he was nominated.

[Disturbance in the hearing room.]

Senator CORNYN. The level of disingenuousness and hyperbole even by today's standards is extraordinary. Members from the other side of the aisle, including some who serve on this Committee, have claimed that confirming Judge Kavanaugh would somehow be complicit in evil and result in the destruction of the Constitution. Some have even claimed that you testified falsely—we have already heard that alluded to—before the Committee when you were serving our country in the Bush White House.

[Disturbance in the hearing room.]

Senator CORNYN. I hope you will have a chance to explain the apparent misunderstanding on the part of some Senators. And I sincerely hope this week we can all take a deep breath—we are not doing very well so far—

[Laughter.]

Senator CORNYN [continuing]. And get a grip and treat this process with the respect and gravity it demands.

As others have alluded, the American Bar Association, which some have called the “gold standard” for judicial evaluations, have unanimously rated you as “well qualified” for service on the Supreme Court. And as we have heard, a number of lawyers and

judges across the spectrum have talked about your qualifications and sung your praises. And I am confident at the end of this hearing your stellar credentials and your body of work as a judge will demonstrate that you properly understand the role of a judge under the Constitution, and I am confident you will demonstrate that you will faithfully and fairly interpret the text of the law and the Constitution and dutifully apply them to the disputes that come before you.

Finally, Judge, I expect we will have a conversation or two about this book which you contributed to and the law of judicial precedent because I know that there is a number of questions by Members of the Senate about how you will regard previously decided cases in the Supreme Court. And I trust you will give us a scholarly and detailed explanation of that and demonstrate that many of the concerns that have been expressed about a new Justice coming on the Court somehow wiping away previous decisions single-handedly, not even with the help of other members of the Court, is just plain ridiculous. And we look forward to asking those questions and getting your answers.

Thank you very much.

Chairman GRASSLEY. Senator Durbin.

**OPENING STATEMENT OF HON. RICHARD J. DURBIN,
A U.S. SENATOR FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you, Mr. Chairman.

Judge Kavanaugh, it is good to see you again. I thank the members of your family who are weathering this hearing. Thank you very much for being here today.

This is a different hearing for the Supreme Court than I have ever been through. It is different in what has happened in this room just this morning. What we have heard is the noise of democracy. This is what happens in a free country when people can stand up and speak and not be jailed, imprisoned, tortured, or killed because of it. It is not mob rule.

There have been times when it is uncomfortable, and I am sure it was for your children. I hope you can explain this to them at some point. But it does represent what we are about in this democracy.

Why is this happening for the first time in the history of this Committee? I think we need to be honest about why it is happening. I think it is the same reason why when I go home to Illinois, after being in this public service job for over 30 years, I hear a question that I have never, ever heard before, repeatedly, as people pull me off to the side and say, "Senator, are we going to be all right? Is America going to be all right?" They are genuinely concerned about the future of this country.

You come to this moment of history in a rare situation. You are aspiring to be the most decisive vote on the Supreme Court on critical issues. Justice Kennedy did that for 12 years, and you are called to that responsibility, and we realize the gravity of that opportunity and that responsibility.

Second, of course, your record and the statements of others suggest there is real genuine concern about changing life-and-death values in this country because you see things differently. We have

heard that over and over again, and I think you must understand the depth of feeling about that possibility.

And, third, try as they might, I am afraid the Majority just cannot get beyond the fact that there are parts of your public life that they want to conceal. They do not want America to see them. I think that is a serious mistake, and I am going to make a suggestion at the end of my remarks.

But over and above all of those things is this: You are the nominee of President Donald John Trump. This is a President who has shown us consistently that he is contemptuous of the rule of law. He has said and done things as President which we have never seen before in our history. He has dismissed the head of the Federal Bureau of Investigation when he would not bend to his will. He harasses and threatens his own Attorney General on almost a daily basis in the exercise of his office. And I did not vote for Jeff Sessions, but I have to tell you, there should be some respect at least for the office that he serves in. And it is that President who has decided you are his man; you are the person he wants on the Supreme Court; you are his personal choice.

So, are people nervous about this? Are they concerned about it? Of course, they are. I am sure there will be a shower of Tweets sometime later in the day harassing people in the Cabinet, people in the White House, maybe even dismissing them. And maybe he will go after me again. Be my guest.

But the point I am getting to is if you wonder why this reaction is taking place, it is because what is happening in this country. There are many of us who are concerned about the future of this country and the future of democracy, and you are asking for a lifetime appointment to the highest court in the land where you will make decisions, the deciding vote on things that will decide the course of history and where we are headed.

The Senate has a constitutional responsibility to evaluate your nomination. We do know that before you became a judge, you were faithfully advancing the Republican Party agenda. I jokingly said in one of your previous appearances that you are like the Forrest Gump of Republican politics. You always show up in the picture. Whether it is the Ken Starr investigation, *Bush v. Gore*, the Bush White House, you have been there.

We also know that before naming you, President Trump made it clear that he would appoint Justices—only appoint Justices to the Supreme Court who would overturn *Roe v. Wade* and the Affordable Care Act. Those were his litmus tests.

Now, he did not ask you the question. What he did was to delegate this responsibility to two special interest groups: the Federalist Society and the Heritage Foundation. And the other groups that are spending millions of dollars in support of your candidacy, they are confident that you are going to favor the interests of corporations over workers and give the President wide berth when it comes to Executive authority.

And your own law clerks, men and women you chose, men and women who wrote the words that had your signature at the bottom of the page, have told us what they think of you. One wrote in an article entitled, "Brett Kavanaugh said Obamacare was unprecedented and unlawful." That is from one of your clerks.

Another wrote, when it comes to “enforcing restrictions on abortion, no court of appeals judge in the Nation has a stronger, more consistent record than Judge Brett Kavanaugh.”

Big corporate interests, solidly behind your nomination. Chamber of Commerce, full support. And President Trump, whose lawyers say they will fight any effort to subpoena or indict him all the way to the Supreme Court, that President seems personally eager to have you confirmed as quickly as possible.

Why are your supporters so confident you will rule on these issues as they wish? Why do they think you are such a sure bet to take their side when, in the words of one of your former clerks, “This is no time for a gamble.”

Unfortunately, I do not think you are going to tell us much this week. It is interesting to me that people in your position write all these law review articles, make all these speeches, and come to this room and clam up, do not want to talk about any issues. But that is what I expect.

Instead, we will be asked to trust that, if you are confirmed, you will have an open mind, that you will follow the law rather than move the law in the direction of your views. I would like to trust you, but I agree with President Ronald Reagan: Trust, but verify.

I wanted to trust you the last time you testified before this Committee in 2006, but after you were confirmed to the D.C. Circuit, reports surfaced that contradicted your sworn testimony before this Committee. You said to me unambiguously under oath the following: “I was not involved and am not involved in the questions about the rules governing detention of combatants.”

But later, just a week or so ago, you acknowledged in my office that you were involved. For 12 years, you could have apologized and corrected this record, but you never did. Instead, you and your supporters have argued we should ignore that simple declarative sentence which you spoke and somehow conclude your words mean something far different. You are a committed textualist, Judge Kavanaugh. If you are going to hold others accountable for their words, you should be held accountable for your own words.

So after my personal experience, I start these hearings with a question about your credibility as a witness. I know from my history with you that things you said need to be carefully verified.

That brings us to a major problem. I will not retread the ground about all the documents that are being withheld, but I will show you a little calendar here that is interesting. There is a 35-month black hole in your White House career where we have been denied access to any and all documents. Thirty-five months in the White House. And I asked you in my office, during that period of time, President Bush was considering same-sex marriage, an amendment to ban it; abortion; Executive power; detainees; torture; Supreme Court nominees; warrantless wiretapping.

One of these issues bears special mention as we mourn the passing of John McCain. In 2004 and 2005, I joined John McCain when he led the effort to pass an amendment affirming that torture and cruel and inhuman and degrading treatment would be illegal in America. As a survivor of unspeakable torture, John McCain spoke with powerful moral authority about American values during the

time of war. You were in the Bush White House when that McCain Amendment passed.

The Bush administration did everything in its power to stop John McCain's Torture Amendment. Then after we passed it 90–9, a veto-proof margin, President Bush issued a signing statement asserting his right to ignore the law that John McCain had just passed in Congress. When we met in my office, you acknowledged that you worked on that signing statement. Yet we have been denied any documents disclosing your role or your advice to President Bush.

I asked you if you wrote, edited, or approved documents about these and other issues while you were staff secretary. Time and again you said, “I cannot rule it out.”

Judge Kavanaugh, America needs to see those documents. We cannot carefully review, advise, and decide whether to consent to your nomination without clarity on the record. The period of time when you worked in the Republican White House led to a change in position on an issue which we have to address directly. Your views on Executive power and accountability have changed dramatically. When you worked for Special Counsel Ken Starr in the late 1990s, you called him “an American hero” for investigating President Bill Clinton, and you personally urged Starr to be aggressive, confrontational, and even graphic in his questions. We have seen your memo on that one.

But a few years later, after working in a Republican White House, you totally reversed your position and argued the President should be above the law and granted a free pass from criminal investigation while in office. What did you see in that Bush White House that dramatically changed your view? What are your views about Presidential accountability today?

Judge Kavanaugh, at this moment in our Nation's history, with authoritarian forces threatening our democracy, with the campaign and administration of this President under Federal criminal investigation, we need a direct, credible answer from you. Is this President or any President above the law? Equally important, can this President ignore the Constitution in the exercise of his authority?

You dissented in the *Seven-Sky* case when the D.C. Circuit upheld the Affordable Care Act's constitutionality. You criticized a law, a law which this President has said many times he wants to ignore and abolish, and you said, “The President may decline to enforce a statute that regulates private individuals when the President deems”—“when the President deems”—“the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

This statement by you flies in the face of *Marbury v. Madison*, our North Star on the separation of powers. It gives license to this President, Donald John Trump, or any President who chooses to ignore the Constitution to assert authority far beyond that envisioned by our Founding Fathers.

There are many people who are watching carefully. I am going to make a suggestion to you today, and it will not be popular on the other side of the aisle. If you believe that your public record is one that you can stand behind and defend, I hope that at the end of this you will ask this Committee to suspend until we are

given all the documents, until we have the time to review them, and then we resume this hearing. What I am saying to you is basically this: If you will trust the American people, they will trust you. But if your effort today continues to conceal and hide documents, it raises a suspicion.

I will close Mr. Chairman. I know you are anxious. When I was a practicing lawyer a long time ago in trial and the other side either destroyed or concealed evidence, I knew that I was going to be able to have a convincing argument to close that case. What were they hiding? Why will they not let you see the speed tape on that train or the documents that they just cannot find? You know that presumption now is against you because of all the documents that have been held back.

For the sake of this Nation, for the sanctity of the Constitution that we both honor, step up. Ask this meeting, this gathering, to suspend until all the documents of your public career are there for the American people to see.

Thank you, Mr. Chairman.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman GRASSLEY. Senator Lee.

**OPENING STATEMENT OF HON. MICHAEL S. LEE,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator LEE. Thank you, Mr. Chairman. Thank you, Judge Kavanaugh. And thank you also, Ashley and Margaret and Liza, for being here.

I want to start by saying that the fact that there is so much angst over a single nominee, a single judicial nominee, tells you everything you need to know about why it is that we need judges now more than ever who are willing to read the law and interpret it based on what the law says rather than on the basis of something else.

It also tells you more than anything else you could need to know about the need to restore a discussion of civics in this country, to restore a discussion about federalism and separation of powers, about where power is concentrated and where it should not be, and what the role of each branch of the Federal Government is and is not.

Many of the comments, many of the outbursts that we have had today suggest that we need to return to some of those fundamental principles, and I do not care whether you are a liberal Democrat or a conservative Republican or something in between. These principles apply. They are principles to which we have sworn an oath, and they are principles that I think we would do well to restore and focus on once again. If ever we are to return to an era of civility, we will return to that era on the basis of those foundational, structural principles within our Constitution.

Over the next few days, Judge Kavanaugh, a number of Members of this Committee are going to ask you questions, questions about cases that you have handled as a lawyer, cases that you have decided as a judge, about your record, about your qualifications.

Well, on that point about your record and your qualifications, the suggestion that you misled this Committee at any point in your

previous hearings is absurd, and the absurdity of that suggestion will be borne out in the coming days. I am certain of it.

Some of the questions that will be asked of you will, in fact, be fair, and others will be unfair, and I think it is important for us to acknowledge that at the outset.

When you look back at history, answering these kinds of questions, this is sort of how the practice of holding these hearings began, so that Senators could ask nominees how they might vote, how they might rule in particular cases. But this did not always happen. In fact, it was not until 1916 that this even started. You see, there have been 113 Justices confirmed to the Supreme Court so far. The first 66 were confirmed without even holding a hearing. The idea of a hearing is relatively new. It is about 102 years old. We went for between 125 and 130 years under our constitutional republic without ever having a hearing. But, regardless, we started having hearings just over a century ago.

The very first Supreme Court confirmation hearing occurred in 1916 with Justice Louis Brandeis. After Louis Brandeis was nominated to the Court, some called for a hearing. Now, if we are honest with ourselves, if we are honest about history, I think a lot of this maybe had to do with some anti-Semitic fervor and the fact that Justice Brandeis was Jewish. But Senators also wanted to determine whether Brandeis would use his seat on the Supreme Court to advocate for some of the things that he had advocated for as a private citizen, as a public interest attorney. They wanted to know how he might vote in particular cases. They did not ask Justice Brandeis to testify, significantly, but they did, in fact, ask some outside witnesses what they thought about his nomination.

The next important moment, one could argue, occurred in 1939 when Felix Frankfurter became the first nominee to himself testify before the Committee. At the time Frankfurter was controversial in part because he was born overseas, but Senators also worried that Frankfurter was a radical based on his defense of anarchists in court. So, again, Senators wanted assurances about how Frankfurter might rule in particular cases, in particular what results he might reach in a particular type of case. Frankfurter, however, significantly, declined to engage with Senators on those topics and insisted that his public record spoke for itself.

Justice Stewart's nomination in 1959 was another turning point. Senators seeking to resist *Brown v. Board of Education* wanted to grill Stewart on his views on integration. Others still wanted to grill Stewart about his views on national security. So Senators turned up the heat a little bit more in that hearing. Like Frankfurter before him, Justice Stewart did not provide substantive answers to their questions. When they wanted to know how he might rule in particular cases, he appropriately declined, just as his predecessors had.

Twenty-eight years later, 28 years after Justice Stewart came through this Committee, the Senate considered Robert Bork's nomination to the Supreme Court. This was another significant turning point and, in my view, remains something of a rock-bottom moment for the Senate and for the Senate Judiciary Committee. Without getting into any of the gory details here, I think it suffices to say that Senator Ted Kennedy and Judge Bork did not agree on certain

matters of constitutional law. And Kennedy's response was to savage—unfairly, in my opinion—the results that Judge Bork would reach if confirmed to the Supreme Court.

History shows that over the better part of a century the Judiciary Committee has gradually created something of a new norm, a norm in which Members demand that nominees speak about specific cases in return for favorable treatment from the Committee as the jurists are going through this process.

Now, nominees for the most part have gracefully resisted trading confirmation in exchange for promises about how they might vote in particular cases brought before them. To give two famous examples, Justice Scalia refused to say whether *Marbury v. Madison* was settled law on the ground that it could come before him. And, sure enough, last term, in *Ortiz v. United States*, the Supreme Court considered a case implicating the scope of *Marbury*. Likewise, Justice Ruth Bader Ginsburg created the so-called, “Ginsburg standard”: no previews, no forecasts, no hints. Every current member of the Supreme Court has adhered to a similar principle, what we might call the “Ginsburg standard.” Even though nominees have not caved to the pressure, I still believe that there are some aspects of the Senate's approach here that might do a disservice to the country and might be frowned upon by future historians.

If Senators repeatedly ask nominees about outcomes, then the public will be more entitled or at least more inclined to think that judges are supposed to be outcome-minded, that that is supposed to be their whole approach to judging, that that is supposed to be what judging is, in fact, about. But this, of course, undermines the very legitimacy of the courts themselves, the very legitimacy of the tribunal you have been nominated by the President to serve on. Over time, no free people would accept a judiciary that simply imposes its own policy preferences on the country absent fidelity to legal principle.

There is a better way for the Senate to approach its work. This process, in my opinion, should be about your qualifications, about your character, and perhaps most importantly, about your approach to judging, your own view about the role of the Federal judiciary. It should not be about results in a select number of cases.

Now, you are obviously exceptionally well qualified. Even your staunchest critics would not claim otherwise—your academic pedigree, your experience as a practicing lawyer, your experience in Government, and your 12 years' experience sitting on what many refer to as the “second highest court in the land,” the U.S. Court of Appeals for the D.C. Circuit.

You are independent. You have written that, “Some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law.” You have said that judges cannot be buffaloed, influenced, or pressured into worrying too much about transient popularity when we are trying to decide a case, and that one of the most important duties of a judge is to stand up for the unpopular party who has the correct position.

And you have lived up to your words during your time on the bench. Everyone knows that you served in the Bush administration, and yet when you became a judge, in only 2 years you ruled

against the Bush administration a total of eight times. For you, it simply does not matter who the parties are. It simply does not matter that you may have worked for an administration before you became a judge. The only thing that matters is your commitment to correctly applying the law to the facts of any particular case.

As far as your approach to judging, you have appropriate respect for precedent. You have co-authored an 800-page book on precedent that, among other things, explains that a change in a court's membership alone should not throw former decisions open to reconsideration or justify their reversal.

You have explained that for precedent to be overruled, it must not be just wrong but a case with serious practical consequences. You voted to overturn Circuit precedent only four times during your time on the D.C. Circuit, and each of those cases involved a unanimous decision reached by your colleagues. And you follow binding precedent even if you believe that binding precedent was itself wrongly decided.

You decide cases based on legal merits, not based on the identity of the parties, and certainly not based on any political beliefs that you may harbor. We have already heard that your nomination will somehow be bad for women, for the environment, for labor unions, for civil rights, for a whole host of other things that Americans hold near and dear. I have a laundry list of cases in which you have ruled for people in each of those groups.

But there is a more fundamental point here that I think needs to be made. The judiciary's decisions are legitimate only to the extent that they are based on sound legal principle and reasoning, and ruling for a preferred party is not itself a sound legal principle. It is quite to the contrary. Jury-rigging decisions and backfilling legal reasoning to reach a particular result, a particularly politically acceptable result in a particular case, no matter how desirable that result might be in any instance, is not a legitimate mode of judicial decisionmaking. And no free people purporting to have an independent judiciary should ever be willing to settle for that.

So my plea to my colleagues today is that we ask Judge Kavanaugh hard questions. I believe we are required to do so. The Senate is not and never should be a rubber stamp, particularly when it comes to issuing lifetime appointments, even lifetime appointments on the highest court in the land.

But if you disagree with an opinion he has written, make a legal argument as to that issue. Explain why you think it is wrong. Do not complain about the results as if the result itself is proof that he is wrong, when you separate out the result from the legal analysis, from the facts and how they interact with the law in that particular case. And do not ask him to make promises about outcomes in particular cases. If it is unacceptable for the President to impose a litmus test, it is surely unacceptable for the United States Senate to do so.

Judge Kavanaugh, I look forward to your testimony, and I am grateful to you and your willingness to serve our country and to be considered for this important role.

Thank you, Mr. Chairman.

[The prepared statement of Senator Lee appears as a submission for the record.]

Chairman GRASSLEY. Senator Whitehouse.

**OPENING STATEMENT OF HON. SHELDON WHITEHOUSE,
A U.S. SENATOR FROM THE STATE OF RHODE ISLAND**

Senator WHITEHOUSE. Thank you, Mr. Chairman.

When is pattern evidence of bias? In court, pattern is evidence of bias all the time, evidence on which juries and trial judges rely to show discriminatory intent, to show a common scheme, to show bias.

When does a pattern prove bias? I wish this were an idle question. It is relevant to the pattern of the Roberts' Court when its Republican Majority goes off on partisan excursions through the civil law. That is, when all five Republican appointees—the “Roberts Five,” we can call them—go riding off together and no Democratic appointee joins them.

Does this happen often? The Roberts Five has gone on almost 80 of these partisan excursions since Roberts became Chief. That is a lot of times. And there is a feature to these 80 cases. They almost all implicate interests important to the big funders and influencers of the Republican Party. When the Republican Justices go off on these five-Justice partisan excursions, there is a big Republican corporate or partisan interest involved 92 percent of the time.

The tiny handful of these cases that do not implicate an interest of the big Republican influencers is so flukishly few that we can set them aside. Let us look at the 73 cases that all implicate a major Republican Party interest. Again, 73 is a lot of cases at the Supreme Court.

Is there a pattern to these 73 cases? Oh, yes, there is. Every time a big Republican corporate or partisan interest is involved, the big Republican interest wins. Every time.

Let me repeat. In 73 partisan decisions where there is a big Republican interest at stake, the big Republican interest wins every damned time. Thus, the mad scramble of big Republican interest groups to protect a Roberts Five that will reliably give them wins, really big wins sometimes.

I note that when the Roberts Five saddles up, these so-called conservatives are anything but judicially conservative. They readily overturn precedent, toss out statutes passed by wide bipartisan margins, and decide on broad constitutional issues that they need not reach. Modesty, originalism, stare decisis—all these supposedly conservative judicial principles all have the hoofprints of the Roberts Five all across their backs wherever those principles got in the way of those wins for the big Republican interests.

The litany of Roberts Five decisions explains why big Republican interests want Judge Kavanaugh on the Court so badly—so badly that Republicans trampled so much Senate precedent to push him through.

So let us review the highlights reel. What do big Republican interests want?

Well, first, they want to win elections. What has the Roberts Five delivered? Help Republicans gerrymander elections. *Vieth v. Jubelirer*, 5-to-4, license to gerrymander.

Help Republicans keep minority voters away from the polls. *Shelby County*, 5-to-4, and *Bartlett v. Strickland*, 5-to-4, and *Abbott*

v. Perez, 5–to–4, despite the trial judge finding the Texas Legislature actually intended to target and suppress minority voters.

And the big one, help corporate front-group money flood elections. Big money interests love unlimited power to buy elections, lobby, and threaten and bully Congress. *McCutcheon*, 5–to–4, counting the concurrence; *Bullock*, 5–to–4; and the infamous, grotesque 5–to–4 *Citizens United* decision, which I believe stands beside *Lochner* on the Court’s “roll of shame.”

What else do big influencers want? To get out of courtrooms. Big influencers hate courtrooms because their lobbying and electioneering and threatening does not work, or at least it is not supposed to. In a courtroom, big influencers, used to getting their way, have to suffer the indignity of equal treatment. So the Roberts Five protects corporations from group class action lawsuits: *Wal-Mart v. Dukes*, 5–to–4; *Comcast*, 5–to–4; and this past term, *Epic Systems*, 5–to–4.

The Roberts Five helps corporations steer customers and workers away from courtrooms and into mandatory arbitration: *Concepcion*, *Italian Colors*, and *Rent-A-Center*, all Roberts Five. *Epic Systems* does double duty here because now workers cannot even arbitrate their claims as a group.

Hindering access to the courthouse for plaintiffs generally, *Iqbal*, 5–to–4. Protecting corporations from being taken to court by employees harmed through pay discrimination, *Ledbetter*, 5–to–4. Age discrimination, *Gross*, 5–to–4. Harassment, *Vance*, 5–to–4. And retaliation, *Nassar*, 5–to–4. Even insulating corporations from liability for international human rights violations, *Jesner*, 5–to–4.

Corporations are not in the Constitution. Juries are. Indeed, courtroom juries are the one element of American Government designed to protect people against encroachments by private wealth and power. So, of course, the Roberts Five rules for wealthy, powerful corporations over jury rights every time, with nary a mention of the Seventh Amendment.

What is another one? Oh, yes, a classic—helping big business bust unions: *Harris v. Quinn*, 5–to–4, and *Janus v. AFSCME* this year, 5–to–4, overturning a 40-year precedent.

Lots of big Republican influencers are polluters who like to pollute for free. So the Roberts Five delivers partisan decisions that let corporate polluters pollute. To pick a few, *Rapanos*, weakening wetland protections, 5–to–4; *National Association of Home Builders*, weakening protections for endangered species, 5–to–4; *Michigan v. EPA*, helping air polluters, 5–to–4; and in the face of emerging climate havoc, there is the procedurally aberrant 5–to–4 partisan decision to stop the EPA Clean Power Plan. Pattern.

Then come Roberts Five bonus decisions advancing a far-right social agenda: *Gonzales v. Carhart*, upholding restrictive abortion laws; *Hobby Lobby*, granting corporations religion rights over the healthcare rights of their employees; *NIFLA*, letting States deny women truthful information about their reproductive choices. All 5–to–4. All Republican.

Add *Heller* and *McDonald*, which reanimated for the gun industry a theory a former Chief Justice once called a “fraud,” both decisions, 5–to–4.

This year, *Trump v. Hawaii*, 5-to-4, rubberstamping the Muslim travel ban. And in case Wall Street was feeling left out, helping insulate investment bankers from fraud claims, *Janus Capital*, 5-to-4.

Pattern.

No wonder the American people feel the game is rigged. Here is how the game works. Big business and partisan groups fund the Federalist Society, which picked Gorsuch and now, you. As the White House Counsel admitted, they insourced the Federalist Society for this selection. Exactly how the nominees were picked and who was in the room where it happened and who had a vote or a veto and what was said or promised, that is all a deep, dark secret.

Then big business and partisan groups fund the Judicial Crisis Network, which runs dark money political campaigns to influence Senators in confirmation votes, as they have done for Gorsuch and now, for you. Who pays millions of dollars for that and what their expectations are is a deep, dark secret.

These groups also fund Republican election campaigns with dark money and keep the identity of big donors a deep, dark secret. And, of course, 90 percent of your documents are to us a deep, dark secret.

Then once the nominee is on the Court, the same business front groups with ties to the Koch brothers and other funders of the Republican political machine file friend-of-the-court or amicus briefs to signal their wishes to the Roberts Five. Who is really behind those friends is another deep, dark secret.

It has gotten so weird that Republican Justices now even send hints back to big business interests about how they would like to help them next, and then big business lawyers rush out to lose cases—to lose cases—just to rush up before the friendly court pronto. That is what happened in the *Friedrichs-Janus* episode.

The U.S. Chamber of Commerce is the biggest corporate lobby of them all, for big coal, big oil, big tobacco, big pharma, big guns, you name it. And this year, with Justice Gorsuch riding with the Roberts Five, the Chamber won nine out of 10 cases it weighed in on. The Roberts Five, since 2006, has given the Chamber more than three-quarters of their total votes. This year, in all civil cases they voted for the Chamber's position fully 90 percent of the time, and in these 5-to-4 cases I have highlighted, 100 percent.

People are noticing. Veteran court watchers like Jeffrey Toobin, Linda Greenhouse, and Norm Ornstein describe the Court's service to Republican interests. Toobin wrote that on the Supreme Court, Roberts has "served the interests of the contemporary Republican Party." Greenhouse has said the "Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda." Ornstein described the new reality of today's Supreme Court: it is "polarized along partisan lines in a way that parallels other political institutions and the rest of society in a fashion we have never seen."

And the American public knows it, too. The American public thinks the Supreme Court treats corporations more favorably than individuals—compared to vice-versa—by a 7-to-1 margin; 49 percent of Americans think corporations get special treatment there.

Now let us look at where you fit in. A Republican political operative your whole career who has never tried a case. You made your political bones helping the salacious prosecution of President Clinton and leaking prosecution information to the press. As an operative in the Second Bush White House, you cultivated relationships with political insiders like nomination guru Leonard Leo, the Federalist Society architect of your Court nominations.

On the D.C. Circuit, you gave more than 50 speeches to the Federalist Society. That looks like auditioning.

On the D.C. Circuit, you showed your readiness to join the Roberts Five with big political wins for Republican and corporate interests, unleashing special interest money into elections, protecting corporations from liability, helping polluters pollute, striking down commonsense gun regulations, keeping injured plaintiffs out of court against corporations, and perhaps most important for the current occupant of the Oval Office, expounding a nearly limitless vision of Presidential immunity from the law.

Your alignment with right-wing groups who came before you as friends of the court, 91 percent. When big business trade associations weighed in, 76 percent. This, to me, is what corporate capture of the courts looks like.

There are big expectations for you. The shadowy dark money front group, the Judicial Crisis Network, is spending tens of millions in dark money to push for your confirmation. They clearly have big expectations about how you will rule on dark money.

The NRA has poured millions into your confirmation, promising their members that you will break the tie. They clearly have big expectations on how you will vote on guns.

White House Counsel Don McGahn admitted, "There is a coherent plan here where, actually, the judicial selection and the deregulatory effort are really the flip side of the same coin." Big polluters clearly have big expectations for you on their deregulatory effort.

Finally, you come before us nominated by a President named in open court as directing criminal activity and a subject of ongoing criminal investigation. You displayed expansive views on Executive immunity from the law. If you are in that seat, sir, because the White House has big expectations that you will protect the President from the due process of law, that should give every Senator pause.

Tomorrow we will hear a lot of confirmation etiquette. It is mostly a sham. You know the game. In the Bush White House, you coached judicial nominees to just tell Senators that they have "a commitment to follow Supreme Court precedent, that they will adhere to statutory text, that they have on ideological agenda." Fairy tales.

At his hearing, Justice Roberts famously said he would just call balls and strikes, but this pattern, 73-0, of the Roberts Five qualifies him to have NASCAR-style corporate badges on his robes.

Alito said in his hearing what a strong principle *stare decisis* was, an important limitation on the Court. Then he told the Federalist Society, "*Stare decisis* means to leave things decided when it suits our purposes."

Gorsuch delivered the key fifth vote in the precedent-busting and union-busting *Janus* decision. He, too, had pledged in his hearing

to follow the law of judicial precedent, assured us he was not a philosopher king, and promised to give equal concern to every person, poor or rich, mighty or meek. How did that turn out? Great for the rich and mighty. Gorsuch is the single most corporate-friendly Justice on a Court already full of them, ruling for big business interests in over 70 percent of cases and in every single case where his vote was determinative.

The President early on assured evangelicals his Supreme Court picks would attack *Roe v. Wade*. Despite confirmation etiquette assurances about precedent, your own words make clear you do not really believe *Roe v. Wade* is settled law since the Court, as you said, “can always overrule its precedent.”

Mr. Chairman, we have seen this movie before. We know how it ends. The sad fact is that there is no consequence for telling the Committee fairy tales about stare decisis and then riding off with the Roberts Five, trampling across whatever precedent gets in the way of letting those big Republican interests keep winning 5–to–4 partisan decisions, 73–0, Mr. Kavanaugh, every damned time.

Thank you, Mr. Chairman.

[The prepared statement of Senator Whitehouse appears as a submission for the record.]

Chairman GRASSLEY. Senator Cruz.

Senator WHITEHOUSE. Mr. Chairman, I have some documents to support this. May I ask unanimous consent they be entered into the record?

Chairman GRASSLEY. Without objection, so ordered.

Senator WHITEHOUSE. Thank you.

[The information appears as submissions for the record.]

**OPENING STATEMENT OF HON. TED CRUZ,
A U.S. SENATOR FROM THE STATE OF TEXAS**

Senator CRUZ. Thank you, Mr. Chairman. Judge Kavanaugh, welcome. Welcome to your family, to your friends. Demonstrating your good judgment, your wife was born and raised in West Texas, and you and she have been friends of Heidi and mine for 20 years. Thank you for your decades of public service, and I am sorry that your daughters had to endure the political circus of this morning. That is, alas, the world that is Washington in 2018.

I want to discuss what this hearing is about and what it is not about.

First, this hearing is not about the qualifications of the nominee. Judge Kavanaugh is by any objective measure unquestionably qualified for the Supreme Court. Everyone agrees he is one of the most respected Federal judges in the country. He has impeccable academic credentials, even if you did go to Yale. And you served over a decade on the U.S. Court of Appeals for the D.C. Circuit, often referred to as the “second highest court in the land.” So our Democratic colleagues are not trying to make the argument that Judge Kavanaugh is not qualified. Indeed, I have not heard anyone even attempt to make that argument.

Second, this hearing is not about his judicial record. Judge Kavanaugh has over 300 published opinions which altogether amount to over 10,000 pages issued in his role as a Federal appellate judge. Everyone agrees a judge’s record is by far the most im-

portant indicium of what kind of Justice that nominee will be. And, tellingly, we have heard very little today from Democratic Senators about the actual substance of Judge Kavanaugh's judicial record.

Third, it is important to understand today is also not about documents. We have heard a lot of arguments this morning about documents. There is an old saying for trial lawyers: "If you have the facts, pound the facts. If you have the law, pound the law. If you have neither, pound the table." We are seeing a lot of table pounding this morning.

The Democrats are focused on procedural issues because they do not have substantive points strong enough to derail this nomination. They do not have substantive criticism with Judge Kavanaugh's actual judicial record, so they are trying to divert everyone with procedural issues. But let us talk about the documents for a moment.

The claims that the Democrats are putting forward on documents do not withstand any serious scrutiny. Judge Kavanaugh has produced 511,948 pages of documents. That includes more than 17,000 pages in direct response to this Committee's written questionnaire, which is the most comprehensive response ever submitted to this Committee. The more than a half million pages of documents turned into this Committee is more than the number of pages we have received for the last five Supreme Court nominees combined.

Listen to that fact again. The over a half million documents turned over to this Committee is more than the last five nominees submitted to this Committee combined.

So what is all the fuss over the documents that are not turned over? Most of those concern Judge Kavanaugh's 3 years as the staff secretary for President George W. Bush. Now, many people do not know what a staff secretary does, but that is the position in charge of all of the paper that comes into and out of the Oval Office. Critically, the staff secretary is not the author of the paper coming into and out of the Oval Office. That paper is typically written by the Attorney General, by the Secretary of State, by other Cabinet members, by other senior White House officials. The staff secretary is simply the funnel for collecting their views and then for transferring the paper back and forth.

In other words, those documents written by other people say nothing, zero, about Judge Kavanaugh's views, and they say nothing, zero, about what kind of Justice Judge Kavanaugh would make. But they are by necessity the most sensitive and confidential documents in a White House. They are the documents that are going to the President. This is the advice and deliberations of the President at the senior level, and the staff secretary is the conduit for those documents. So why is it that the Democrats are putting so much energy in saying hand over all of those documents? Because they know, they know beyond a shadow of doubt, that President George W. Bush's White House team is not going to allow every piece of paper that went to the President to be made public any more than any other White House would. Republican or Democrat, no White House would allow every piece of paper that went to and from the President to be made public. Indeed, there are rules and laws and procedures for when and how Presidential papers become public. And the reason the Democrats are fighting so

loudly on this issue is they are making a demand they know is impossible to meet and, by the way, is utterly irrelevant to what actually Judge Kavanaugh thinks, believes, or has said.

It would open up all sorts of fishing expeditions to attack, relitigate George W. Bush's record as President and what various Cabinet members and senior advisers might or might not have said. But it is at the end of the day simply an attempt to distract and delay. And, indeed, the multiple motions we have seen from Democrats, "Delay this confirmation, delay this confirmation," that reveals the whole joke. Their objective is delay.

So what is this fight about? If it is not about documents, if it is not about Judge Kavanaugh's credentials, if it is not about a judicial record, what is this fight about?

I believe this fight is nothing more and nothing less than an attempt by our Democratic colleagues to relitigate the 2016 Presidential election. 2016 was a hard-fought election all around, and it was the first Presidential election in 60 years where Americans went to the polls with a vacant seat on the Supreme Court, one that the next President would fill. Americans knew who had been in that seat: the late Justice Antonin Scalia, one of the greatest jurists ever to sit on the U.S. Supreme Court. And it was the first time since President Dwight D. Eisenhower's reelection campaign that a Supreme Court seat was directly on the ballot.

Both candidates knew the importance of the vacant Supreme Court seat, and it was a major issue of contention in the Presidential election. Donald Trump and Hillary Clinton were both clear about what kind of Justices and judges they would appoint. During all three Presidential debates, both candidates were asked what qualities were most important to them when selecting a Supreme Court Justice.

Secretary Clinton's answer was clear. She wanted a Supreme Court Justice who would be a liberal progressive willing to rewrite the U.S. Constitution, willing to impose liberal policy agendas that she could not get through the democratic process, that the Congress of the United States would not adopt, but that she hoped five unelected lawyers would force on the American people. That is what Hillary Clinton promised for her judicial nominees.

Then-Candidate Donald Trump gave a very different answer. He said he was looking to appoint judges in the mold of Justice Scalia. He said he wanted to appoint judges who would interpret the Constitution based on its original public meaning, who would interpret the statutes according to the text, and who would uphold the rule of law and treat parties fairly regardless of who they are or where they come from.

Then-Candidate Donald Trump also did something that no Presidential candidate has done before. He published a list of nominees that he would choose from when filling Justice Scalia's seat, providing unprecedented transparency to the American people. All of this was laid before the American people as they went to the polls on November 8, 2016, and the American people made a choice that night.

Now, my Democratic colleagues are not happy with the choice the American people made, but as President Obama famously said, "Elections have consequences." Because the American people had

the chance to vote, a national referendum on the direction of the Supreme Court, I have said a number of times that Justice Gorsuch's nomination and Judge Kavanaugh's nomination have almost a super legitimacy in that they were ratified, they were decided by the American people in a direct vote in 2016.

And so the Democratic obstruction today is all about trying to reverse that election. They are unhappy with the choice the American people want. And there is a reason that the American people want strong constitutionalists on the U.S. Supreme Court. Most Americans, and I know the overwhelming majority of Texans, want judges who will follow the law and will not impose their policy preferences on the rest of us and who will be faithful to the Constitution and the Bill of Rights; Justices who will uphold fundamental liberties like free speech, like religious liberty, like the Second Amendment. That is what this election was about, and if you look at each of these—let us take free speech. It is worth noting that in 2014 every Democratic Member of this Committee voted to amend the United States Constitution to repeal the free speech provisions of the First Amendment. And, sadly, every Democrat in the Senate agreed with that position, voting to give Congress unprecedented power to regulate political speech. It was a sad day for this institution.

Years earlier, Ted Kennedy, the great liberal lion, had opposed a very similar effort, and Ted Kennedy said, "We have not amended the Bill of Rights in over 200 years. Now is no time to start." Ted Kennedy was right then, and not a single Democrat in the U.S. Senate had the courage to agree with Ted Kennedy and support free speech. Indeed, they voted party line to repeal the free speech provisions of the First Amendment. That is radical, that is extreme, and it is part of the reason the American people voted for a President who would put Justices on the Court who will protect our free speech.

How about religious liberty? Religious liberty is another fundamental protection that the Democrats in the Senate have gotten extreme and radical on. Indeed, our Democratic colleagues want Justices who will rubber stamp efforts like the Obama administration's efforts litigating against the Little Sisters of the Poor, litigating against Catholic nuns, trying to force them to pay for abortion-inducing drugs, and others. That is a radical and extreme proposition. And to show just how dramatic Senate Democrats have gotten, every single Senate Democrat just a few years ago voted to gut the Religious Freedom Restoration Act, legislation that passed Congress with overwhelming bipartisan support in 1993, was signed into law by Bill Clinton, and yet, two decades later, the Democratic Party has determined that religious freedom is inconvenient for their policy and political objectives. They want Justices that will further that assault on religious liberty.

And, finally, let us take the Second Amendment. In the Presidential debate, Hillary Clinton explicitly promised to nominate Justices who would overturn *Heller v. District of Columbia*. *Heller* is the landmark decision issued by Justice Scalia, likely the most significant decision of his entire tenure on the Bench, and it upheld the individual right to keep and bear arms.

Now, Hillary Clinton was quite explicit. She wanted judges who would vote to overturn *Heller*, and, indeed, a number of our Democratic colleagues, that is what they want as well. Overturning *Heller*, I believe, would be a truly radical proposition. To understand why, you have to understand what the four dissenters said in *Heller*. The four dissenters in *Heller* said that the Second Amendment protects no individual right to keep and bear arms whatsoever, that it protects merely a collective right of the militia. The consequence of that radical proposition would mean that Congress could pass a law making it a felony, a criminal offense, for any American to own any firearm, and neither you nor I nor any American would have any individual right whatsoever under the Second Amendment. It would effectively erase the Second Amendment from the Bill of Rights. That is a breathtakingly extreme proposition. It is what Hillary Clinton promised her Justices would do. And at the end of the day, it is what this fight is about.

We know that every Democratic Member of this Committee is going to vote “no.” We do not have to speculate. Every single one of them has publicly announced they are voting “no.” It does not depend on what they read in documents. It does not depend on what Judge Kavanaugh says at this hearing. They have announced ahead of time they are voting “no,” and most of the Democrats in the Senate have announced that in the full Senate. But everyone should understand Judge Kavanaugh has handed over more documents than any nominee, more than the last five combined, Republican and Democratic nominees. This is not about documents. It is not about qualification. It is not about record. What it is about is politics. It is about Democratic Senators trying to relitigate the 2016 election and, just as importantly, working to begin litigating the 2020 Presidential election.

But we had an opportunity for the American people to speak. They did. They voted in 2016, and they wanted judges and Justices who will be faithful to the Constitution. That is why I am confident, at the end of what Shakespeare would describe as, “a lot of sound and fury, signifying nothing,” I am confident that Judge Kavanaugh will become Justice Kavanaugh and will be confirmed to the United States Supreme Court.

Thank you, Mr. Chairman.

Chairman GRASSLEY. We are going to take a break now, and—wait a minute. We are going to take a break now, and 30 minutes is what the Democrats would like to have, so we will return at 1:17. And Justice Gorsuch returned about 10 minutes later than that, so be on time, please.

[Laughter.]

[Whereupon the Committee was recessed and reconvened.]

Chairman GRASSLEY. First of all, thanks, Judge Kavanaugh, for getting back on the exact time.

Before I call on Senator Klobuchar, I think that some of my colleagues have raised some issues that I think demand an answer, and I want to speak to those points. But this issue has never come up from my colleagues, but I thought, as I sat here and listened to some people criticize the Supreme Court for, in a sense, being “bought”—and they always tend to criticize the President of the United States for somehow interfering in the judiciary, and I hear

all about the criticism of Trump—it seems odd to me that we do not have criticism of people that are saying the same thing about the Supreme Court.

So, I want to read. Whenever the President criticizes the judiciary or judicial decisions, we hear wails of anguish from my Democratic colleagues. They attack the President for threatening the independence and the integrity of the judiciary, and they applaud the judiciary for standing up to the President.

I just listened to some of my colleagues here. One of them spent 18 minutes attacking the personal integrity of Justices of the Supreme Court. He said that five Justices have been bought and sold by private interests. He accused them of deciding cases to the benefit of favored parties. So I think it is pretty clear: a double standard. And we should not have to tolerate such double standard, and particularly from a press that is a policeman of our whole democratic process. That without a free press, our Government would be less than what it is. And it seems to me that that is something that I hope some of you will take into consideration, probably will not, but at least I said my piece.

Then also, several Senators have brought up about the 6 percent and the 99 percent and things like that that I thought I ought to clear up because I could say myself that when I first started finding out how much paper Judge Kavanaugh had on his record—I mean, for his background, I started talking about 100 million pages. And then when we finally get 488,000, then I could say, well, I got about 48 percent of what we ought to have. But there is a good explanation of why we do not have it, so I want to read.

Some of my colleagues keep saying that we have only 6 percent of Judge Kavanaugh's White House records but that 99 percent of Justice Kagan's White House records were made public before the hearing. This is "fuzzy math." My colleagues calibrate their phony 6 percent figure on two inaccurate numbers. First, their 6 percent figure counts the estimated page count by career archivists at the National Archives based upon their historical practice, before the unprocessed emails and attachments are actually reviewed.

Judge Kavanaugh's White House emails that we have received, the actual number of pages ended up being significantly less than the number the National Archives estimated before the actual review. One reason is because we were able to use technology to cull out the exact duplicate emails. Instead of having to read 13 times an email that Judge Kavanaugh sent to 12 White House colleagues, we only had to read the email once.

Second, the 6 percent figure counts millions and millions of pages of irrelevant staff secretary documents that we never, ever requested or needed. More importantly, we received 100 percent of the documents we requested from Judge Kavanaugh's time as an executive branch lawyer. And while we may have received 99 percent of Justice Kagan's White House records, we received zero records from her most relevant legal service as a Solicitor General, the Federal Government's top Supreme Court advocate. We received much less than 99 percent of her records as a lawyer. And we did not receive 60,000 emails from Justice Kagan, so 99 percent is an overestimate.

And even though we never received them, Justice Kagan's Solicitor General records were much more needed at the time because Kagan was a blank slate as a judge. Instead, unlike Judge Kavanaugh with his 12 years of judicial service and over 10,000 pages of judicial writings on the Nation's most important Federal circuit court, Justice Kagan had zero years of judicial service and zero pages of judicial writing before her appointment to the highest court.

Senator Klobuchar.

Senator KLOBUCHAR. Well, thank you, Mr. Chairman.

And before I begin my opening statement, I just wanted to respond to just a few things. One, none of that takes away from the fact that 42,000 documents were dumped on us last night, and I do not think anyone would go to trial and allow a trial to go forward or allow a case to go forward if one side got 42,000 documents the night before and the other side—and you cannot simply review them. As pointed out by Senator Whitehouse, you would have to review 7,000 documents every hour. That happened last night.

Chairman GRASSLEY. Let me respond without taking time away from you.

Senator KLOBUCHAR. Thank you.

Chairman GRASSLEY. Democrats got exactly the same amount of money we did to do the massive amount of work we had to do, and we got it done at 11 o'clock last night.

Proceed.

Senator KLOBUCHAR. The point is, that no one could prepare and review 42,000 documents in one evening. We know that, no matter how much coffee you drink.

And the second point is, that it is true that executive privilege has never been invoked before to block the release of Presidential records to the Senate during a confirmation hearing, so I will begin my opening statement, but those are two points I do not believe are refuted so—

Chairman GRASSLEY. Okay. Well, I will refute it from this standpoint. There were 5,000 documents, 42,000 pages.

Senator KLOBUCHAR. Okay.

Chairman GRASSLEY. Proceed.

**OPENING STATEMENT OF HON. AMY KLOBUCHAR,
A U.S. SENATOR FROM THE STATE OF MINNESOTA**

Senator KLOBUCHAR. Thank you. Welcome, Judge Kavanaugh. We welcome your family as well. On its face, this may look like a normal confirmation hearing. It has all the trappings. All of us up here, all of the cameras out there, the statement, the questions, all of it looks normal, but this is not a normal confirmation hearing.

First, as we have debated this morning, we are being asked to give advice and consent when the administration has not consented to give us over 100,000 documents, all of which detail a critical part of the Judge's career, the time he spent in the White House. And, in addition, the Majority party has not consented to make 189,000 of the documents we do have, public.

As a former prosecutor, I know that no lawyer goes to court without reviewing the evidence and record. I know—and I know you know, Judge Kavanaugh—that a good judge would not decide a

case with only 7 percent of the key documents. A good judge would not allow a case to move forward if one side dropped 42,000 pages of documents on the other side the night before a case started. And yet, that is where we are today. This is not normal. It is an abdication of the role of the Senate and a disservice to the American people, and it is our duty to speak out.

Second, this nomination comes before us at a time when we are witnessing seismic shifts in our democracy. Foundational elements of our Government, including the rule of law, have been challenged and undermined. Today, our democracy faces threats that we never would have believed occurring not that long ago.

Our intelligence agencies agree that a foreign adversary attempted to interfere in our most recent election, and it is happening again. In the words of the President's Director of National Intelligence, "The lights are blinking red."

There is an extensive ongoing investigation by a special counsel. The President's private lawyer and campaign chairman have been found guilty of multiple Federal crimes.

The man appointed as special counsel in this investigation, a man who has served with distinction under Presidents from both parties, has been under siege. The dedicated public servants who work in our Justice Department, including the Attorney General and the FBI, have been subjected to repeated threats and have had their work politicized and their motives questioned.

In fact, just this past weekend, Federal law enforcement was called out—was rebuked—by the President of the United States for simply doing their jobs: for prosecuting two white-collar defendants, one for insider trading, one for campaign theft. Why? Because the defendants were personal friends and campaign supporters of the President of the United States. As a former prosecutor, as someone who has seen Federal law enforcement do their jobs, this is abhorrent to me, so no, this is not normal.

And the last branch, the third branch of Government—our courts and individual judges—have been under assault, not just by a solitary disappointed litigant but by the President of the United States. Our democracy is on trial. And for the pillars of our democracy and our Constitution to weather this storm, our Nation's highest court must serve as a ballast in these turbulent times. Our very institutions, and those nominated to protect these institutions, must be fair, impartial, and unwavering in their commitment to truth and justice.

So, today, we will begin a hearing in which it is our duty to carry on the American constitutional tradition that John Adams stood up for many centuries ago, and that is to be, in his words, "a government of laws and not men." To me, that means figuring out what your views are, Judge, on whether a President is above the law. It is a simple concept we learned in grade school, that no one is above the law. So I think it is a good place to start.

There were many highly credentialed nominees like yourself that could have been sitting before us today, but, to my colleagues, what concerns me is, that during this critical juncture in history, the President has handpicked a nominee to the Court with the most expansive view of Presidential power possible, a nominee who has

actually written that the President, on his own, can declare laws unconstitutional.

Of course, we are very pleased when a judge submits an article to the University of Minnesota Law Review and even more so when that article receives so much national attention. But the article you wrote that I am referring to, Judge, raises many troubling questions. Should a sitting President really never be subject to an investigation? Should a sitting President never be questioned by a special counsel? Should a President really be given total authority to remove a special counsel?

In addition to the article, there are other pieces of this puzzle which demonstrate that the nominee before us has an incredibly broad view of the President's Executive power. Judge Kavanaugh, you wrote, for example, in *Seven-Sky v. Holder* that a President can disregard a law passed by Congress if he deems it to be unconstitutional, even if a court has upheld it.

What would that mean when it comes to laws protecting the special counsel? What would that mean when it comes to women's healthcare? The days of the divine rights of kings ended with the Magna Carta in 1215, and centuries later, in the wake of the American Revolution, a check on the Executive was a major foundation of the U.S. Constitution. For it was James Madison, who may not have had a musical named after him but was a top scholar of his time, who wrote in Federalist 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands may justly be pronounced the very definition of tyranny."

So what does that warning mean in real-life terms today? Here is one example: It means whether people like Kelly Gregory, an Air Force veteran, mother, and business owner who is here from Tennessee, and who is living with stage IV breast cancer, can afford medical treatment. At a time when the administration is arguing that protections to ensure people with pre-existing conditions cannot be kicked off their health insurance are unconstitutional, we cannot and should not confirm a Justice who believes the President's views alone carry the day.

One opinion I plan to ask about? When judges appointed by Presidents of both parties joined in upholding the Consumer Financial Protection Bureau, you, Judge, dissented. Your dissent concluded that the Bureau, an agency which has served us well in bringing back over \$12 billion to consumers for fraud from credit cards to loans to mortgages, was unconstitutional.

Or, in another case, you wrote a dissent against the rules that protect net neutrality, rules that help all citizens and small businesses have an even playing field when it comes to accessing the internet.

Another example that seems mired in legalese but is critical for Americans: Antitrust law. In recent years, a conservative majority on the Supreme Court has made it harder and harder to enforce the Nation's antitrust laws, ruling in favor of consolidation and market dominance. Yet two of Judge Kavanaugh's major antitrust opinions suggest that he would push the Court even further down this pro-merger path. We should have more competition and not less.

Now to go from my specific concerns and end on a higher plane. All of the attacks on the rule of law and our justice system over the past year have made me—and I would guess some of my other colleagues on this Committee—pause and think many times about why I decided to come to the Senate and get on this Committee and, much further back, why I even decided to go into law in the first place.

Now, I will tell you that not many girls in my high school class said they dreamed of being a lawyer. We had no lawyers in my family, and my parents were the first in their families to go to college. But somehow my dad convinced me to spend a morning sitting in a courtroom watching a State court district judge handle a routine calendar of criminal cases. The judge took pleas, listened to arguments, and handed out misdemeanor sentences. It was certainly nothing glamorous like the work for the job you have been nominated for, Judge, but it was important just the same.

I realized that morning that behind every single case there was a story and there was a person, no matter how small. Each and every decision the judge made that day affected that person's life. And I noticed how often he had to make gut decisions and had to take account of what his decisions would mean for that person and his or her family.

This week, I remembered that day, and I remembered I had written an essay about it at the ripe old age of 17. I went back and looked at what I had said. It is something that I still believe today and that is, that “to be part of an imperfect system, to have a chance to better that system” was and is a cause worth fighting for, a job worth doing.

Our Government is far from perfect, Judge, nor is our legal system, but we are at a crossroads in our Nation's history where we must make a choice. Are we going to dedicate ourselves to improving our democracy, improving our justice system, or not? The question we are being asked to address in this hearing, among others, is whether this judge, at this time in our history, will administer the law “with equal justice” as it applies to all citizens, regardless of if they live in a poor neighborhood or a rich neighborhood, or if they live in a small house or the White House.

Our country needs a Supreme Court Justice who will better our legal system, a Justice who will serve as a check and balance on the other branches, who will stand up for the rule of law without consideration of politics or partisanship, who will uphold our Constitution without fear or favor, and who will work for the betterment of the great American experiment in democracy. That is what this hearing is about.

Thank you.

[The prepared statement of Senator Klobuchar appears as a submission for the record.]

Chairman GRASSLEY. Senator Sasse.

**OPENING STATEMENT OF HON. BEN SASSE,
A U.S. SENATOR FROM THE STATE OF NEBRASKA**

Senator SASSE. Thank you, Mr. Chairman.

We need to get to Judge Kavanaugh, but I really want to riff with Amy for a while. Senator Klobuchar, you did Madison, Lin-Manuel Miranda, the Magna Carta, and your dad——

Senator KLOBUCHAR. Thank you. Thank you, I——

Senator SASSE [continuing]. Taking you to court.

Senator KLOBUCHAR [continuing]. Appreciate that.

Senator SASSE. Well done.

Senator KLOBUCHAR. Thank you.

Senator SASSE. I had all that on my bingo card.

[Laughter.]

Senator SASSE. I have little kids, and I have taken my two little girls to court a few times, too, mostly to juvie just to scare them straight, not to turn them into attorneys but that is not——

Senator KLOBUCHAR. Who said that that was not what my dad was doing, Senator Sasse?

[Laughter.]

Senator SASSE. That was wisdom in Minnesota.

Congratulations, Judge, on your nomination. Actually, congratulations and condolences. This process has to stink. I am glad your daughters could get out of the room, and I hope they still get the free day from school.

Let us do some good news/bad news, the bad news first. Judge, since your nomination in July, you have been accused of hating women, hating children, hating clean air, wanting dirty water. You have been declared a quote/unquote “existential threat” to our Nation. Alumni of Yale Law School, incensed that faculty members at your alma mater praised your selection, wrote a public letter to the school saying, quote, “People will die if Brett Kavanaugh is confirmed.”

This drivel is patently absurd, and I worry that we are going to hear more of it over the next few days. But the good news is it is absurd, and the American people do not believe any of it. This stuff is not about Brett Kavanaugh when screamers say this stuff for cable TV news. The people who know you better, not those who are trying to get on TV, they tell a completely different story about who Brett Kavanaugh is. You have earned high praise from the many lawyers, both right and left, who have appeared before you during your 12 years on the D.C. Circuit and those who have had you as a professor at Yale Law and at Harvard Law. People in legal circles invariably applaud your mind, your work, your temperament, your collegiality. That is who Brett Kavanaugh is. And to quote Lisa Blatt, a Supreme Court attorney from the left who has known you for a decade, quote, “Sometimes a superstar is just a superstar, and that is the case with this judge. The Senate should confirm him,” close quote.

It is pretty obvious to most people going about their work today that the deranged comments actually do not have anything to do with you, so we should figure out why do we talk like this about Supreme Court nominations now? There is a bunch that is atypical in the last 19, 20 months in America. Senator Klobuchar is right. The comments from the White House yesterday about trying to politicize the Department of Justice, they were wrong, and they should be condemned. And my guess is Brett Kavanaugh would condemn them.

But really the reason these hearings do not work is not because of Donald Trump. It is not because of anything in the last 20 months. These confirmation hearings have not worked for 31 years in America. People are going to pretend that Americans have no historical memory and supposedly there have not been screaming protestors saying women are going to die at every hearing for decades, but this has been happening since Robert Bork. This is a 31-year tradition. There is nothing really new the last 18 months.

So the fact that the hysteria has nothing to do with you means that we should ask what is the hysteria coming from? The hysteria around Supreme Court confirmation hearings is coming from the fact that we have a fundamental misunderstanding of the role of the Supreme Court in American life now. Our political commentary talks about the Supreme Court like they are people wearing red and blue jerseys. That is a really dangerous thing. And, by the way, if they have red and blue jerseys, I would welcome my colleagues to introduce the legislation that ends lifetime tenure for the judiciary because if they are just politicians, then the people should have power, and they should not have lifetime appointments. So until you introduce that legislation, I do not believe you really want the Supreme Court to be a politicized body, though that is the way we constantly talk about it now.

We can and we should do better than this. It is predictable that every confirmation hearing now is going to be an overblown politicized circus, and it is because we have accepted a new theory about how our three branches of Government should work and, in particular, how the judiciary should work.

What Supreme Court confirmation hearings should be about is, an opportunity to go back and do "Schoolhouse Rock!" civics for our kids. We should be talking about how a bill becomes a law and what the job of Article II is, and what the job of Article III is, so let us try just a little bit. How did we get here, and how can we fix it?

I want to make just four brief points. Number one: In our system, the legislative branch is supposed to be the center of our politics.

Number two: It is not. Why not? Because for the last century, and increasing by the decade right now, more and more legislative authority is delegated to the executive branch every year. Both parties do it. The legislature is impotent, the legislature is weak, and most people here want their jobs more than they really want to do legislative work, and so they punt most of the work to the next branch.

Third consequence is that this transfer of power means the people yearn for a place where politics can actually be done, and when we do not do a lot of big actual political debating here, we transfer it to the Supreme Court, and that is why the Supreme Court is increasingly a substitute political battleground in America. It is not healthy, but it is what happens, and it something that our Founders would not be able to make any sense of.

And fourth and finally, we badly need to restore the proper duties and the balance of power from our constitutional system.

So, point one: The legislative branch is supposed to be the locus of our politics properly understood. Since we are here in this room

today because this is a Supreme Court confirmation hearing, we are tempted to start with Article III, but really, we need Article III as part of the Constitution that sets up the judiciary. We really should be starting with Article I, which is us. What is the legislature's job? The Constitution's drafters began with the legislature. These are equal branches, but Article I comes first for a reason, and that is because policymaking is supposed to be done in the body that makes laws.

That means that this is supposed to be the institution dedicated to political fights. If we see lots and lots of protests in front of the Supreme Court, that is a pretty good litmus-test barometer of the fact that our republic is not healthy because people should not be thinking they are protesting in front of the Supreme Court. They should be protesting in front of this body.

The legislature is designed to be controversial, noisy, sometimes even rowdy because making laws means we have to hash out the reality that we do not all agree. Government is about power. Government is not just another word for things we do together. The reason we have limited government in America is because we believe in freedom. We believe in souls. We believe in persuasion. We believe in love. And those things are not done by power. But the Government acts by power. And since the Government acts by power, we should be reticent to use power. And so it means when you differ about power, you have to have a debate. And this institution is supposed to be dedicated to debate and should be based on the premise that we know since we do not all agree, we should try to constrain that power just a little bit, but then we should fight about it and have a vote in front of the American people.

And then what happens? The people get to decide whether they want to hire us or fire us. They do not have to hire us again. This body is the political branch where policymaking fights should happen. And if we are the easiest people to fire, it means the only way the people can maintain power in our system is if almost all the politicized decisions happen here, not in Article II or Article III.

So that brings us to a second point. How do we get to a place where the legislature decided to give away its power? We have been doing it for a long time. Over the course of the last century but especially since the 1930s and then ramping up since the 1960s, a whole lot of the responsibility in this body has been kicked to a bunch of alphabet-soup bureaucracies. All the acronyms that people know about their Government or do not know about their Government are the places where most actual policymaking—kind of, in a way, lawmaking—is happening right now. This is not what “Schoolhouse Rock!” says. There is no verse of “Schoolhouse Rock!” that says give a whole bunch of power to the alphabet-soup agencies and let them decide what the governance decisions should be for the people because the people do not have any way to fire the bureaucrats.

And so what we mostly do around this body is not pass laws. What we mostly do is decide to give permission to the Secretary or the Administrator of bureaucracy X, Y, or Z to make lawlike regulations. That is mostly what we do here. We go home and we pretend we make laws. No, we do not. We write giant pieces of legislation, 1,200 pages, 1,500 pages long that people have not read filled

with all these terms that are undefined and we say the Secretary of such-and-such shall promulgate rules that do the rest of our dang jobs. That is why there are so many fights about the executive branch and about the judiciary because this body rarely finishes its work.

And the House is even worse. I do not really believe that. It just seemed like you needed to try to unite us in some way.

So I admit that there are rational arguments that one could make for this new system. The Congress cannot manage all the nitty-gritty details of everything about modern government, and this system tries to give power and control to experts in their fields where most of us in Congress do not know much of anything about technical matters for sure, but you could also impugn our wisdom if you want. But when you are talking about technical complicated matters, it is true that the Congress would have a hard time sorting out every final dot and tittle about every detail.

But the real reason at the end of the day that this institution punts most of its power to executive branch agencies is because it is a convenient way for legislators to be able to avoid taking responsibility for controversial and often unpopular decisions. If people want to get reelected over and over again and that is your highest goal, if your biggest long-term thought around here is about your own incumbency, then actually giving away your power is a pretty good strategy. It is not a very good life, but it is a pretty good strategy for incumbency.

And so at the end of the day, a lot of the power delegation that happens from this branch is because the Congress has decided to self-neuter. Well, guess what? The important thing is not whether the Congress has lame jobs. The important thing is that when the Congress neuters itself and gives power to an unaccountable fourth branch of government, it means the people are cut out of the process. There is nobody in Nebraska, there is nobody in Minnesota or Delaware who elected the deputy assistant administrator of plant quarantine at the USDA.

And yet if the deputy assistant administrator of plant quarantine does something to make Nebraskans' lives really difficult, which happens to farmers and ranchers in Nebraska. Who do they protest to? Where do they go? How do they navigate the complexity and the thicket of all the lobbyists in this town to do executive-agency lobbying. They cannot. And so what happens is they do not have any ability to speak out and to fire people through an election.

And so, ultimately, when the Congress is neutered, when the administrative state grows, when there is this fourth branch of Government, it makes it harder and harder for the concerns of citizens to be represented and articulated by people that the people know that they have power over. All the power right now or almost all the power right now happens off-stage, and that leaves a lot of people wondering who is looking out for me?

And that brings us to the third point. The Supreme Court becomes our substitute political battleground. It is only nine people. You can know them. You can demonize them. You can try to make them messiahs, but ultimately, because people cannot navigate their way through the bureaucracy, they turn to the Supreme Court looking for politics. And knowing that our elected officials no

longer care enough to do the hard work of reasoning through the places where we differ and deciding to shroud our power at times, it means that we look for nine Justices to be super-legislators. We look for nine Justices to try to right the wrongs from other places in the process. When people talk about wanting to have empathy from their Justices, this is what they are talking about. They are talking about trying to make the Justices do something that the Congress refuses to do, as it constantly abdicates its responsibility.

The hyperventilating that we see in this process and the way that today's hearing started with 90 minutes of theatrics that are preplanned with certain Members of the other side here, it shows us a system that is wildly out of whack.

And thus, a fourth and final point. The solution here is not to try to find judges who will be policymakers. The solution is not to try to turn the Supreme Court into an election battle for TV. The solution is to restore a proper constitutional order with a balance of powers. We need "Schoolhouse Rock!" back. We need a Congress that writes laws and then stands before the people and suffers the consequences and gets to go back to our own Mount Vernon if that is what the electors decide. We need an executive branch that has a humble view of its job as enforcing the law, not trying to write laws in the Congress' absence. And we need a judiciary that tries to apply written laws to facts and cases that are actually before it.

This is the elegant and the fair process that the Founders created. It is the process where the people who are elected, two and 6 years in this institution, 4 years in the executive branch, can be fired because the Justices and the judges, the men and women who serve America's people by wearing black robes. They are insulated from politics. This is why we talk about an independent judiciary. This is why they wear robes. This is why we should not talk about Republican and Democratic judges and Justices. This is why we say justice is blind. This is why we give judges lifetime tenure. And this is why this is the last job interview Brett Kavanaugh will ever have because he is going to a job where he is not supposed to be a super-legislator.

So the question before us today is not what does Brett Kavanaugh think 11 years ago on some policy matter. The question before us whether or not he has the temperament and the character to take his policy views and his political preferences and put them in a box marked irrelevant and set it aside every morning when he puts on the black robe. The question is does he have the character and temperament to do that. If you do not think he does, vote no, but if you think he does, stop the charades because, at the end of the day, I think all of us know that Brett Kavanaugh understands his job is not to rewrite laws as he wishes they were. He understands that he is not being interviewed to be a super-legislator. He understands that his job is not to seek popularity. His job is to be fair and dispassionate. It is not to exercise empathy. It is to follow written laws.

Contrary to The Onion-like smears that we hear outside, Judge Kavanaugh does not hate women and children. Judge Kavanaugh does not lust after dirty water and stinky air. No. Looking at his record, it seems to me that what he actually dislikes are legislators that are too lazy and too risk-averse to do our actual jobs. It seems

to me that if you read his 300-plus opinions, what his opinions reveal to me is a dissatisfaction—I think he would argue a constitutionally compelled dissatisfaction—with power-hungry executive branch bureaucrats doing our job when we fail to do it.

And in this view, I think he is aligned with the Founders. For our Constitution places power not in the hands of this city's bureaucracy, which cannot be fired, but our Constitution places the policymaking power in the 535 of our hands because the voters can hire and fire us. And if the voters are going to retain their power, they need a legislature that is responsive to politics, not a judiciary that is responsive to politics.

It seems to me that Judge Kavanaugh is ready to do his job. The question for us is whether we are ready to do our job.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Yes. The example I always use to back up what Senator Sasse says about the Congress not doing its job and delegating too much is the Obamacare legislation that was 2,700 pages and there was 1,693 delegations of authority to bureaucrats to write regulations because Congress did not know how to reorganize health care.

Senator Coons.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Senator COONS. Thank you, Mr. Chairman.

Welcome, Judge Kavanaugh. Welcome to you and to your family and to your friends who are here. As you know well, we went to the same law school. We clerked in the same courthouse in Wilmington, Delaware, so I have known you and your reputation for nearly 30 years, and I know well that you have a reputation as a good friend, a good classmate, a good roommate, as a good husband and family man, that you have contributed to your community. I think we will hear later today that you have even been a great youth basketball coach.

But frankly, we are not here to consider you as the president of our neighborhood civic association or even to review whether you have been a great youth basketball coach. We are here to consider you for a lifetime appointment to the United States Supreme Court where you will help shape the future of this country and have an impact on the lives of millions of Americans for literally decades to come.

And to make that decision to exercise our constitutional role, we have to look closely at your decisions, your statements, your writings to understand how you might interpret our Constitution. The next Justice will play a pivotal role in defining a wide range of critical issues, including the scope of the President's power in determining whether the President might be above the law. The next Justice will impact essential rights enshrined in our modern understanding of the Constitution, including the right to privacy, rights to contraception, intimacy, abortion, marriage, the freedom to worship as we choose, the ability to participate in our democracy as full citizens, and the promise of equal protection.

That is because the cases that come before the Court are not just academic or esoteric or theoretical. They involve real people and have real and lasting consequences.

With stakes this high, I deeply regret the process that has gotten us to this point, the excesses and partisan gamesmanship of the last few years, and that history bears briefly repeating.

When Justice Scalia passed in February 2016, I called the White House and urged then-President Obama to nominate a jurist who could gain support from both sides of the aisle and help build a strong center on the Court, and he did just that when he nominated Merrick Garland, chief judge of the D.C. Circuit, whom I know you also admire. But my Republicans refused to even meet with him, must less hold a hearing or vote on his confirmation.

During the 400 days that the Majority refused to fill the Supreme Court vacancy, then-Candidate Trump also released a list of potential nominees to the Court, a list compiled by two highly partisan organizations: the Federalist Society and the Heritage Foundation. And after our President was elected, he picked from that list and nominated Neil Gorsuch to the Supreme Court.

When Judge Gorsuch testified before this very Committee, he told us repeatedly how deeply he understood and respected precedent. He even cited a book on precedent he co-authored with you. But in his first 15 months of service, Justice Gorsuch has already voted to overrule at least five important Supreme Court precedents and to question many others. To name just one, given it was just Labor Day, Justice Gorsuch voted to gut public-sector unions, overturning a 41-year-old precedent on which there were great reliance interests in impacting millions of workers across the country.

My point is, that Justice Gorsuch was confirmed to the Court in one of the most concerningly partisan processes in Senate history, and only after the Majority deployed the nuclear option to end the filibuster for Supreme Court nominations. This brings us, Judge, to today and your nomination.

When Justice Kennedy announced his retirement, I once again called the White House and urged, through White House Counsel, that President Trump consider selecting someone for this seat who could win broad support from both sides of the aisle. And, Judge Kavanaugh, I am concerned you may not be that nominee. Your record prior to joining the bench places you in the midst of some of the most pitched and partisan battles in our lifetimes, from Ken Starr's investigation of President Clinton, to the 2000 election recount, to the controversies of the Bush administration, including surveillance, torture, access to justice, and the culture wars.

So, Judge, it is critical that this Committee and the American people fully examine your record to understand what kind of Justice you would be. And, unfortunately, as we have all discussed at length here today, that has been rendered impossible. The Majority has blocked access to millions of pages of documents from your service in a critical role in the White House. For the first time since Watergate, the nonpartisan National Archives has been cut out of the process for reviewing and producing your records.

Senate Republicans have worked to keep "committee confidential" nearly 200,000 pages of documents so that the public cannot view them, and we cannot question based on them, and your

former deputy is in charge of designating which documents this Committee and the American people get to see. Not only that, but for the first time in our history, the President has invoked executive privilege to withhold more than 100,000 pages of documents on a Supreme Court nominee from the Judiciary Committee. This leads to a difficult but important question, which is, "What might President Trump or the Majority be trying to hide?"

Mr. Chairman, I want to make an appeal to work together to restore the integrity of this Committee. We are better than this process. We are better than proceeding with a nominee without engaging in a full and transparent process. This Committee is failing the American people by proceeding in this way, and I fully support the motions made by my colleagues earlier in this hearing and regret that we proceeded without observing the rules of this Committee.

That said, Judge Kavanaugh, I have reviewed the parts of your record that I have been able to access and what I have been able to see from available speeches, writings, and decisions, and I have to say it troubles me. While serving on the bench, you have dissented at a higher rate than any circuit judge elevated to the Supreme Court since 1980, and that includes Judge Bork. Your dissents reveal some views and positions that fall well outside the mainstream of legal thought. You have suggested, as has been referenced, that the President has the authority to refuse to enforce a law such as the Affordable Care Act were he to decide it was unconstitutional.

You have voted to strike down net neutrality rules, gun safety laws, the organization of the Consumer Financial Protection Bureau, and many of your dissents would undercut environmental protections or workers' rights or any antidiscrimination laws, and you have recently praised Justice Rehnquist's dissent in *Roe*. You have embraced an approach to substantive due process that would undermine the rights and protections of millions of Americans, from basic protections for LGBT Americans to access to contraception, to health care and the ability for Americans to love and marry whom they wish. I am concerned your writings demonstrate a hostility to affirmative action and civil rights. And, most importantly, I believe you have repeatedly and enthusiastically embraced an interpretation of Presidential power so expansive that it could result in a dangerously unaccountable President at the very time when we are most in need of checks and balances.

I want to pause for a moment on this last point, because the context of your nomination troubles me the most. In reviewing your records, Judge, you have questioned the lawfulness of *United States v. Nixon*, a historic decision in which a unanimous Court said the President had to comply with a grand jury subpoena. You have questioned the correctness of *Morrison v. Olson*, a 30-year-old precedent, holding that Congress can create an independent counsel with the authority to investigate the President, who the President cannot just fire on a whim. You have questioned whether a President and his aides should be subject to any civil or criminal investigations while in office.

And, given these positions about Presidential power, which I view as being at one extreme of the record of circuit judges, we have to confront an uncomfortable but important question about

whether President Trump may have selected you, Judge Kavanaugh, with an eye toward protecting himself.

So, Judge Kavanaugh, I am going to ask you about these issues, as we did when we met in my office, and I expect you to address them. When we spoke, you agreed that we have a shared concern about the legitimacy of the Supreme Court, that it is critical to our system of rule of law. In my view, it is today in jeopardy. You are participating in a process that has featured unprecedented concealment and partisanship around your record. And a few moments ago, Senator Durbin proposed a bold step, which would be for you to support suspending this hearing until all your records are produced and available to this Committee and the American people, and I encourage you to do this.

There are also Members of both parties who have not stated how they will vote on your nomination, and I urge you to answer our questions about your prior work, about your writings, about precedent and the Constitution itself, to trust the American people, and to help build our trust in the Court on which you may well soon serve.

I have been to too many hearings in which judicial nominees have told us that they will evenhandedly apply the text of laws or the Constitution only to watch them ascend to the Bench and whittle away the individual rights of Americans or narrow and overturn long-settled precedent.

This Supreme Court vacancy comes at a critical time for our country, when our institutions of law and the very foundations of our democracy are being gravely tested. If we are going to safeguard the rule of law in this country, our courts—and in particular, our Supreme Court—must be a bulwark against unprecedented violations of law, deprivations of freedom, and abuses of power by anyone—including our President.

No one said it better than our former colleague, Senator McCain, who once asked about America, what makes us exceptional? Is it our wealth, our natural resources, our military power, our big and bountiful country? No, it is our founding ideals and our fidelity to them and our conduct in the world, they are the source of our wealth and power, that we live under the rule of law. That enables us to face threats with confidence that our values make us stronger than our enemies.

Judge Kavanaugh, we are here to determine whether you would uphold or undermine those founding ideals and the rule of law. We are here to determine whether you would continue in the traditions of the Court or transform it into a body more conservative than a majority of Americans. We are here to determine whether your confirmation would compromise or undermine the legitimacy of the Court itself. I urge you to answer our questions and to confront these significant challenges. These are weighty questions, and the American people deserve real answers.

Thank you, and I look forward to your testimony.

[The prepared statement of Senator Coons appears as a submission for the record.]

Chairman GRASSLEY. Yes. You can easily get the impression, not just from Senator Coons but other Senators, that somehow you, Judge Kavanaugh, are out of the mainstream in some way. So I

looked at your record in the D.C. Circuit and have found that judges have agreed with you and your rulings in an overwhelming majority of matters across the board. Ninety-four percent of the matters Judge Kavanaugh heard were decided unanimously. In 97 percent of the matters Judge Kavanaugh heard, he voted with the majority. Judge Kavanaugh issued dissenting opinions in only 2.7 percent of the matters that you heard.

I would also like to clarify what the Presidential Records Act requires. Our documents process has fully complied with the Presidential Records Act. Under the Federal statute, President Bush has the right to request his own administration records. He also has the authority to review his records before the Senate receives them. Indeed, the Archives may not produce them to the Committee without giving President Bush and his statutory representatives an opportunity to review first. This is what President Bush has done, and the National Archives does not have the authority to second-guess President Bush's decision to release records to us.

The National Archives was not cut out of the process. As President Bush's representative informed the Committee, quote, "Because we have sought, received, and followed NARA's"—that means the Archivist's—"views on any documents withheld as personal documents, the resulting productions of documents to the Committee is essentially the same as if the 'Archivist' had conducted its review first, and then sought our views and the current administration's views, as required by law," end of quote.

Senator Flake.

**OPENING STATEMENT OF HON. JEFF FLAKE,
A U.S. SENATOR FROM THE STATE OF ARIZONA**

Senator FLAKE. Thank you, Mr. Chairman.

Congratulations, Judge Kavanaugh, and congratulations to your family as well.

Let me just say a few things about the issue that has been discussed here a lot today, the issue of documents and document production. The standard historically that we use to look at nominees is what is relevant and probative. I would suggest that we certainly get that from the 12 years you have served on the circuit court, on the D.C. Circuit Court, that considers, when you look at the docket, items that, you know, more than any other circuit court, that the Supreme Court would be perhaps called to rule on.

In the past, Senators on this panel have argued on both sides of the aisle that confirming a judge, the best we can look at is his or her judicial record. You have that record, and it is a long one, over 300 opinions, and I would suggest that that is where we need to start. A lot of the other records that have been discussed are mainly duplicative, administrative documents. Many do not meet the standard of relevant or probative. They may not demonstrate the type of Justice that you will be.

Senator Sasse talked about what we are called to do here is to look at your temperament and your judgment and your character, and I think you can see a lot of that by the type of life you have lived outside of the courtroom. When we met in my office, I was impressed obviously with your respect for the law and quick intellect but also struck by kindness and decency. I found out that we

share a deep love of sports. We both played football back in the day. I am sure you are looking forward to this weekend not just when these hearings are concluded but when the Redskins and Cardinals play on Sunday.

I have learned that you have run the Boston Marathon twice. I wonder if the ABA took that into account when they gave you a favorable rating. I am not sure what that says about your soundness of mind myself. But, in all seriousness, training for a marathon, completing two marathons like this, is a huge accomplishment. It demonstrates not just your competitive spirit but a strong sense of purpose and commitment and says something about your temperament and character.

Of course, you have no greater commitment than to your family, your wife Ashley and your two daughters. I know that you beamed with pride when talking about them and talking about, as has been mentioned earlier, coaching your daughter's elementary-school basketball teams.

I have a letter for the record written by a group of parents whose girls play for basketball teams that Judge Kavanaugh coaches, and, Mr. Chairman, without objection, I would like to enter that letter into the record.

Chairman GRASSLEY. So ordered.

[The information appears as a submission for the record.]

Senator FLAKE. The team's parents' note that Judge Kavanaugh has been a devoted coach and a mentor to their daughters. As these parents note, Coach K—and that is new, you, not the Duke, a famous one—stresses the importance of playing as a team and has provided the girls the opportunity to learn about teamwork, honesty, integrity, humility, respect, discipline, hard work, and competitiveness. Again, we are going back to temperament and character. Judge Kavanaugh's dedication and commitment as a volunteer basketball coach I think demonstrates and says a good deal about that character.

And congratulations to you and the Blessed Sacrament Bulldogs for winning the city championship this past year. I know you must be proud of your team.

Now, aside from running marathons, winning basketball championships, you have spent, as I mentioned, the last 12 years as a Federal Appeals Court Judge on the D.C. Circuit. You have earned a reputation among legal commentators and colleagues on both sides of the aisle of a solid, careful judge; a thorough and clear writer; and someone who promotes collegiality on the court, working with people across ideological lines.

I have also a New York Times article for the record written by Professor Akhil Amar, a self-professed liberal who describes Judge Kavanaugh as one who appreciates the craft of judging with seriousness and commands wide and deep respect among scholars, lawyers, and jurists across the political spectrum. Mr. Chairman, I would like to submit that for the record as well.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator FLAKE. As I mentioned, Judge Kavanaugh has amassed an astonishingly distinguished and extensive record, writing more than 300 opinions, joining his colleagues in issuing thousands of

additional cases, and that is where we need to look first when we are looking at how you will judge on the Supreme Court.

Now, I know—and it has been brought up today—that a lot of the concern on the other side of the aisle stems from the concern of an administration that does not seem to understand and appreciate separation of powers and the rule of law. I have that concern as well. If you just look at what was said just yesterday by the President, I think it is very concerning. He said in a tweet, “Two long-running Obama-era investigations of two very popular Republican Congressmen were brought to a well-publicized charge just ahead of the midterms by the Jeff Sessions Justice Department,” he calls it. “Two easy wins now in doubt because there is not enough time. Good job, Jeff.”

That is why a lot of people are concerned about this administration and why they want to ensure that our institutions hold. Thus far they have, gratefully. Jeff Sessions has resisted pressure from the President to punish his enemies and relieve pressure on his friends, and many of the questions that you will get on the other side of the aisle and from me will be how you view that relationship, where you believe the Article I powers end and Article II powers of the administration begin.

So I expect to have a number of questions on that subject. I again appreciate your willingness to put yourself through this process, and I look forward to the hearing moving ahead in the next week.

Thank you, Mr. Chairman.
Chairman GRASSLEY. Okay.
Senator Blumenthal.

**OPENING STATEMENT OF HON. RICHARD BLUMENTHAL,
A U.S. SENATOR FROM THE STATE OF CONNECTICUT**

Senator BLUMENTHAL. Thank you, Mr. Chairman. Thank you, Mr. Chairman, for your conducting these hearings as fairly and patiently as you have, and I am going to be remarking further on what procedurally I think is appropriate here.

But I want to begin by thanking Judge Kavanaugh and your family for your commitment to public service. I want to thank the many, many Americans who are paying attention to this hearing, not only in this room but also across the country. I want to thank them for their interest and indeed their passion. That is what sustains democracy, that commitment to ordinary, everyday Americans participating and engaging in this process.

There is a T-shirt worn by a number of folks walking around this building that says, “I am what’s at stake.” This vote and this proceeding could not be more consequential in light of what is at stake: whether women can decide when they want to have children and become pregnant; whether the people of America can decide whom they would like to marry; whether we drink clean water and breathe clean air; whether consumers are protected against defective products and financial abuses; and whether we have a real system of checks and balances or, alternatively, an imperial Presidency.

I will not cast a vote more important than this one, and I suspect few of my colleagues will, as well. And what is at stake is, indeed,

also the rule of law. My colleague, Senator Flake, quoted the President's tweet yesterday. I am going to repeat it: "Two long-running Obama-era investigations of two very popular Republican Congressmen were brought to a well-publicized charge just ahead of the midterms by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job, Jeff."

I have had my disagreements with this Department of Justice. I want to note for the record that at least one high-ranking member of the Department of Justice was in this room. I want to urge the Department of Justice to stand strong and hold fast against this onslaught which threatens the basic principles of our democracy.

And I want to join my colleague, Senator Sasse, in his hope that you, Judge Kavanaugh, would condemn this attack on the rule of law and our judiciary. Because, at the end of this dark era, when the history of this time is written, I believe that the heroes will be our independent judiciary and our free press.

You are nominated by that very President who has launched this attack on our Department of Justice, on the rule of law, on law enforcement like the FBI, law enforcement at every level whose integrity he has questioned, and your responses to our questions will be highly enlightening about whether you join us in defending the judiciary and the rule of law.

That very President has nominated you in this unprecedented time, unprecedented because he is an unindicted co-conspirator who has nominated a potential Justice who will cast the swing vote on issues relating to his possible criminal culpability; in fact, whether he is required to obey a subpoena to appear before a grand jury, whether he is required to testify in a prosecution of his friends or associates or other officials in his administration, and whether, in fact, he is required to stand trial if he is indicted while he is President of the United States.

There is a basic principle of our Constitution, and it was articulated by the Founders: No one can select a judge in his own case. That is what the President is potentially doing here, selecting a Justice on the Supreme Court who potentially will cast a decisive vote in his own case. That is a reason why this proceeding is so consequential.

Senator Sasse urged us to do our job. I agree. Part of our job is to review the record of the nominee as thoroughly and deliberately as possible, looking to all the relevant and probative evidence. We cannot do that on this record.

Mr. Chairman, you have said multiple times that your staff has already reviewed the 42,000 pages of documents produced to this Committee at 5:41 p.m. yesterday. Both sides are using the same computer platform to review the documents from Mr. Burck. The documents had to be loaded into this platform overnight and could not be concluded until 6:45 a.m. this morning. How is it possible that your staff concluded its review last night before the documents were even uploaded? That is this platform that both sides are using here. It is simply not possible, Mr. Chairman, that any Senator has seen these new materials, much less all of the other relevant docu-

ments that have been screened by Bill Burck, who is not the National Archivist.

And this situation, when we say it is unprecedented, is truly without parallel in our history, and I am going to quote from the National Archivist: It is “something that has never happened before.” And the Archivist continued, “This effort by former President Bush does not represent the National Archives or the George W. Bush Presidential Library,” end quote.

So, Mr. Chairman, I renew my motion to adjourn so that we have time to conclude our review of these documents and so that also, my request under the Freedom of Information Act, which is now pending to the National Archivist, to the Department of Justice, to other relevant agencies, can be considered and judged. That Freedom of Information Act will require some time, I assume, to conclude.

I renew my motion, Mr. Chairman, and ask for a vote on the motion to adjourn. As I said earlier, Rule IV provides, quote, “The Committee Chairman shall”—shall, not may—“shall entertain a non-debatable motion to bring a matter before the Committee to a vote.” That seems pretty clear to me, Mr. Chairman. I have made a motion to bring before the Committee a motion to adjourn under the rules. With all due respect, you are required to entertain my motion.

And I would just add this final point. All of these documents will come out. They will come out eventually, as soon as 2019 and 2020. By law, these documents belong to the American people. They do not belong to President Bush or President Trump. They belong to the American people. It is only a matter of time, my Republican colleagues, before you will have to answer for what is in these documents. We do not know what is in them. But the question is, what are they concealing that you will have to answer to history for?

Mr. Chairman, I renew my motion to adjourn.

Chairman GRASSLEY. You quote the rules very accurately, but those rules apply to executive business sessions. We are not in an executive business session, so I deny your motion.

Senator BLUMENTHAL. Mr. Chairman, with all due respect, I ask you to point out to me the language in Rule IV or anywhere else in our rules that limits its scope to executive business meetings. There is no such language, Mr. Chairman.

Chairman GRASSLEY. I would have you quote language to the contrary.

Senator BLUMENTHAL. Could you quote me that language?

Chairman GRASSLEY. No. I am asking you, you quote me language to the contrary of what I ruled.

Senator BLUMENTHAL. There is no language to the contrary. I am asking for a vote in this session now. There is nothing that precludes a vote in our hearing at this exact time.

Chairman GRASSLEY. I have ruled. Do you want to proceed? Do you?

Senator BLUMENTHAL. Well, if the Chair, with all due respect, is ruling against me, I move to appeal the ruling of the Chair. With all due respect, the Chairman is not above the Rules of the Com-

mittee. I ask for a roll call vote to overturn the ruling of the Chair and to allow for a vote on my motion to adjourn these proceedings.

Chairman GRASSLEY. That would be an appropriate motion if we were in executive business session, but we are not in executive business session, so it is denied.

Senator BLUMENTHAL. Mr. Chairman, I will proceed under protest. We have had a lot of rhetoric so far about rules and norms. I am very regretful that the Chair has adopted this stance, which in my view, contradicts our basic norms and rules. But I will proceed.

[Disturbance in the hearing room.]

Senator BLUMENTHAL. Mr. Chairman, I have fears about what this nominee will do with respect to our rule of law, but also about basic rights that have been established by past Supreme Court precedent. And the only way to test what his fidelity to the rule of law is, in fact, is to ask, as I have asked every single judicial nominee coming before me when I have served on this Committee in hearings, whether he believes past decisions of the Supreme Court were correctly decided.

So I am going to be asking you, Judge Kavanaugh, whether you believe *Roe v. Wade* was correctly decided.

Senator CORNYN. Mr. Chairman?

Senator BLUMENTHAL. I am going to be asking you—

Senator CORNYN. Mr. Chairman, may I ask a question? I was under the impression each of us had 10 minutes for an opening statement. We will have 15 minutes for questions, but—

Chairman GRASSLEY. Let me clarify.

Senator CORNYN. And then—plus, Mr. Chairman—

Senator BLUMENTHAL. Well, I do not—

Senator CORNYN [continuing]. Various Members have been making speeches all day long and have not been confined to their 10-minute opening statement.

Chairman GRASSLEY. Yes. Okay. Well, like I told you—

Senator BLUMENTHAL. I think I have time left.

Chairman GRASSLEY [continuing]. You will have time. I am going to let you finish. Just a minute.

I was hoping that the 10-minute rule would stand, but we got off to a very bad start.

[Disturbance in the hearing room.]

Chairman GRASSLEY. And we got off to a bad start, and everybody started exceeding their time limit. So I guess as long as we have to stay here and get this all done today, if we have to stay into the night, we are going to stay, but I am not going to cut anybody off now that I did not do it right away. And like you said, mob rule. I have always said to myself when I am advising other people, either you run the Committee or the Committee runs you, and I let the—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. And I let the Committee run me this time. So let's just proceed as we have and let Senator Blumenthal take what time he wants. I hope you will not go too long.

Senator BLUMENTHAL. I will be very judicious, Mr. Chairman. Thank you.

Chairman GRASSLEY. I do not know what that means.
[Laughter.]

Chairman GRASSLEY. I am sorry, Senator Cornyn, I cannot agree with you. We will just proceed.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

Senator CORNYN. Next time, Mr. Chairman.

Senator BLUMENTHAL. So I will be asking, Judge Kavanaugh, whether you believe *Roe v. Wade* was correctly decided, whether you believe *Brown v. Board of Education* was correctly decided. Judicial nominees have figured out all kinds of ways to avoid answering the question. At first they said they thought it would violate the canons of ethics. There are no canons of ethics that preclude a response. Then they said that they felt a decision might come before them, an issue in a case that might arise, and more recently they have adopted the mantra that they think all Supreme Court decisions are correctly decided.

But you are in a different position. You have been nominated to the highest court in the land, and your decisions as a potential swing vote could overturn even well-settled precedent. There are indications in your writings, your opinions, as well as the articles you have written and some of the memos that have come to light, that you believe, for example, *Roe v. Wade* could be overturned. And that is why I want to know from you whether you think it was correctly decided in the first place, and other decisions that are regarded as well-settled or long-established.

In fact, I have these fears because, Judge Kavanaugh, the system and process has changed so radically. In fact, you have spent decades showing us in many ways what you believe. Or to put it more precisely, you have spent decades showing those groups like the Federalist Society and the Heritage Foundation and others what you believe. They are the ones who have really nominated you because the President outsourced this decision to them.

In those opinions and writings and statements and interviews, you have done everything in your power to show those far-right groups that you will be a loyal soldier on the Court. I am going to use some of those writings and some of the timing and other indications to show that you are more than a nominee, in fact a candidate in a campaign that you have conducted. That seems to be, unfortunately, the way the system has worked in your case.

The norms have been dumbed down, and the system has been degraded, but I think that we have an obligation to do our job and elicit from you where you will go as a Justice on the United States Supreme Court based on what you have written and said, and also what you will tell the American people in these hearings.

I join in the request that has been made of you that you show the initiative and ask for a postponement of these hearings. I think that this process has been a grave disservice to you, as well as this Committee and the American people. If you are confirmed after this truncated and concealed process, there will always be an asterisk after your name, "appointed by a President named as an unindicted co-conspirator after the vast majority of documents relating to the most instructive period of his life were concealed." The question will always be why was all that material concealed?

You have coached and you have mentored judges going through this process. You are as sophisticated and knowledgeable as anyone who will ever come before us as a judicial nominee. So you know that we have an obligation to inquire as to everything that can be relevant.

And it is not the numbers of documents. It is the percentage. There were no emails when Justice Ginsburg was the nominee. The documents that we have been provided contain duplicates. They are full of junk. We need everything that is relevant, including the 3-years that you served in the Bush White House as staff secretary, the most instructive period of your professional career.

So let me just conclude by saying what we share, I think, is a deep respect and reverence for the United States Supreme Court. I was a law clerk, as you were. I have argued cases before the Court. Most of my life has been spent in the courtroom as U.S. Attorney or as Attorney General. The power of the Supreme Court relies not on armies or police forces. It has none. But on its credibility, the trust and confidence of the American people. I ask you to help us uphold that trust by asking this Committee to suspend this hearing and come back when we have a full picture with the full sunlight that our Chairman is so fond of espousing, so that we can fully and fairly evaluate your nomination.

Thank you, Mr. Chairman.

[The prepared statement of Senator Blumenthal appears as a submission for the record.]

Chairman GRASSLEY. Once again, I would remind everybody we have—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. We have a half-a-million documents on this gentleman's record. And also—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. I would like to respond to the fact that you cannot go 42,000 pages, which I guess is way over the number of documents that we actually received. The Majority and Minority received documents in two ways. One is a format that can be uploaded to reviewing platforms, and the second is in a standard document file format called PDFs.

Given the importance of reviewing documents in a timely manner, my staff reviewed the PDF versions. The production was relatively small, and therefore there was no need to upload them to a reviewing—

[Disturbance in the hearing room.]

Chairman GRASSLEY. Senator Kennedy, you are next.

Senator KENNEDY. Say again?

Chairman GRASSLEY. You are next, Senator Kennedy.

[Disturbance in the hearing room.]

**OPENING STATEMENT OF HON. JOHN KENNEDY,
A U.S. SENATOR FROM THE STATE OF LOUISIANA**

Senator KENNEDY. Thank you, Mr. Chairman.

I have listened with interest today. I agree so much with what Senator Sasse said. I listened today, and it is no wonder to me that so many Americans think that the United States Supreme Court

is nothing more than a little Congress, a political body like the United States Senate.

Let me try to explain what I am looking for in a Supreme Court Justice. I want a judge. I do not want a politician. Now, I am not naive. It is true, Senator Booker and I are new to the Senate. We did not come here when Moses walked the earth. But we are not new to politics. And I understand that human relations are about politics. I get that. But I do not think our Founders ever intended for the United States Supreme Court to become a political body. I do not.

I am not looking for an ideologue. I am not looking for a hater. What I am looking for is somebody who is smart, who is intellectually curious, who writes cleanly and crisply, who knows what a semicolon is for, and who is willing to protect the United States Constitution and the Bill of Rights, and understands that the Bill of Rights is not an a la carte menu. Every one of them counts.

Let me try to explain further why I agree with so much of what Senator Sasse said. This is not a news flash. Our country is divided. We have been divided before. We will be divided again. We will survive this. But I confess, the division in our country today seems to me to be especially sharp. And what concerns me so much about that division is the basis for it. It is not honest disagreement. So much of it is anger.

There have been thousands, millions of pages written about the genesis of that anger. We all have opinions. You know what they say about opinions. Here is mine. I think a big part of the anger in America today is because we have too many Americans who are not sharing in the great wealth of this country, not economically, not socially, not culturally, and not spiritually. And those Americans believe that the American dream has become the American game, and that that game is fixed.

Let me give you one example why I say that. I do not hear it so much today. I am biased, but I happen to think the Tax Cuts and Jobs Act bill worked. But when I ran 2 years ago, I would hear it every single day. People would stop me and they would say, "Kennedy, do you know what is wrong with us economically?" They would tell me, "I look around, Kennedy, and I see too many undeserving people"—I emphasize undeserving. I do not want to paint with too broad a brush. They would tell me, "Kennedy, I look around and I see too many undeserving people at the top getting bailouts, and I see too many undeserving people at the bottom getting handouts. And I am here, just a working schmuck in the middle, stuck in the middle, and I cannot pay the freight anymore because my health insurance has gone up and my kid's tuition has gone up and my taxes have gone up, but I will tell you what has not gone up—my income."

Now, I happen to think we are doing better in that regard, but we still have a long way to go. But here is the point: Who is supposed to fix that for the American people? It is us. It is the United States Congress. It is not the United States Supreme Court that is supposed to fix this country culturally, economically, socially, spiritually.

And that is why I say I agree with so much of what Senator Sasse said. It has almost become a cliché, but the role of the judge

is, or at least should be, to say what the law is, not what the law ought to be. Now, that has become cliché, but clichés become clichés because they are true. Judges are not put there to try to bypass the ballot. Courts should not try to fix problems that are within the province of the United States Congress, even if the United States Congress does not have the courage to address those problems. Our courts were not meant to decide these kinds of issues.

Again, I am not naive. I know that judges are not robots. We cannot replace you and should not try to replace you with a software program based on artificial intelligence. You have discretion. We are going to talk about that if we ever get to the questioning part of this exercise.

But I want to say it again. I understand why, listening today, so many Americans believe that the law, which I think all of us revere, has become politics just pursued in another way. It is not the way it is supposed to be, judge. That is not what I am looking for.

Now, I am going to end. I still have plenty of time left. I think I have 2 hours allotted, Mr. Chairman?

[Laughter.]

Senator KENNEDY. Somebody talked about—said they had seen this movie before. I commented to my friend, Senator Tillis, this thing is as long as a movie.

These are the words of Justice Curtis in 1857, when he dissented in the *Dred Scott* case: “When a strict interpretation of the Constitution according to the fixed rules which govern the interpretation of laws is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution. We are under the government of individual men who, for the time being, have power to declare what the Constitution is according to their own views of what it ought to mean.” That is not the rule of law.

Justice Scalia put it another way, and I truly will end with that. He said, “The American people love democracy, and the American people are not fools. The people know their value judgments are quite as good as those taught in any law school, maybe better. Value judgments, after all, should be voted on, not dictated.”

And that is what I am looking for, Judge.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Hirono.

**OPENING STATEMENT OF HON. MAZIE K. HIRONO,
A U.S. SENATOR FROM THE STATE OF HAWAII**

Senator HIRONO. Thank you, Mr. Chairman.

Judge Kavanaugh and your family, welcome.

Mr. Chairman, earlier on today, I pointed to an op-ed that had been written by two former White House staff secretaries, John Podesta and Todd Stern, entitled “Staff Secretaries Aren’t Traffic Cops: Stop Treating Kavanaugh Like He Was One.” And I note in their op-ed what they said. I will quote part of it.

They say that, “When we handled the job for Bill Clinton in much the same way that staff secretaries did for President George H.W. Bush, we wrote concise cover memos for every decision memo that went to the President. We summarized the underlying memo, identified the core decision points and options, and conveyed the

views of key senior staff members from whom we had sought comments. We wrote hundreds of these memos.” It is no wonder that Judge Kavanaugh has deemed his time as White House staff secretary so important to his performance as a judge. But unfortunately, as we have said many times already, we do not have any of these documents during Judge Kavanaugh’s time as staff secretary.

Dana Sabraw. Michael Baylson. Ketanji Brown Jackson. Colleen Kollar Kotelly. Naomi Reice Buchwald. John Bates. Derek Kahala Watson.

These are the names of some of the Federal judges across this country who have vindicated my faith in the rule of law over the last year and a half. These are the women and men, appointed by Republican and Democratic Presidents, who ordered the Government to reunite parents with the children ripped from their arms at the border; who rejected attempts to deny Federal funds to cities refusing to be drawn into the war against immigrants; who stopped Executive orders aimed at kneecapping public-sector unions; who stopped the implementation of an ugly ban on transgender Americans serving in our military; who ruled that public officials cannot block citizens from their Twitter feeds; and who stopped the Government from banning Muslims from entering the United States.

These judges stood firm in defense of the Constitution, the American values it expresses, and the system of checks and balances it enshrines. At this moment of peril for our democracy, it is these judges, and others like them, who have pushed back against the efforts of a President eager to wield unlimited and unchecked power.

In normal times, we would be here today to determine the fitness of a nominee to the Supreme Court of the United States chosen for his or her legal talent and reputation for fairness.

But these are not normal times.

Instead, we are here to decide whether or not to rubber stamp Donald Trump’s choice of a pre-selected political ideologue, nominated precisely because he believes a sitting President should be shielded from civil lawsuits, criminal investigation, and prosecution, no matter the facts.

Let’s not forget. During his campaign, Donald Trump needed to shore up support from the Republican base who questioned whether he was sufficiently conservative. To help, he turned to the Federalist Society and the Heritage Foundation to build a pre-approved list of names, and promised to pick from among them when selecting nominees for the Supreme Court.

These groups are longstanding right-wing organizations that advocate for conservative causes and legal positions. The Heritage Foundation focuses on developing policy to, among other things, oppose climate change, repeal the Affordable Care Act, and reduce regulations for big business. The Federalist Society focuses on changing the American legal system to align with an ultra-conservative interpretation of the Constitution, including the overturning of *Roe v. Wade*.

When given the opportunity to nominate a new Supreme Court Justice, Donald Trump did exactly as he promised. He did not select someone who demonstrates independence and fidelity to the rule of law. Instead, Donald Trump selected a pre-approved name

in order to guarantee a fifth vote for his dangerous anti-worker, anti-consumer, anti-women, pro-corporate, and anti-environment agenda.

And Donald Trump selected Brett Kavanaugh from this list for an even more specific reason. The President is trying as hard as he can to protect himself from the independent, impartial, and dogged investigation of his abuse of power, before the walls close in on him entirely.

Because if there is one thing we know about Donald Trump, it is that he is committed to self-preservation every minute, every hour, every day.

Judge Kavanaugh's appointment should be considered in a broader context. The President has been packing our courts with ideologically driven judges who come to the bench with firm positions and clear agendas, who then go on to rule in ways consistent with those agendas.

For example, Trump nominee James Ho, now a judge on the Fifth Circuit, has written in favor of unlimited campaign contributions and, in another case, publically aired his personal views in opposition to abortion.

Trump nominee Don Willet, now a judge on the Fifth Circuit, has already voted to curtail the independence of a Federal agency that helped rescue the economy after the mortgage crisis of 2008.

Trump nominee Stephanos Bibas, now a judge on the Third Circuit, wrote a dissent to explain that he does not believe Title IX requires school districts to provide transgender students appropriate changing facilities and bathrooms.

Trump nominee Amy Coney Barret, now a judge on the Seventh Circuit, ruled to keep out of court employees trying to challenge an arbitration proceeding, and cast the deciding vote to allow a business to continue to segregate its work force.

And Trump nominee John K. Bush, now a judge on the Sixth Circuit, ruled to keep out of court a woman accusing her employer of age discrimination, despite a dissenting judge's view that there was sufficient evidence to go forward.

When these Trump-nominated judges came before the Judiciary Committee as nominees, my Democratic colleagues and I tried to find out how they would go about deciding tough cases, what they would base their decisions on when the law did not give a clear enough direction, as is often the case.

Time and again, we were told: Do not worry about my personal background or my history as a partisan, political advocate. Do not worry about what I have done, written, or said until now. When I get on the bench, I will just follow the law. But clearly, they have not. Why should we expect this Supreme Court nominee, you, to be any different?

President Trump selected Brett Kavanaugh because of his fealty to the partisan political movement he has been a part of his entire professional life.

From his clerkship with Judge Alex Kozinski, to his apprenticeship with Ken Starr, to his work on George W. Bush's legal team during the Florida recount and in the White House, Judge Kavanaugh has been knee-deep in partisan politics.

The first reward for that service was his nomination to the D.C. Circuit. It was a tough fight, but Republican-aligned special interests fought for more than 3 years to get him confirmed.

And for the last 12 years as a judge, he has ruled, whether in dissent or majority, in ways in line with their political and ideological agenda.

Now, President Trump has selected Judge Kavanaugh to provide the decisive fifth vote in cases that will change some of the most basic assumptions Americans have about their lives and their Government.

There are more than 730 Federal judges working on thousands of cases across the country every day. Most of these cases end in trial courts. Some of them are appealed and heard in appellate courts. The closely divided Supreme Court hears very few cases, many times fewer than 100, every year.

Before Justice Kennedy retired, so many important Constitutional rights were hanging in the balance, decided on narrow grounds by 5-to-4 votes.

And now that Justice Kennedy has left the Court, the forces opposed to workers' rights, women's rights, LGBTQ rights, voting rights, civil rights of all kinds, and environmental protections are eager to secure a solid majority on the Court to support their right-wing views.

These ultra-right-wing forces have been working for decades to prepare for this moment because they know that a single vote from one Justice is all it would take to radically change the direction of this country.

It could take just one vote on the Supreme Court to overturn *Roe v. Wade* and deny women control over their reproductive rights.

It could take just one vote to declare the ACA's pre-existing condition protections unconstitutional.

It could take just one vote to dismantle environmental protections that keep our air safe to breathe and our water clean to drink.

It could take just one vote to dismantle commonsense gun safety laws that keep our communities safe.

And it could take just one vote to further erode protections for working people and unions.

Since this nomination was announced, I have been asked many times why the Democrats would even bother to go through the motions when we know that our Republican colleagues will do anything to support this administration's judicial nominees.

There are battles worth fighting regardless of the outcome. A lifetime appointment to the Supreme Court, of someone who will provide the fifth vote on issues impacting the lives of every working American, is a battle worth fighting.

So, I intend to use this hearing to demonstrate to the American people precisely why who sits on the Supreme Court matters, why a fifth ideologically driven conservative and political vote on the Court is dangerous for our country, why the Senate should reject this President's latest attempt to rig the system in his favor.

As Senators begin to ask their questions in the coming days, I ask the American people to listen carefully to what the nominee

says and compare it with what we heard only a short time ago from Neil Gorsuch at his confirmation hearing.

Just 18 months ago, Judge Gorsuch told us that, “All precedent of the United States Supreme Court deserves the respect of precedent, which is quite a lot. It’s the anchor of the law.”

Judge Gorsuch said, “It’s not whether I agree or disagree with any particular precedent. That would be an act of hubris. Because a precedent, once it’s decided, it carries far more weight than what I personally think.”

Judge Gorsuch made these promises when he was asking for our votes. But earlier this year, he joined a majority of the Court to overturn precedent in a 41-year-old case that protected Government workers and their ability to form a union in a 5-to-4 decision.

I expect Judge Kavanaugh to make similar promises over the next few days, only to do, sadly, the exact opposite if confirmed.

Our job here is important, because every American should be concerned about what our Government and country would look like if Judge Kavanaugh is confirmed.

We owe it to the American people, and to all of the independent-minded judges I mentioned at the beginning of my remarks, to preserve the integrity of our Constitution and the fairness and order of a system that has served us well for so long.

Judge Kavanaugh, what may be going through your mind right now is to simply and stoically endure this hearing. But do you not think you owe it to the American people to disclose all of the documents being requested? Because you have nothing to hide. Because you have nothing to hide.

I agree with my colleague, Senator Durbin, Judge Kavanaugh. If you stand behind your full record in public life, fundamental fairness will dictate that you join us in our call for this Committee to suspend until we receive all relevant documents and have a chance to review them. Your failure to do so would reflect a fundamental mistrust of the American people.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hirono appears as a submission for the record.]

Senator HIRONO. And I would like to have entered into the record the op-ed piece that I referred to by John Podesta and Todd Stern.

Chairman GRASSLEY. Without objection, it will be entered.

[The information appears as a submission for the record.]

Chairman GRASSLEY. Let’s go to Senator Crapo next.

**OPENING STATEMENT OF HON. MIKE CRAPO,
A U.S. SENATOR FROM THE STATE OF IDAHO**

Senator CRAPO. Thank you, Mr. Chairman.

Judge Kavanaugh, welcome. Thank you for your service to this country, and thank you for the willingness you have expressed to take this additional assignment. And thank you to your family. We welcome them as well.

The process upon which we are about to embark is one of, if maybe not the most, important duties entrusted to the Senate, advise and consent on judicial nominations. Ultimately, a fair and

proper judge, Supreme Court or otherwise, must follow the law and not make laws from the bench.

Upon receiving his nomination to serve as an Associate Justice of the Supreme Court, Judge Kavanaugh stated, "My judicial philosophy is straightforward. A judge must interpret statutes as written, and a judge must interpret the Constitution as written, informed by history and tradition and precedent."

Isn't that the ideal of a judge steadfastly committed to the law?

No one seriously questions Judge Kavanaugh's qualifications to serve as an Associate Justice on our Nation's highest court. He is vastly experienced and widely respected for his intellect, his honesty, and his legal acumen. With over 300 offered opinions and 12 years of service on the bench, he is a judge with a clear record demonstrating that he applies the law as written and enforces the Constitution. He values precedent and has written, along with Justice Gorsuch and others, the law of judicial precedent, a scholarly piece on the importance of stare decisis.

Sadly, much of the discourse surrounding Judge Kavanaugh's nomination deals not with the content of his legal opinions, his judicial philosophy, or temperament, but rather, as today's discussion has shown, the spurious notion that our distinguished Chairman has not been rigorous or fair or transparent in navigating the requisite document production efforts required by this Committee.

Those claims are wholly without foundation. There have been 57 days since the announcement of Judge Kavanaugh's nomination on July 9 and today's confirmation hearing. This is a longer period of time than Senators had for Justices Sotomayor, Kagan, and Gorsuch. Justice Kavanaugh also submitted over 17,000 pages with his bipartisan Judiciary Committee questionnaire, the most extensive questionnaire ever returned by a nominee to the Supreme Court.

The Committee also received more than 440,000 pages of documents related to his service in the executive branch. This, too, is more than any Supreme Court nominee to date. As has been said earlier, in fact, it is more than the last five nominees combined.

I applaud Chairman Grassley and his dedicated staff for their tireless work in reviewing these documents and making the vast majority publicly available as quickly as possible. And frankly, Mr. Chairman, I believe the American people appreciate your efforts, your transparency, and your commitment to a fair process.

Now, I want to make one side note. It was said here today that the number of documents provided by now-Justice Kagan, who was also a nominee who had served in the White House and had many, many documents related to her service, that 99 percent of the documents requested for her were provided. One problem with that fact, and that is that when Justice Kagan was before us, she had been the solicitor General. There were probably more pages relevant to her service there than to your service. We do not know the number because the Republicans agreed after a strong disagreement with the Democrats that we would not request those documents because the White House claimed they were sensitive.

The Democrats have not made that agreement with the Republicans this time. But I think it is incredibly important to note that

this argument that is going on today about the balance of document production is simply a trumped-up argument.

These facts aside, many of my colleagues continue to criticize this process. Their motives are clear: use any means available to attempt to delay the confirmation process of a well-qualified jurist fit for the job, indefinitely.

I strongly agree with the comments of many of my colleagues here today. Senator Cruz pointed out what was really at stake. Senator Sasse pointed out why it is that Congress needs to be the part of our Federal Government that makes the law, not the judiciary. Senator Kennedy has followed up on that thought, as have many of my colleagues here today.

I think that one point that Senator Cruz mentioned deserves repeating. Much of what we are hearing today and will hear for the remainder of this process is ultimately an effort to re-litigate the last Presidential election. In fact, we have just heard Judge Kavanaugh attacked and stated to be unqualified because he is a Trump nominee. Other Trump nominees have also been attacked here today.

The attack is on President Trump, not on their nominees, because of an unwillingness to accept the outcome of the last Presidential election. Judge Kavanaugh as the nominee has been widely recognized for his judicial temperament and his detailed legal writings in defense of the Constitution. His opinions are widely cited by his fellow appellate judges, and even the Supreme Court. And although his integrity was just challenged, stating that no matter what he says to this Committee he will vote the other way once put into office, put into the Supreme Court, the fact is that his record, as the Chairman has already outlined, disproves that.

He serves on the D.C. Circuit Court of Appeals, a court on which more of the judges who serve have been appointed by Democratic Presidents than Republican Presidents. Yet he has voted 97 percent of the time with his colleagues in the majority on that court, showing that he will follow the law and that he does so with the majority support of broad and—I was going to say bipartisan, but nonpartisan judges who are appointed by Republican and Democratic Presidents and who consider some of the most important cases in America today.

That is the judge we have before us. He is a judge's judge.

Many critics argue that Justice Kavanaugh would play an instrumental role in reversing a number of Supreme Court precedents. However, I wonder how one can draw that conclusion given his record of exhaustive and weighty consideration of important legal questions on a court such as the D.C. Circuit.

I recognize that it is politics driving these attacks, and so do the American people. They know what is at stake.

Moreover, in his legal opinions, Judge Kavanaugh has consistently demonstrated a willingness to rein in both Congress and the executive branch when they overstep their respective constitutional grounds. Judge Kavanaugh understands and is focused on the principle that a judge is a servant of the law, not a maker of it. We should take him at his own words. The judge's job is to interpret the law, not to make the law or policy.

So, read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. Do not make up new constitutional rights that are not in the text of the Constitution. Do not shy away from enforcing constitutional rights that are in the text of the Constitution. Those are Judge Kavanaugh's words. That is the man who sits before us nominated to be a Justice on the highest court of our land.

Judge Kavanaugh has the backing of his former law clerks and law students, his colleagues on the bench appointed by both Republican and Democratic Presidents, and many members of his local community in which he remains so closely involved. He is a man of honor, integrity, and well-respected in the legal community. There is no dispute he is qualified to serve on our Nation's highest court.

Mr. Chairman, I look forward to the hearing to hear from the nominee himself when we all get done with our statements.

[Disturbance in the hearing room.]

Senator CRAPO. The next few days will prove insightful as we discuss with Judge Kavanaugh for the public to hear in his own words the proper role of the judge in our constitutional system. I look forward to this hearing, and again, Judge Kavanaugh, thank you for being willing to be here.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you.

Senator Booker.

**OPENING STATEMENT OF HON. CORY A. BOOKER,
A U.S. SENATOR FROM THE STATE OF NEW JERSEY**

Senator BOOKER. Thank you, Mr. Chairman.

Welcome, Judge Kavanaugh. And I want to say welcome to your family sincerely as well. We are all Americans taking part in what is truly an historic moment.

Mr. Chairman, Chairman Grassley, I hope you do not think earlier this morning that in any way I was questioning your integrity or your decency. I was appealing to it earlier before, and you have been conducting this hearing giving myself and others the opportunity to at least speak and make our case, and even though you have not ruled in our favor, of which I am disappointed, I do hope you understand that I value your friendship, and frankly some of the most valuable moments I have had in the Senate. I still remember shaking your hand and coming to agreement with you on criminal justice reform. I have come to have a deep respect for you, sir. So I hope you do not think I was doing that earlier.

Chairman GRASSLEY. If you worry about our friendship being affected, it will not be. And that gives me an opportunity to say something to the public at large, and that is about this Committee.

You would think that Republicans and Democrats do not talk to each other, but I would like to remind the public that when they think that happens, they ought to think of the record of this Committee, not just this Chairman but this Committee in the 3½ years and maybe even before I got to be Chairman. But in the 3½ years I have been Chairman, every bill that got out of this Committee has been a bipartisan bill.

Proceed, Senator Booker.

Senator BOOKER. Thank you very much, sir. I appreciate that. It does not detract from the fact that I just fundamentally disagree with the way you have been concluding today.

When I first got to the Senate I was very fortunate that a lot of senior statesmen, yourself and Senator Hatch included, pulled me aside and gave me hard wisdom at times. You will remember, I came to the Senate in a special election at a time when we were changing some of the Senate rules. Senator Levin brought me aside and gave me a hard talking to. Senator McCain gave me a hard talking to. And all of them made similar points about this idea that sometimes you need to be as objective as possible and see how you would react if the pendulum had swung the other way. In other words, they warned me that what goes around in this place comes around, and to really think as if the shoe was on the other foot.

And I have been struggling with that, sir, in all honesty, of what the Republicans would be saying and what we would be saying if we had a Democratic President right now, a Democratic nominee right now, and this process was in the reverse. And I would like to believe how I would behave, and I am pretty confident, would be willing to bet that if the Republicans were being denied effectively about 90 percent of the documents about a person's public record, I actually do believe that some of the analogies that are made to Justice Kagan and her Solicitor General time is not a fair analogy.

This is a part of the nominee's history that he himself has said was one of his most formative times. I would not hire an intern in my office knowing only 10 percent of their résumé. There is not a person here who would buy a home only seeing 10 percent of the rooms.

I just believe what we are doing here, just on the objective view of fairness, is sincerely unfair and is insulting to the ideals that we try to achieve with some sense of comity and some sense of rules.

But I want to go deeper than that. I am trying to figure out what the jeopardy would be if we just waited for the documents. Last night we had a document dump of tens of thousands of pages, tens of thousands of pages. As has been said already, there is no judge that would allow a court proceeding to go on, no judge that would move forward if one of the parties had just gotten documents as of 5 o'clock last night, or potentially as of 11 o'clock.

What I do not understand is, what is the jeopardy of just waiting, not just to digest these documents but other documents? The reality is that, Senator Grassley, you have yourself asked for a specific, more finite set, a more limited set of documents that you have not even gotten.

So whether it is not seeing 90 percent of the résumé of the gentleman before us, or 50 percent, or 40 percent, that should come within time, and there is no jeopardy when we have a lifetime appointment. He will be there, should he be confirmed, for decades and decades and decades. Waiting another week or 5 days or 2 weeks for those documents that you yourself have requested, which is a more limited subset, for even those documents to come through, I do not understand what the rush is, especially given all that is at stake.

So those are the reasons why I say to you with sincere respect that this is an absurd process. It just seems unfair to me, and it could easily be solved by us putting a pause here in this process, waiting for the documents, evaluating the documents, and it will be a much more robust set of hearings on this nominee.

As I said, I would not hire an intern if I had not seen—if I had only seen 10 percent of their résumé. And here, to have a fuller body of the work of this gentleman before us, who one of my colleagues called popping up in some of the most interesting times in the last decade or two on some of the most important issues, already the limited amount, 7 percent of the documents that I have seen, unfortunately those are things that are being held Committee confidential, which I do not even know if I can use in my question here. I think the penalty is being ousted from the Senate.

But even the limited documents has made potentially my questioning far more rich, far more substantive, to get to the heart of the issues of the individual nominee. And again, sir, I try to summon the spirit of some of the elder statespeople I had the privilege of serving with, from Rockefeller to Levin to McCain, to summon that spirit to be as objective as possible. I do not think it is unreasonable for us to wait for a week or two to get the full body of those documents. It will cause no harm or damage except to have more of a full telling of what is at stake here.

The stakes are too high in what this nominee represents for us to rush through this process without a full sharing of the documents. And with that, I will continue, sir, with my opening statement.

I have said before already that—

Chairman GRASSLEY. Since you have not begun your opening statement—

[Laughter.]

Chairman GRASSLEY. I will take this opportunity to probably say that you said, I did not get all the documents I requested. You probably heard the first sentence of something I said after our break, and that was, that I first started talking about expecting a million documents, and we end up, I think, with 488,000. But then I went on to explain that the process with all the software and everything else that can speed things up, duplicates were eliminated, and, et cetera, et cetera. And so, we have gotten all the documents I requested, just to correct you.

Senator BOOKER. Sir, and to my understanding—

Chairman GRASSLEY. Go ahead with your opening statement.

Senator BOOKER. No, sir, but I just want to make a point to that, if you do not mind. You requested a limited set of documents of his time as a—in the White House Counsel's Office. We have not received all the documents from his time there. They are still being vetted slowly through our system of a—not a representative from the Committee, but the Bill Burck individual still—is still reading through those documents as we speak. I imagine some of them will be dumped on us as this process is going on, and I predict, with quite confidence, that some of those documents might still be trickling out in the days before the actual full Senate vote. Please, sir.

Chairman GRASSLEY. You are talking about “committee confidential,” and you have access to them right now. They just—there has

not been a determination that, like, 80 percent of all the documents are on the website so the public can see them, but in regard to some, they were forwarded to us without a second review. That second review gives an opportunity to then get them out to the public if there is no reason that they are excluded under the law, and you can read those committee confidential documents right now.

Senator BOOKER. Well, sir, we sent a letter days ago asking for that. I will—I will re-send it with you in these next 24 hours before our hearing tomorrow.

Chairman GRASSLEY. We responded to your letter.

Senator BOOKER. Again, sir, you did not respond to our letter by allowing committee confidential documents to be—

Chairman GRASSLEY. Please go to your opening statement.

Senator BOOKER. Thank you very much, sir. And, look, I was—you know, former Senator—now former Vice President Biden talked about not questioning your colleagues' motives, and some of the colleagues across the aisle have called the efforts by some of us sincerely to get access to these documents a sham, a charade. I can go through a lot of the words that were used calling into question the motivations that I have or doing what I believe, sir, is perhaps the most grave and important duty that I have as a Senator, to advise and consent. And, yes, as Senator Cornyn pointed out, I have announced my decision already, but my duty to the people of the State of New Jersey, and others, is to fully vet an individual. That is why I think these documents are important, that his full record is made clear, and that we have a chance to ask questions about it.

I also have said that I oppose this nomination happening right now because of the moment we are in American history, which is very unprecedented. I remind you that we have had bipartisan statements by Senators working in tangent about the attack on the United States of America, which was an attack going to the core of what our democracy is about: the voting processes. A special counsel was put into place, and that has led to dozens of people being indicted, people all around the President of the United States. It has led to dozens and dozens of charges, and that investigation is ongoing. We have seen the President of the United States credibly accused by his own personal lawyer to—as being an unindicted co-conspirator.

In all of this, we have one judge being chosen who was not on the original list. He was not on the outsourced Federal Society's original list. He was not on the second version of that list. He got onto that list after this special investigation got going; in other words, after the President was in jeopardy. He was added to the list, and then the President pulled the one person from all of that list late—that was added late that would give him, in a sense, the ability to pick a judge that has already spoken vastly about a President's ability to be prosecuted, about a President's ability to dismiss or end an investigation. And so, that is the second reason why I have asked for us to put a pause on this process.

Fundamental to this Nation's very beliefs—Judge Learned Hand said this—as powerful and profound as the documents of this country, our founding documents, they are not worth much if the people themselves lose faith in them. And I believe the nomination of a

judge through all of this, who so powerfully speaks to a President's de facto immunity from ongoing investigation prosecution, will shake the faith that millions and millions of Americans have in the fairness of the process and the system. And I have asked Judge Kavanaugh time and time again to recuse himself, to restore that faith, to alleviate the concerns of Americans, and he has thus far refused to do so.

Now, I am upset about the process, and this is not manufactured outrage. This is sincere concern for a process that seems wrong and just not objective and fair. I am concerned about, as many colleagues are on both sides of the aisle, a Russian attack on our Nation. But there is a lot more going on here that makes this nomination of great concern, and it is, frankly, some of the things I have heard from both sides of the aisle tonight, is when we travel this country and what we are hearing from individuals, and how that is related to a position on the Supreme Court.

Right now, millions of American families are watching this in sincere concern and fear. I have heard them. I have gotten the calls. I have traveled this country. I have talked to Republicans and Democrats. They are fearful about where the Supreme Court is going and what it will do when it has the power to shape law, shape the lives and liberties for individuals, for decades to come. I have talked to workers all over my State, all over this Nation, workers that now work in a country where wages are at a 60-year low as a portion of our GDP, whose labor protections—workers whose labor protections are being diluted and whose unions are under attack.

So many of those individuals are asking whether the Supreme Court of their lifetimes will be an institution that elevates the dignity of American workers, or one that allows powerful corporate interests to continue to weaken labor protections that did not just happen, labor protections that were fought for, that people struggled for, that some, you know, in the labor movement actually died for. Are these labor rights going to become aggravated, are they going to become limited, further increasing the vast disparities of wealth and power in our country?

We know this. We have talked to them on both sides of the aisle. We have talked to cancer survivors, Americans with disabilities, survivors of domestic abuse, parents with beautiful children that happen to have disabilities, who, because of the Affordable Care Act, can no longer be denied coverage because of, quote, "a pre-existing condition." There is a Texas case where that is being challenged right now. That is moving up. It could likely go before the Supreme Court.

Well, knowing your record, it is right that these Americans, so many of them with pre-existing conditions, are asking whether the Supreme Court will be an institution that affirms and protects the rights of people with access to healthcare, some—many people who rightfully believe when they read our founding documents that talk about life, liberty, and the pursuit of happiness, that healthcare they believe is fundamental. We all know too many people who have set aside prescription drugs because they are too high because of what corporations are doing there, people who have put off going

to see the doctor because a visit is too expensive. That is in the balance with this nomination.

I have gone across the State, and, Senator Durbin, I do not know if I have told you this. I was in your State talking to a Republican farmer about how the farm country is changing so dramatically the livelihoods of so many independent family farmers, are being threatened by the consolidation of large multinational corporations. These corporations have acquired so much power. This consolidation now—from the seeds that they buy, the prices going up, to who they have the ability to side to. This abuse of corporation consolidation is driving so many farmers out of business. You see, one farmer was telling me about the suicide rates.

Now, people are saying that this is histrionics, this is not life or death. Well, I know these things actually are often a matter of life or death. When insurance rates go up—when insurance rates go down rather, more people without healthcare often lose their lives. There are—there is not one Senator on the Republican side or the Democratic side who has not seen—I have only been here 5 years, and I have seen the culture of Washington change because of the obscene amount of dark money pouring into our political process, corrupting our political process, rigging the system. This nomination will have an effect on that.

I have seen Americans all over this country with the bipartisan work that I have done with Senators on either side who feel entrapped by a broken criminal justice system, one that is—we know and unassailably disproportionately targets Black and Brown Americans, where many Americans believe, and one famous American said, we have a system that now treats you better if you are rich and guilty, than poor and innocent. These issues are in the balance now.

And everyone who is concerned about these issues and more are wondering what the story of America is. We have this great leader, a man named King, who said, “The arc of the moral universe is long, but it bends toward justice.” There are so many Americans who fought for these fundamental rights, family members who they remember, union organizers, civil rights activists, women’s rights activists who fought for, struggled for, and died for many of these rights, the right for women to make their own medical decisions, including the right to an abortion and not a back alley butcher, the right of all Americans to marry who they love, the right to vote, and to work free of discrimination regardless of race and the rights of all Americans. These are our rights. These are American rights.

And so, we know the answer to these questions. I have looked through the record I have had access to to see the pattern of your decisions, and that is the pattern that really troubles me, Judge. And I know we are going to get a chance to go through this, and I know my colleagues will as well. But it seems so clear that in your courts, the same—the same folks seem to win over and over again—the powerful, the privileged, big corporations, special interests—over and over again. Folks that lose are the folks that why I came to Washington to fight, working folks, consumers, women, immigrants, minorities, the disadvantaged, the poor.

This is the challenge before us. This is why so much is at stake. I love that my colleagues keep going back to the Constitution, but

understand this. I laud our Founders. I think they were geniuses, but you got to understand that there are millions of Americans who understand that they were also flawed people. We are the oldest constitutional democracy. We are the oldest one. We were founded in a break with human events. You know this, Judge. I have read your writings. We were not founded on some kind of tribalism as much as we think it is breaking out in our country. We were not founded because we all look alike, we all pray alike, because we are all of the same race. We are not a monarchy or theocracy. We broke with the course of human events and formed this Nation. God bless America. God bless our Founders.

But we know our Founders and their values and their ideals, we know that they—that they were flawed, and you can see that in the documents. Native Americans were referred to as “savages.” Women were not referred to at all. African Americans, Black slaves, were referred to as fractions of human beings. As one civil rights activist, I think it was Stokely Carmichael, used to always say, “constitute, constitute, I can only say three-fifths of the word.”

Chairman GRASSLEY. Senator Booker—

Senator BOOKER. I am almost done, sir.

Chairman GRASSLEY. Okay, go ahead.

[Laughter.]

Senator BOOKER. I have got about three more minutes.

Chairman GRASSLEY. The only reason—the only reason I stopped you at this point is I thought that I would let people go at least as far as Senator Blumenthal went, and you have reached that point.

Senator BOOKER. I appreciate that. I am a bit of a trailblazer, sir. I am going to push just two or three more minutes.

Chairman GRASSLEY. Okay.

Senator BOOKER. My point—my point, sir, is that I am proud of this history.

Chairman GRASSLEY. Your clock, when it reaches 10, is your 2½ minutes—

Senator BOOKER. And I just want to point out right here from the activism in Stonewall, Selma, Seneca Falls. There is an activism that I worry, rights that were gained were rolled back. And the example I have here is, there is an amazing activist here right now, Ms. Carlotta Walls LaNier. And Ms. LaNier, I thank her for coming today. It was 61 years ago on this very day on September 4th, 1957, that Ms. LaNier at the age of 14, faced crowds that were shouting racial slurs. She was jeered. And on that day, Ms. LaNier joined eight other students, a group that would become known as the Little Rock Nine, to try to desegregate an all-White high school in Little Rock, Arkansas. We know what they did that day was much more—much bigger than a first day of school. It was the first major test of the Supreme Court’s landmark decision, the 1954 *Brown v. Board of Education* decision.

I have been shocked sitting here that there are now some judges that Trump has appointed that refuse to even say—and I am not saying this is you, sir—that that is settled law. There are people, like Ms. LaNier, who were part of gaining rights in this country, advancing the ideals of this Nation toward the purity of the ideals put forth by the Founders despite the imperfections. And now, the

fear and the worry is, what the trend of the Court is doing, is rolling back those gains. It is undermining that progress. It is restricting individual rights as the rise of corporations, the rise of dark money, the rise of the interests of the powerful and the privileged and the elite.

And so, I just say in conclusion, sir, and I said this to you in a heart-to-heart moment in the last seconds that you were—you came to my office to meet with me one-on-one, which I appreciated. I pointed to the map behind my desk, which is the central ward of Newark, New Jersey, a place with mighty people. It is a low-income community, people still struggling for the fullness and the richness of the promises of America. That is the concern that I have right now. That is what is at stake. And so, I say in conclusion, sir, this to me is a profound and historical moment. I cannot support your nomination not just because of the body of your work, but also the perverse process by which this comes forward. We should not vote now. We should wait, and if we are not waiting, we should object to your nomination.

Thank you.

Chairman GRASSLEY. Senator Tillis.

**OPENING STATEMENT OF HON. THOM TILLIS,
A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA**

Senator TILLIS. Thank you, Mr. Chairman.

I have a 12-minute preamble and 18 minutes of comments.

[Laughter.]

Senator TILLIS. In all seriousness, I hope to beat Senator Flake in being brief.

First of all, to Ashley, I know that Margaret and Liza are gone, but you have gone through a very difficult day, and you have held up well. To your parents, Judge Kavanaugh, I have got to compliment you on your mother's composure. I am pretty sure my mother would have been out of the chair by now.

[Laughter.]

Senator TILLIS. So, I appreciate all that you have—all you have done. You have obviously raised your son right.

You know, I think we need to go back and recognize we were going to be here. This was not going to be a “Kumbaya” moment. We had every Member on this Committee either publicly state or participate in a press conference before the sun had set on the first 24 hours of your nomination that they were going to vote against you. Now, we are asking for all kinds of documents, and you are getting them. As a matter of fact, I think the Chair has done an extraordinary job. He started on this process by offering—acquiring as many as a million documents. We determined because of duplication and relevance it was only a half a million, and they have all been provided. And I am not an attorney, but I am a technologist, and I am also a process person, and I know damn well that if you get documentation electronically, you can get through in a matter of hours. And for the documents that got sent yesterday, you could get through it in a matter of hours. They have plenty of time to get documents. They only need to run up the score because they already know they are going to vote against you.

I also want to compliment you on your composure. You have taken a lot of notes, and I for one tomorrow am going to spend more of my time listening to your responses rather than talking over you and trying to simplify things into “yes”/“no” answers that you know you cannot respond to. So, I look forward to your testimony tomorrow.

You know, as the hearing was going on, there were two things that just caught me. I am not going to do my prepared statements. I will submit them for the record, Mr. Chair. But we’re talking about all this dark money and efforts going on on the other side. Well, I just got an email from Organizing for Action—you all would know that as the legacy campaign of President Obama—telling me to oppose you because you are going to deny reproductive rights, deny healthcare coverage, advance climate change in a bad way, and gun violence prevention. I do not know near as much about the institutions of Government as, let us say, Senator Sasse, but I am pretty sure once you get confirmed on the Bench, you are not going to be able to file a bill to do any of that. What you may end up doing is finding out that we got lazy, we did not work hard enough, we did not understand the Constitution, we did not reach across the aisle to create enduring value, which is largely the reasons why people get frustrated with you. They want you to do our job.

Justice Gorsuch said numerous times in his confirmation hearing that I had the privilege of participating in, “It is not my job to do your job, Mr. Senator.” If you are frustrated and worried about the prospects of somebody being denied coverage for pre-existing conditions, then let us fix it. That is why I filed a bill a couple of weeks ago. Let us fix it. Do not play politics and blame the Supreme Court for your inadequate architecture of a bill. Let us fix it. If you are worried about the balls and strikes that Judge Kavanaugh has called on the bench around regulatory issues, it seems to me you have called balls and strikes on both sides of the Administrative Procedures Act, and there seem to be flaws in there that need to be fixed.

For the attorneys in the room who are studied on the law, rather than trying to get Judge Kavanaugh to commit one way or another on these policy initiatives that President Obama and others around this table are interested in, get them to explain to you the legal theory behind his position that may have, in fact, produced an outcome that he did not particularly like, but because he did it based on his interpretation of the Constitution and the laws. Do not expect him to be a politician.

And as for motivations, you know, I have to say that it has been said by at least one person on this Committee that on the one hand we should not question other people’s motivations. On the other hand, I find it personally insulting to think that because I think we have before us an imminently qualified judge, someone who is going to call balls and strikes, to suggest that because I am inclined to support him, that I am complicit in evil really makes me wonder the sincerity about questioning other people’s motives.

So, Judge Kavanaugh, I am glad that you are before us. I believe that you have 300 opinions that people should look at and read and try and spar with you on the basis of your legal knowledge, your constitutional understanding and the statutory constructs. It would

be great, and I hope that people are actually taking time to look at the single most important factor in your résumé. It is not maybe where you went to school. I guess that is good. It is not maybe where you practiced law, but it is the 307 different opinions you can read and the dissents you can read. Spar on the basis of your legal knowledge those of you who want to prove to be the smartest lawyer in the room, and see if you can actually prove a better theory that may actually give Judge Kavanaugh pause.

But that is not what this hearing has been about, and I am so glad that I am one of the last people to do an opening statement because what I hope I hear tomorrow—and by the way, just from a process standpoint, the—we are going to have 30-minute rounds, which in Senate time is about an hour and a half per Member—

[Laughter.]

Senator TILLIS [continuing]. Tomorrow, and then we are going to have 20-minute rounds the following day. Everybody take time to actually talk about legal theory. Stop the theater, and start talking about what is really meaningful here. And I think if we do that, I have every confidence, Judge Kavanaugh, you are going to be Justice Kavanaugh, and I am proud to actually see you compose yourself the way you have today.

I will be asking you several questions on some judgments that, frankly, I did not like, but I know you probably made the right decision. And I believe that when you get confirmed to the Bench, you are actually going to take some other opinions that I do not like because it is what it is, what I wished you could do for me because we failed to get it done here, but it will be done for the right reasons.

And I think if people objectively look at your record, they are going to be hard-pressed to take all this theater we have heard today and boil it down into something that makes you look like you are an activist judge just waiting to be one of the members of that nine-member legislative branch down the street. I think you are one of the single greatest opportunity—great opportunities that we have to make the Supreme Court make us do our job and to reign in the dangerously high amount of authority that our administration branch has, and that is all I want you to do. And I look forward to asking you questions tomorrow.

I yield back the rest of my time.

[The prepared statement of Senator Tillis appears as a submission for the record.]

Chairman GRASSLEY. Senator Harris.

Senator HARRIS. I see Senator Graham has rejoined us. I think he was here before me. He is more senior.

Chairman GRASSLEY. We go back and forth.

Senator HARRIS. Okay, great.

**OPENING STATEMENT OF HON. KAMALA D. HARRIS,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator HARRIS. So, I thank you, Mr. Chairman.

I would like to restate my objection from earlier for the record, which is my motion to postpone this hearing.

A number of comments have been made by my honored and respected colleagues. I would like to address a few of them. One,

there was some mention of a concern about Elena Kagan's hearing and that the White House at the time, there was an agreement that those—certain records and should, therefore, not be disclosed. It is my understanding that as a point of distinction between that time and today that those were active cases in the White House, and for that reason, there was an understanding and agreement that they were of a sensitive nature and should not be disclosed.

In terms of the point that has been made about playing politics and blaming the Supreme Court, I think that we have to give pause when those kinds of concerns are expressed to also think about the fact that there have been many a political campaign that has been run indicating an intention to use the United States Supreme Court as a political tool to end things like the Affordable Care Act, the Voting Rights Act, and campaign finance reform, which makes this conversation a legitimate one in terms of a reasoned concern about whether this nominee has been nominated to fulfill a political agenda as it relates to using that Court and the use of that Court.

As it relates to the 42,000 documents or 42,000 pages of documents, I find it interesting that we get those documents less than 24 hours before this hearing is scheduled to begin, but it took 57 days for those documents to be vetted before we would even be given those documents. So, there is some suggestion that we should be speed readers and read 42 pages—42,000 pages of documents in about 15 hours when it took the other side 57 days to review those same documents. So, the logic, at least on the math, is not applying.

Now, the Chairman has requested 10 percent of the nominee's documents. That is 10 percent of 100 percent of his full record. The nominee's personal lawyer has only given us 7 percent of his documents, 7 out of 100 percent of the full record. Republicans have only given 4 percent of these records or made them public. That is 4 percent of 100 percent of a full record. Ninety-six percent of his record is missing. Ninety-six percent of his record is missing. It is reasonable—it is reasonable—that we should want to review his entire record, and then we can debate among us the relevance of what is in his record to his nomination. But it should not be the ability of this—the leadership of this Committee to unilaterally make decisions about what we will and will not see in terms of its admissibility instead of arguing about the weight of whatever is made admissible.

The late Senator Kennedy of Massachusetts called these hearings of Supreme Court nominees, "a job interview with the American people," and by that standard, the nominee before us is coming into his job interview with more than 90 percent of his background hidden. I would think that anyone who wanted to sit on the Nation's highest court would be proud of their record and would want the American people to see it. I would think that anyone privileged to be nominated to the Supreme Court of the United States would want to be confirmed in a process that is not under a cloud, that respects due process. I would think that anyone nominated to the Supreme Court of the United States would want to have a hearing that is characterized by transparency, and fairness, and integrity, and not shrouded by uncertainty, and suspicion, and con-

cealment, and doubt. We should not be moving forward with this hearing. The American people deserve better than this.

So, Judge Kavanaugh, as most of us know, and I will mention to you, and you have young children, and I know they are very proud of you, and I know you are a great parent, and I applaud all that you have done in the community. And so, as you know, as we all know, this is a week when most students in our country go back to school, and it occurs to me that many years ago, right around this time, I was starting kindergarten. And I was in a bus, a school bus, on my way to Thousand Oaks Elementary School as part of the second class of students as busing desegregated Berkeley, California, public schools. This was decades after the Supreme Court ruled *Brown v. Board of Education* that separate was inherently unequal.

And as I have said many times, had Chief Justice Earl Warren not been on the Supreme Court of the United States, he could not have led a unanimous decision, and the outcome then of that case may have been very different. Had that decision not come down the way it did, I may not have had the opportunities that allowed me to become a lawyer or a prosecutor. I likely would not have been elected District Attorney of San Francisco or the Attorney General of California. And I most certainly would not be sitting here as a Member of the United States Senate.

So, for me, a Supreme Court seat is not only about academic issues of legal precedent or judicial philosophy. It is personal. When we talk about our Nation's highest court and the men and women who sit on it, we are talking about the impact that one individual on that Court can have, impact on people you will never meet and whose names you will never know: whether a person can exercise their constitutional right to cast a ballot, that may be decided if Judge Kavanaugh sits on that Court; whether a woman with breast cancer can afford healthcare or is forced off lifesaving treatment; whether a gay or transgender worker is treated with dignity or maybe treated as a second class citizen; whether a young woman who got pregnant at 15 is forced to give birth or, in desperation, go to a back alley for an abortion; whether a President of the United States can be held accountable, or whether he will be above the law.

All of this may come down to Judge Kavanaugh's vote, and that is what is at stake in this nomination. And the stakes are even higher because of the moment we are in, and many of us have discussed this. These are unprecedented times. As others have already observed, less than 2 weeks ago, the President's personal lawyer and campaign chairman were each found guilty or pleaded guilty to eight felonies. The President's personal lawyer under oath declared that the President directed him to commit a Federal crime. Yet, that same President is racing to appoint to a lifetime position on the highest court in our land, a court that very well may decide his legal fate.

And, yes, that is essentially what confirming Judge Kavanaugh could mean, so it is important, more important, I would say, than ever that the American people have transparency and accountability with this nomination. And that is why it is extremely disturbing that Senate Republicans have prevented this body and,

most importantly, the American people, from fully reviewing Judge Kavanaugh's record, and have disregarded just about every tradition and practice that I heard so much about before I arrived in this place.

Judge Kavanaugh, when you and I met in my office, you said with respect to judicial decisions that rushed decisions are often bad decisions. I agree with you. I agree with you. And when we are talking about who will sit on the Supreme Court of the United States, I believe your plank could not be more important.

Mr. Chairman, when Judge Kavanaugh was nominated in July, he expressed his belief that a judge must be independent, must interpret the law, and not make law. But in reviewing this nominee's background, I am deeply concerned that what guides him is not independence or impartiality. It is not even ideology. I would suggest it is not even ideology. What I believe guides him and what his record that we have been able to see shows is what guides this nominee is partisanship. This nominee has devoted his entire career to a conservative Republican agenda, helping to spearhead a partisan investigation into President Clinton, helping George W. Bush's legal team ensure that every vote was not counted in *Bush v. Gore*, helping to confirm partisan judges and enact partisan laws as part of the Bush White House. And in all of these efforts, he has shown that he seeks to win at all components, even if that means pushing the envelope.

And if we look at his record on the D.C. Circuit and in his recent writings and statements, it is clear that the nominee has brought his political bias to the bench. He has carried out deeply conservative partisan agenda as part—as a judge favoring big business over ordinary Americans, polluters over clean air and water, and the powerful over the vulnerable.

Just last year, Judge Kavanaugh praised the dissent in *Roe v. Wade* and ruled against a scared 17-year-old girl seeking to end her pregnancy. He has disregarded the Supreme Court precedent to argue that undocumented workers were not really employees under our labor laws. We have witnessed horrific mass shootings from Parkland to Las Vegas to Jacksonville, Florida, yet Judge Kavanaugh has gone further than the Supreme Court and has written that because assault weapons are “in common use,” assault weapons and high-capacity magazines cannot be banned under the Second Amendment. When he was part of an independent counsel investigation into the Democratic President, the nominee was dogged in demanding answers, and yet he has since changed his tune, arguing that Presidents should not be investigated or held accountable, a position that I am sure that is not lost on this President.

These positions are not impartial. They are partisan. Judge Neil Gorsuch, Judge Kavanaugh's classmate, insisted before this Committee that judges are not merely “politicians in robes.” I fear that Judge Kavanaugh's record indicates that is exactly what he may very well be.

Now, I know Members of this Committee and the nominee's friends and colleagues have assured us that he is devoted to his family, and supportive of his law clerks, and volunteers in his community, and I do not doubt that at all, but that is not why we are here. I would rather that we think about this hearing in the con-

text of the Supreme Court of the United States and the impact that it will have on generations of Americans to come. And do we want that Court to continue a legacy of being above politics and unbiased, or are we prepared to participate in a process that is tainted and that leaves the American public questioning the integrity of this process?

And I will close by saying this. We have a system of justice that is symbolized by a statue of a woman holding scales, and she wears a blindfold. Justice wears a blindfold because we have said in the United States of America, under our judicial system, justice should be blind to a person's status. We have said that in our system of justice, justice should be blind to how much money someone has, to what you look like or who you love, to who your parents are, and the language they speak, and every Supreme Court Justice must understand and uphold that ideal.

And, sir, should those cases come before you, Judge Kavanaugh, I am concerned whether you would treat every American equally, or instead show allegiance to the political party and the conservative agenda that has shaped and built your career. I am concerned your loyalty would be to the President who appointed you and not to the Constitution of the United States. These concerns I hope you will answer during the course of this hearing.

I believe the American people have a right to have these concerns. I also believe the American public has a right to full and candid answers to the questions that are presented to you during the course of this hearing. I will be paying, of course, very close attention to your testimony, and I think you know the American public will be paying very close attention to your testimony.

Thank you.

[The prepared statement of Senator Harris appears as a submission for the record.]

Chairman GRASSLEY. Senator Graham.

**OPENING STATEMENT OF HON. LINDSEY O. GRAHAM,
A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA**

Senator GRAHAM. Am I the last person?

Chairman GRASSLEY. Yes.

Senator GRAHAM. All right.

Chairman GRASSLEY. But do not forget, we are going to hear from the nominee and his introducers before you can go home and go to bed.

[Laughter.]

Senator GRAHAM. Okay, thank you.

I was going to ask you to take me to dinner, but that is not going to happen.

Chairman GRASSLEY. You know the answer to that.

[Laughter.]

Senator GRAHAM. You know that. That is right.

So, to my colleagues on the other side, I look forward to working with you, but we have a different view here. I think you got to be blind as to what is going on here. Have you heard of Justice Breyer? Do you know him? He cannot say anything, I guess. Where did he come from? He was Ted Kennedy's Senate Judiciary person. Where do you think Republicans are going to go find a judge?

The whole argument is, you can be a conservative Republican President, but you got to nominate a liberal to be fair to the country. That is absurd. Where do you think Ruth Bader Ginsburg came from? She was the general counsel of the ACLU. Wonderful person. What groups do you all use to pick from? This is shaping up to be the hypocrisy hearing, and that is hard to do in the Senate in today's time to be hypocritical, but let me just point to a few of these things.

Clinton. It did not bother anybody for Clinton to nominate Breyer while he was under investigation. We actually did it. It did not bother any of you all that a Ted Kennedy staff person was his pick. It did not bother me either because that is who I expected you to pick. This is ridiculous.

You are one of the best choices any Republican could make. As I said with Justice Gorsuch, I am glad you are here because there were days I was wondering who he would have picked.

[Laughter.]

Senator GRAHAM. And this is a homerun from my point of view.

Let us talk about *Roe v. Wade*. Who would ever play politics on the campaign trail with *Roe v. Wade*? What a bastard Donald Trump is, until you hear about Hillary Clinton. February the 3rd, 2016, this is what Hillary Clinton said. When asked, does she have a litmus test for SCOTUS nominations—Supreme Court nominees, “I do have a litmus test. I have a bunch of litmus tests, because the next President could get as many as three appointments,” and I hope she is right. “We have got to make sure to preserve *Roe v. Wade*, not let it be nibbled away or repealed.” She sounds very open-minded. October 2016, “We need a Supreme Court that will stand up on behalf of women’s rights. It is important that we not reverse *Roe v. Wade*. I want a Supreme Court that will stick with *Roe v. Wade* and a woman’s right to choose.” I understand where she is coming from. Anybody running for President over there, I dare you to disagree with her. You will wind up like I did, getting 1 percent.

[Laughter.]

Senator GRAHAM. If you even suggest that you will pick a nominee that is not going to uphold *Roe v. Wade*, that is the end of you. But you have figured that out. You do not need me to tell you. So, this is the way we do politics. This is a big decision called *Roe v. Wade*. There are two sides and a bunch of nuances.

Here is what I know about you. You are going to take it as precedent. You wrote a big book, which I will never read, and you are going to tell us what it takes to overturn longstanding precedent. Nobody on this side will care if you overturn *Citizens United*. As a matter of fact, they will cheer you on. Somebody will challenge *Citizens United*, and you will probably say, let me hear both sides of the story, then I will tell you whether or not I should uphold it. So, Hillary Clinton, we know where she is at, on *Roe v. Wade*, and that is just the way it is.

Now, what other things? Executive power, this idea that Trump picked you to save him. Amazing concept, since you said what you said back in 1998 and 2008. The bottom line is, when Clinton was being impeached, my good friend, and this is true, he is my good friend, on February the 12th, 1999, introduced into the record dur-

ing the deliberations of the Clinton impeachment trial, an article by Brett Kavanaugh suggesting that you should wait, if there is an indictment, until after the President is out of office.

The same concept we are talking about here today, when the shoe was on the other foot, here is what Joe said about your thinking. “The President is not simply another individual. He is unique. He is the embodiment of the Federal Government and the head of a political party. If he is to be removed, the entire Government likely would suffer, and the military or economic consequences to the Nation could be severe. . . . Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor—whether it be the Attorney General or special counsel—and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act. Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States,” according to Joe Biden—the gift that keeps on giving for us. I think that is pretty hypocritical. During the Clinton days, you were right, but all of a sudden you are a danger to the republic.

Let us talk about—oh, there are so many—how many minutes do I have here? The bottom line is—

Chairman GRASSLEY. Do not exceed what Whitehouse had.

Senator GRAHAM. I will not.

Senator CORNYN. That would be impossible.

Senator GRAHAM. Guns. Somehow you are going to make sure that Congress—the bottom line on guns—Dianne Feinstein is a wonderful lady and has passion on this issue about assault weapons. She was able to succeed politically. After 10 years, the gun assault weapons ban expired and it has been hard to get it re-established. She introduced legislation in 2013 that got 60 “no” votes, 16 Democrats. So, I do not believe they see you as a threat to the Nation if you come out on the idea that the Second Amendment has some meaning. In other words, the political process, when it comes to guns, is a work in progress, and I would rather us decide that than you.

When it comes to the pillar of virtue, Comey.

Harry Reid: That he has been a supporter of Comey and led the fight to get him confirmed as he believed Comey was a principled public servant. “With the deepest regret, I now see that I was wrong.”

Mr. Nadler from New York: “The President can fire him for cause and ought to. He violated all the guidelines and put his thumb on the scale of an election.”

Mr. Cohen from Tennessee, a Democrat, called on Comey to resign his position effective immediately. “I am sure upon reflection of this action, he will submit his letter of resignation for the Nation’s good.” To my Democratic friends, you were all for getting rid of this guy. Now all of a sudden, the country is turning upside down because Trump did.

There is a process to find out what happened in the 2016 election. It is called Mr. Mueller. And I will do everything I can to make sure he finishes his job without political interference. And I am here to tell anybody in the country who listens that this is so

hypocritical of my friends on the other side. When it was their President, Kavanaugh was right. When you are talking about *Roe v. Wade*, it is okay to promise the Nation it will never be overturned. It is okay to pick a Democratic staff member of this Committee, but it is not okay to pick somebody who has been a lifelong Republican.

People see through this. You had a chance and you lost. If you want to pick judges from your way of thinking, then you better win an election. I voted for two of your choices, Sotomayor and Kagan. Got a lot of crap. I would suggest you think long and hard if you got a political ambition of voting for this guy because it will not play well on your side. And why did I do it? I thought they were qualified by any reasonable measure given the history of the Senate.

But we have turned the history of the Senate upside down. I found that they were different than I would have picked, Sotomayor and Kagan, but by any reasonable measure they are qualified. You have been on the court for 12 years. You have had 307 decisions. You have been approved before, so I hope people in the country understand this game. It is a game that I am sad to be part of. It has gotten really bad.

The antidote to our problems in this country when it comes to judges and politics is not to deny you a place on the Supreme Court. This is exactly where you need to be. This is exactly the time you need to be there, and I am telling President Trump you do some things that drive me crazy, you do some great things. You have never done anything better in my view than to pick Gorsuch and Kavanaugh because you had an opportunity to put well-qualified conservatives on the Court, men steeped in the rule of law, who will apply analysis, not politics, to their decisionmaking, and you knocked it out of the park. And to my friends on the other side, you cannot lose the election and pick judges. If you want to pick judges, you better win.

Chairman GRASSLEY. Let me tell you what—let me tell everybody what the rest of the day holds for us. Judge Kavanaugh, you can take a break now that we had originally scheduled for 15 minutes, and it may take 15 minutes, but we got to put a different table in here for the people that are going to introduce you. So, if your staff will watch, and if we get done in less than 15 minutes, I would like to start just as soon as the table is set.

So, we will take a 15-minute break now, and then we have the introducers, and then we will give the oath to the nominee, and then we will hear the statement from the nominee, and then we will adjourn until 9:30 tomorrow morning. And tomorrow morning, my approach is going to be the same for the 30 minutes as it would be for the 5 minutes that we normally have in just an otherwise normal hearing, and that is that if you got 1 second left, you can ask a question, but do not take all day to ask a question. And I hope you can give a short answer if their time is up. Then we will—then we will—we will move on to the next person.

So, I want tomorrow not to happen—maybe I better speak to myself. I am not going to let happen tomorrow what I should not have let happen today because I have been instructing people that run Committees either you run the Committee or it runs you, and you

guys have been very successful today in running the Committee. I do not want it to happen tomorrow.

Take your—take your time, sir, I mean, until we get the table set.

Recess.

[Whereupon the Committee was recessed and reconvened.]

Chairman GRASSLEY. We are fortunate to have Condoleezza Rice, Senator Rob Portman, and Lisa Blatt to introduce the nominee.

We will now start with Condoleezza Rice.

INTRODUCTION OF HON. BRETT M. KAVANAUGH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. CONDOLEEZZA RICE, Ph.D., FORMER U.S. SECRETARY OF STATE; SENIOR FELLOW, HOOVER INSTITUTION; AND PROFESSOR, STANFORD UNIVERSITY, STANFORD, CALIFORNIA

Dr. RICE. Thank you very much.

Chairman Grassley, Senator Feinstein, Members of the Committee, I am really honored to join Lisa Blatt and Rob Portman in introducing Brett Kavanaugh at these hearings to consider his confirmation as a Justice of the Supreme Court of the United States of America.

My personal relationship with Judge Kavanaugh goes back 17 years to our time as White House colleagues in the administration of George W. Bush. Those were remarkable times, and I loved serving. They were, however, not easy times, and the guidance and counsel of those with whom I worked was both a joy and a blessing.

I am so grateful to have had Brett Kavanaugh as a colleague. He was always supportive and strong and caring and someone whose integrity and good judgment I valued enormously.

I knew Brett early in his years as a family member. As a matter of fact, I was there when he married Ashley. I remember well the birth of his children. He is a great father and husband and son. In short, he is just a very good human being.

Since the nomination of Brett Kavanaugh, I have been able to reflect back on those times and what my experience tells me about Brett in this crucial role. Many have given testimony to his extraordinary legal mind, the depth of his experience, his intellect, and his good common sense. You have heard and you will hear from his clerks and other jurists and great legal figures, as well as colleagues from throughout his career. I do not need to repeat their praise, only to say that I know firsthand that Brett is really, really smart.

Here is the Brett Kavanaugh that I know. He is hard-working. He has a sense of humor. He seeks truth in facts. There is no detail too small to gain his attention. He makes those around him better. Brett is wise. He is an old soul who is made to help steady us in these complicated times.

Brett listens, especially to those with whom he disagrees. And in our charged environment, when we have become almost tribal, living in echo chambers and often finding comfort in the company of only those with whom we agree, this is an indispensable quality for the responsibilities of the Supreme Court.

The only thing that would be better is if Brett had gone to the same college that his mentor and friend Anthony Kennedy went to. That would be Stanford University. But for that, I will forgive him, and I have to say Yale University seems to have done a pretty good job.

In recent weeks, we have also had the chance to reflect on our Constitution, the Supreme Court itself, and the trust that we place in the Justices of it. As a scholar and as a diplomat, I have watched the struggle of people across the world to achieve democracy and to keep it. Every day, I am more amazed by the brilliance of the institutional design that the Framers left to us.

They carefully balanced powers and responsibilities between the three branches of Government. Knowing that human beings are fallible, they constructed institutions that both enable and constrain those who would govern us.

Scholars often speak of the American spirit of constitutionalism. We Americans believe that the Constitution is our personal protection. We take our rights very seriously, and we will go all the way to the Supreme Court if we think those rights have been violated.

A democracy is only stable when there is that kind of trust in the institutions, a belief that those institutions will be fair and just and secure the rights of citizens. The strength of America's institutions is a cause for optimism, but they cannot be taken for granted.

The Supreme Court's special role in protecting the careful balances that the Constitution seeks to achieve is crucial to our democratic stability. This is true even as times and customs change, and it is more important with every passing year in our increasingly complicated Nation.

As a little girl born in segregated Birmingham, Alabama, who grew up to be Secretary of State, I know personally our country's long journey to guarantee equal rights. I know the power of the Constitution, and I know the gift of our democracy. The Supreme Court is a crucial guardian—both of our Constitution and of our democracy. That is why I am so honored to introduce Brett Kavanaugh for these hearings.

He will be an outstanding Supreme Court Justice. His intellect is unquestioned. His judgment is highly regarded, and I can personally attest to his character and integrity as a colleague. Brett Kavanaugh will thoroughly and faithfully uphold the trust that is our heritage, the Constitution of the United States of America, the most remarkable governing document in human history.

Thank you.

Chairman GRASSLEY. Thank you, Secretary Rice.

Now, our colleague, Senator Portman.

INTRODUCTION OF HON. BRETT M. KAVANAUGH, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, BY HON. ROB PORTMAN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator PORTMAN. Chairman Grassley, Ranking Member Feinstein, and colleagues on this Committee on the Republican and the Democratic side, it is a privilege to join Condi Rice and Lisa Blatt here this afternoon in introducing a friend, Judge Brett Kavanaugh.

I have known Brett and his wife, Ashley, since before they were married, and I had the opportunity to work with Brett during his service in the George W. Bush White House. As Secretary Rice has just said very well, those of us who worked with him universally praise his work ethic, his intelligence, and his integrity.

I visited with George W. Bush a few days ago, and we talked about Brett. He put it simply: Brett Kavanaugh is a class act.

In endorsing Brett, former lawyer to President Bill Clinton, Bob Bennett, called him “a strong advocate of decency and civility.”

By the way, of all the attributes you look for in a judge, what could be more important than good judgment? Brett definitely showed good judgment in marrying Ashley. So did she, and they are a great family. It is wonderful to have their daughters, Margaret and Liza, with us here today.

Brett’s parents, Edward and Martha, are also here. That is especially appropriate since Brett’s first introduction to the law came from listening to his mom practice closing arguments at the dinner table. She was a trailblazer. She went to law school at age 34 and eventually became a trial judge. Brett has said, to him, Martha Kavanaugh will always have been the true Judge Kavanaugh.

During the process of this hearing, there will be more spirited discussions about Brett’s legal philosophy and his experience and background as a lawyer and a judge. I heard quite a bit of it already today, and there should be this discussion. This is about a lifetime appointment to the highest court in the land. In my view, there is not a better qualified person to be on that Court.

Just last Friday, the American Bar Association gave Judge Kavanaugh a unanimous “well qualified” rating, which is the highest rating they offer, unanimous.

I saw how he conducted himself as Associate Counsel to the President in the White House Counsel’s office, the job I once had in the first Bush White House. And I have watched him for the past 12 years on the D.C. Circuit, where he has been praised as fair, smart, and independent.

He has authored more than 300 published opinions, an impressive number. And the Supreme Court has adopted his reasoning a remarkable 13 times, a testament to his thoughtful and well-reasoned decisions and a record that few, if any, other appellate judges can match. Again, no one more qualified.

For more than a decade, he has also taught classes at Harvard, Yale, and Georgetown Law Schools. He is a well-respected judge and a well-respected professor and a thought leader among his peers. That is why so many of his former students, his law clerks, his judicial colleagues, and legal scholars—by the way, from across the political spectrum—have come out in support of his nomination.

Judge Kavanaugh is guided by the Constitution and by the rule of law. He has said the judge’s job is to interpret the law, not to make the law or make policy. I agree, and by the way, as do most of the people we represent. Judges should not be legislating from the bench. Clearly, Brett Kavanaugh has the right qualifications, and he has a judicial philosophy that is very much in the mainstream.

Just as important to me is the kind of person you want on the Supreme Court. I have known Brett not so much as a legal scholar or a judge or a professor, but as a friend, a father, and a husband. He is thoughtful and compassionate and someone who has a big heart and the humility to listen. To me, that might be the single most important attribute for a member of the Supreme Court, the humility to listen.

Throughout this confirmation hearing, I hope the American people will get to know the Brett Kavanaugh I have had the privilege of knowing. A couple days after he was announced, Brett came to my office one evening to discuss his confirmation, just as he has been to your offices. He then went straight from our meeting to serve dinner to the homeless through his church, a regular occurrence that was long scheduled—scheduled long before his nomination.

I only found out about it because that night someone recognized him and took a photo that got tweeted, and it was a photo of him in a baseball cap in the soup kitchen. It is classic Brett that he did not tell me this was where he was going after meeting with me.

To my colleagues, I know the man. He does things because it is the right thing to do.

Brett is also involved, as some of you know, in his daughters' sports teams. Last season, Margaret's sixth grade girls basketball team he coached had an undefeated season and went on to win a citywide championship.

Way to go, Margaret.

[Laughter.]

Senator PORTMAN. To show you where his priorities are, Judge Kavanaugh, or "Coach K," as he is known by his players, has the team photograph and trophy prominently displayed in his judicial chambers.

Julie O'Brien, whose daughter goes to school with Margaret, has another telling story about Brett. A few years ago, Julie's husband passed away. With no one to accompany her daughter to the annual father-daughter dance, Brett stepped up. That year and every year since, Brett has taken her daughter alongside his own to the dance.

That is the kind of person he is. That is the Brett Kavanaugh I know. I am proud to introduce Brett Kavanaugh before this Committee, and I am proud to strongly support his nomination to be the next Associate Justice of the United States Supreme Court.

I know these are partisan times here in Washington, but this is an extraordinary nominee in every respect. Based on his record, his qualifications, and his character, I believe he deserves broad support. My hope, Mr. Chairman, is that, as was the case with Justices Sotomayor and Kagan nominated by President Obama, this Committee will report his nomination favorably, and the full Senate will confirm him with a strong bipartisan vote that he deserves.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you, my colleague.

Ms. Lisa Blatt.

**INTRODUCTION OF HON. BRETT M. KAVANAUGH, NOMINEE TO
BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF
THE UNITED STATES, BY LISA S. BLATT, PARTNER, ARNOLD
& PORTER, WASHINGTON, DC**

Ms. BLATT. Thank you, Mr. Chairman and Committee Members.

It is a privilege to appear before you today. My name is Lisa Blatt, and I know Judge Kavanaugh in my capacity as an appellate lawyer here in Washington. I have argued 35 cases before the Supreme Court of the United States, more than any other woman in history. I am also a liberal Democrat and an unapologetic defender of a woman's right to choose.

My hero is Justice Ruth Bader Ginsburg, for whom I had the great fortune of serving as a law clerk. I proudly voted for Hillary Clinton. I voted for President Obama twice. And with my apologies, Mr. Chairman, for this one, I wish Senator Feinstein were chairing this Committee.

And yet, I am here today to introduce Judge Kavanaugh and urge the Senate to confirm him as the next Associate Justice of the Supreme Court. I have received many angry calls from friends and even strangers for supporting Judge Kavanaugh. But I was raised to call it like I see it, and I do not see the choice before you as difficult.

By any objective measure, Judge Kavanaugh is clearly qualified to serve on the Supreme Court. After law school, he clerked for Justice Anthony Kennedy, the Justice he would succeed. He spent 12 years on the Nation's most prestigious court of appeals, the United States Court of Appeals for the District of Columbia Circuit. His opinions are invariably thoughtful and fair, and many are known as instant classics not just because they are important, but because they are written so clearly and well. The Supreme Court has adopted the reasoning in his opinions more than a dozen times.

Judge Kavanaugh's judicial temperament and integrity are also flawless. He is meticulously prepared, and he treats litigants with respect, asking probing questions of both sides. He approaches judging by determining what the law requires, no matter his personal preference.

Judge Kavanaugh has taught at the Nation's top law schools, published thoughtful Law Review articles, and co-authored a leading treatise on judicial precedent. And as just mentioned, the ABA strongly endorsed him because, "He meets the very highest standards of integrity, professional competence, and judicial temperament."

On a personal level, I just cannot say enough nice things about the Judge. I first met him almost 10 years ago when he emailed me completely out of the blue to say that he liked an article I had written about arguing before the Supreme Court. Since then, we have become friends, and he has become a mentor to me in my career.

Judge Kavanaugh has spent countless hours listening to me talk about the challenges I have faced as a working mother in a profession dominated by men. He has been a great source of advice on these and many other issues about work/life balance. He understands that life is not always perfect, and he responds to life's challenges with a self-deprecating sense of humor.

More generally, Judge Kavanaugh has been remarkably committed to promoting women in the legal profession. More than half of his law clerks have been women, something that is sadly by no means common. And almost all of his clerks, women and men, have gone on to clerk at the Supreme Court, including for Justices Kagan and Sotomayor.

As his former women law clerks told this Committee, the legal profession is “fairer and more equal because of Judge Kavanaugh.” He has mentored countless other women through the classes he teaches at Yale and Harvard Law Schools.

Obviously, I know that Judge Kavanaugh has a conservative judicial outlook, and if he is confirmed, he will have one of nine votes to definitively decide the meaning of the Constitution, including just how far to read it to protect the reproductive rights of women.

Now if it were up to me, Justice Ginsburg would have all nine votes. But that is not our system, and the reality is that the Presidency and the Senate are in Republican hands. Judge Kavanaugh is the best choice that liberals could reasonably hope for in these circumstances. I am sure that some Members of the Senate knew that they would disagree with Justice Ginsburg’s legal views when she was a nominee, but Justice Ginsburg was confirmed 96–3.

This body has obviously treated some nominees differently since then, to the detriment of our courts. I strongly disagree with the Senate’s treatment of Judge Garland. Judge Kavanaugh himself spoke glowingly of Judge Garland during his pending nomination, stating that, quote, “Chief Judge Garland is a brilliant jurist. He is thoughtful. He is considerate. He is collegial. He works well with others. He is a good man, great integrity, and he is supremely qualified by the objective characteristics of experience, temperament, writing ability, scholarly ability for the Supreme Court.”

All of this is equally true of Judge Kavanaugh. I do not think it is fair to hold Judge Kavanaugh responsible for the fact that Judge Garland is not a Justice today. Instead, I would urge this Committee to treat him as we expect him to treat litigants that appear before him: on his own merits and with an open mind toward someone whose views may differ from our own. Our judicial system is not well served by tit-for-tat politics.

At the end of the day, I enthusiastically support Judge Kavanaugh, and I am proud to introduce him because he is unquestionably qualified by his extraordinary intellect, experience, and temperament, and he does easily fit within the mainstream of legal thought.

I look forward to the Committee over the next few days getting to know the Judge Kavanaugh that I know. And at the end of that process, I hope you will agree that he should be confirmed to succeed his former boss on the Supreme Court.

Chairman GRASSLEY. Thank you, Ms. Blatt.

Thanks each of the panel for their introduction, and you are dismissed now.

And then, Judge Kavanaugh, can you shake your head? I was told that you might want 5 minutes right now. Do you need that?

Judge KAVANAUGH. No.

Chairman GRASSLEY. Okay. Then just stay seated until we change the table a little bit, and then we will get to you.

[Pause.]

[Witness is sworn in.]

Chairman GRASSLEY. Thank you.

Proceed with your statement or anything else that you want to tell the Committee right now.

**STATEMENT OF HON. BRETT M. KAVANAUGH, NOMINEE TO
SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES**

Judge KAVANAUGH. Thank you, Mr. Chairman, Senator Feinstein, Members of the Committee.

I thank Secretary Rice, Senator Portman, and Lisa Blatt for their generous introductions. They are patriots who represent the best of America. I am humbled by their confidence. I am proud to call each of them a friend.

Over the past 8 weeks, I have witnessed firsthand the Senate's deep appreciation for the vital role of the American judiciary. I have met with 65 Senators, including almost every Member of this Committee. Those meetings are sometimes referred to as "courtesy calls," but that term understates how substantive and personal our discussions have been.

I have greatly enjoyed all 65 meetings. In listening to all of you, I have learned more about our country and the people you represent. Every Senator is devoted to public service and the public good, and I thank all the Senators for their time and their thoughts.

I thank President Trump for the honor of this nomination. As a judge and as a citizen, I was deeply impressed by the President's careful attention to the nomination process and by his thorough consideration of potential nominees.

I am also very grateful for his courtesy. At the White House on the night of the announcement, the President and Mrs. Trump were very gracious to my daughters, my wife, and my parents. My family will always cherish that night, or, as my daughter Liza calls it, her debut on national television.

[Laughter.]

Judge KAVANAUGH. As a nominee to the Supreme Court, I understand the responsibility I bear. Some 30 years ago, Judge Anthony Kennedy sat in this seat. He became one of the most consequential Justices in American history. I served as his law clerk in 1993. To me, Justice Kennedy is a mentor, a friend, and a hero.

As a member of the Court, he was a model of civility and collegiality. He fiercely defended the independence of the judiciary, and he was a champion of liberty. If you had to sum up Justice Kennedy's entire career in one word, liberty. Justice Kennedy established a legacy of liberty for ourselves and our posterity.

I am here today with another of my judicial heroes, my mom. Fifty years ago this week, in September 1968, my mom was 26, and I was 3. At that time, my mom started as a public school teacher at McKinley Tech High School here in Washington, DC.

1968 was a difficult time for race relations in our city and our country. McKinley Tech had an almost entirely African-American student body. It was east of the park. I vividly remember days as a young boy sitting in the back of my mom's classroom as she

taught American history to a class of African-American teenagers. Her students were born before *Brown v. Board of Education* or *Bolling v. Sharpe*.

By her example, my mom taught me the importance of equality for all Americans. Equal rights, equal dignity, and equal justice under law. My mom was a trailblazer. When I was 10, she went to law school at American University and became a prosecutor.

I am an only child. My introduction to law came at our dinner table when she practiced her closing arguments on my dad and me. Her trademark line was, "Use your common sense. What rings true? What rings false?"

One of the few women prosecutors at the time, she overcame barriers and was later appointed by Democratic Governors to serve as a Maryland State trial judge. Our Federal and State trial judges serve on the front lines of American justice.

My mom taught me that judges do not deal in abstract principles. They decide for real cases, for real people in the real world, and she taught me that good judges must always stand in the shoes of others. The Chairman referred to me today as Judge Kavanaugh, but to me, that title will always belong to my mom.

For 12 years, I have been a judge on the U.S. Court of Appeals for the D.C. Circuit. I have written more than 300 opinions and handled more than 2,000 cases. I have given it my all in every case. I am proud of that body of work, and I stand behind it. I tell people do not read about my judicial opinions, read the opinions.

I have served with 17 other judges, each of them a colleague and a friend on a court now led by our superb Chief Judge Merrick Garland. My judicial philosophy is straightforward. A judge must be independent and must interpret the law, not make the law. A judge must interpret statutes as written. A judge must interpret the Constitution as written, informed by history and tradition and precedent.

In deciding cases, a judge must always keep in mind what Alexander Hamilton said in Federalist 83, "The rules of legal interpretation are rules of common sense."

A good judge must be an umpire, a neutral and impartial arbiter who favors no litigant or policy. As Justice Kennedy explained in *Texas v. Johnson*, one of his greatest opinions, judges do not make decisions to reach a preferred result. Judges make decisions because the law and the Constitution as we see them compel the results.

Over the past 12 years, I have ruled sometimes for the prosecution and sometimes for criminal defendants, sometimes for workers and sometimes for businesses, sometimes for environmentalists and sometimes for coal miners. In each case, I have followed the law. I do not decide cases based on personal or policy preferences. I am not a pro-plaintiff or pro-defendant judge. I am not a pro-prosecution or pro-defense judge. I am a pro-law judge.

As Justice Kennedy showed us, a judge must be independent, not swayed by public pressure. Our independent judiciary is the crown jewel of our constitutional republic. In our independent judiciary, the Supreme Court is the last line of defense for the separation of powers and for the rights and liberties guaranteed by the Constitution.

The Supreme Court must never, never be viewed as a partisan institution. The Justices on the Supreme Court do not sit on opposite sides of an aisle. They do not caucus in separate rooms. If confirmed to the Supreme Court, I would be part of a Team of Nine, committed to deciding cases according to the Constitution and laws of the United States. I would always strive to be a team player on the Team of Nine.

Throughout my life, I have tried to serve the common good, in keeping with my Jesuit high school's motto, "Men for others." I have spent my career in public service. I have tutored at Washington Jesuit Academy, a rigorous, tuition-free school for boys from low-income families. At Catholic Charities at 10th and G, I serve meals to the homeless with my friend Father John Enzler.

In those works, I keep in mind the message of Matthew 25 and try to serve the least fortunate among us. I know I fall short at times, but I always want to do more and do better.

For the past 7 years, I have coached my daughters' basketball teams. I love coaching. All the girls I have coached are awesome, and special congratulations to the girls on this year's sixth grade CYO championship team—Anna, Quinn, Kelsey, Ceane, Chloe, Alex, Ava, Sophia, and Margaret.

I love helping the girls grow into confident players. I know that confidence on the basketball court translates into confidence in other aspects of life.

Title IX helped make girls' and women's sports equal. And I see that law's legacy every night when I walk into my house as my daughters are getting back from lacrosse or basketball or hockey practice. I know from my own life that those who teach and coach America's youth are among the most influential people in our country.

With a kind word here and a hint of encouragement there, a word of discipline delivered in the spirit of love, teachers and coaches change lives. I thank all of my teachers and coaches who have gotten me to this point, and I thank all of the teachers and coaches throughout America.

As a judge, I have sought to train the next generation of lawyers and leaders. For 12 years, I have taught constitutional law to hundreds of students, primarily at Harvard Law School. I teach that the Constitution's separation of powers protects individual liberty. I am grateful to all my students. I have learned so much from them, and I am especially grateful to the dean who first hired me, now Justice Elena Kagan.

One of the best parts of my job as a judge is each year hiring four recent law school graduates to serve as my law clerks for the year. I hire the best. My law clerks come from diverse backgrounds and points of view. A majority of my 48 law clerks have been women. More than a quarter of my law clerks have been minorities, and I have had far more African-American law clerks than the percentage of African-American students in U.S. law schools. I am proud of all my law clerks.

I am grateful for my friends. This past May, I delivered the commencement address at Catholic University Law School. I gave the graduates this advice: "Cherish your friends. Look out for your friends. Lift up your friends. Love your friends." Over the last 8

weeks, I have been strengthened by the love of my friends, and I thank all my friends.

I am grateful to have my family behind me. My mom rightly gets a lot of attention, but a few words about my dad. He has an unparalleled work ethic and the gift for making friends with people, regardless of who they are or where they come from.

My dad and I are both passionate sports fans. When I was 7, he took me to the 1972 NFC Championship Game at RFK stadium just 2 miles from here—upper deck, Section 503, Row 3, Seats 8 and 9. When I was 17, we sat in the same seats for the 1982 NFC Championship Game.

In 1995, when I was 30, we were at Camden Yards together when Cal Ripken played in his 2,131st consecutive game and broke Lou Gehrig's seemingly unbreakable record. And so many other games with my dad, a lifetime of friendship forged in stadium seats over hot dogs and beer.

My daughters, Margaret and Liza, will be in and out of this hearing room over the next few days. They are strong girls, dedicated students, outstanding athletes. In the time since you last saw them at the White House ceremony on July 9th, I am pleased to report that Margaret has gotten her braces off and has turned 13. Margaret is the sweetest girl you will ever know. As for Liza, I tell her every night that no one gives a better hug than Liza Kavanaugh.

Finally, I thank my wife, Ashley. She is a strong West Texan, a graduate of Abilene Cooper Public High School and the University of Texas at Austin. She is now the popular Town Manager of our local community.

This has not exactly been the summer she had planned for the family, but I am grateful for her love and inspiration. Ashley is a kind soul. She always sees the goodness in others. She has made me a better person and a better judge. I thank God every day for my family.

Mr. Chairman, Senator Feinstein, Members of the Committee, I look forward to the rest of the hearing and to answering your questions. I am an optimist. I live on the sunrise side of the mountain, not the sunset side of the mountain. I see the day that is coming, not the day that is gone.

I am optimistic about the future of America. I am optimistic about the future of our independent judiciary. I revere the Constitution. If confirmed to the Supreme Court, I will keep an open mind in every case. I will do equal right to the poor and to the rich. I will always strive to preserve the Constitution of the United States and the American rule of law.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you, Judge Kavanaugh.

I have something I want to say to the Committee, but before that, we have been here approximately 8 hours. You have had a lot to hear today and listen to. I think it is very noteworthy that no one has seriously questioned your qualifications to receive a promotion to the Nation's highest court, and they have learned a lot about you being an exceptional teacher, coach, volunteer, and dad, in addition to being an exceptional judge.

So I thank you very much for your statement.

Questions for the record are due Monday, September the 10th, at noon. We will notice Judge Kavanaugh's markup meeting for Thursday, September 13th. This timeline is consistent with how we have handled past Supreme Court nominations. I want everybody to know that right now, so that Members and their staff can be working on written questions throughout the week.

With that, we will recess until tomorrow morning at 9:30, when we will start the first round of questions. Again, each Senator will have 30 minutes for the first round of questions, and I intend to go like we have with Gorsuch, that people will have a chance to ask the questions they want to ask. But we start out with the 30 minutes, then the 20-minute second round. So everybody is going to have a chance for a 50-minute crack at this strong judge.

Meeting adjourned.

[Whereupon, at 4:55 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 1 follows Day 5 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

WEDNESDAY, SEPTEMBER 5, 2018

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in Room SH-216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Graham, Cornyn, Lee, Cruz, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. Good morning, everybody. And we welcome everybody back again and especially Judge Kavanaugh and his wife, Ashley.

Yesterday, each Senator made their opening remarks. We also heard from three people who had the honor of introducing Judge Kavanaugh—Secretary Rice, Senator Portman, and attorney Lisa Blatt. And we heard for the first time directly from Judge Kavanaugh. He made a powerful, compelling, and convincing statement demonstrating his exceptional background and qualifications to serve our Nation's highest court.

NBC News reported that Democratic Members of the Committee plotted with the Minority Leader to disrupt the hearing yesterday. Democratic Senators interrupted the hearing 63 times before lunch, and in the audience, 70 people were arrested yesterday who were following their lead.

All probably very constitutionally prepared to do that, doing what the Constitution says, the right of freedom of speech. But we also were able to finally conduct our hearing the way it should be conducted.

[Disturbance in the hearing room.]

Chairman GRASSLEY. Yesterday was just opening statements. It was only—it was only our time as Committee Members that we wasted on disruption and disorder over procedural matters. But today is different.

[Disturbance in the hearing room.]

[Pause.]

Chairman GRASSLEY. It was our time, as Committee Members, yesterday to make our case. Today is different. Today is the day that the American people are supposed to hear from the nominee. This morning, we will begin our questioning of Judge Kavanaugh. We will get through all Members' first rounds of questions today, no matter how long it takes.

Members are allotted 30 minutes for the first round. If your time expires, your remaining questions may be continued, of course, in the second round tomorrow.

We will take a lunch break as well as probably two other 15-minute breaks throughout the day. For now, let us plan our first break after five Senators or so have completed their questions. I assume that this will be around 12:15 p.m., which will hopefully coincide with the floor vote that is already scheduled. This would be a 3-minute—or 30-minute break for vote and lunch.

But, Judge, if you would like to take a break any other time, let us know. We are happy to accommodate that. And with that, I will start the questioning of my 30 minutes.

Judge, for the last 12 years, you have served as a Federal circuit judge on one of the most influential Circuits in America. You have authored 307 judicial opinions and joined hundreds more, totaling more than 10,000 pages of record. You have decided some of the most pressing legal issues facing our country. The Supreme Court of the United States, the one you are nominated to be on, has adopted a legal position—your legal position from at least 12 opinions.

The Senate Judiciary Committee has received dozens of strong letters of support from hundreds of people, many of whom you know best, from all across the political and ideological spectrum. And the American Bar Association has given you its highest rating, unanimously “well qualified.” My Democratic colleagues have said that this is the “gold standard” of judicial nomination.

There is no dispute that you are one of the most qualified Supreme Court nominees. Some people say the most qualified, and I do not disagree with their judgment, and that could be for anybody coming before the United States Senate. I am not the only one who says that because we have a letter from Robert Bennett, surprisingly, President Clinton's attorney and your opposing Counsel during the independent counsel investigation of President Clinton. He wrote a very strong letter in support of your confirmation: “Brett is the most qualified person any Republican President could possibly have nominated. Were the Senate to fail to confirm Brett, it would not only mean passing up the opportunity to confirm a great jurist, but it would also undermine civility in politics twice over, first in playing politics with such an obviously qualified nominee and then again in losing the opportunity to put such a strong advocate of decency and civility on our Nation's highest court.”

Mr. Bennett also speaks highly of your integrity and to your fairness and open-mindedness. And so, without objection, I would enter that letter in the record.

[The information appears as a submission for the record.]

Chairman GRASSLEY. Now to a question. I imagine that your 12 years of judicial service on the second-highest court in the land has given you plenty of opportunity to think about my first question, which is what makes a judge a good one, and what influences in your life have shaped your vision of how a judge should go about doing his job?

Judge KAVANAUGH. Thank you, Mr. Chairman.

I think the first quality of a good judge in our constitutional system is independence. Independence comes directly from Article III of the Constitution. The independence of the Federal judges really is guaranteed by the Framers in our life tenure and our protection from pay reduction. So because we have life tenure, we are independent and immune from political or public pressure.

So I think the first thing that makes a good judge is independence, not being swayed by political or public pressure. That takes some backbone. That takes some judicial fortitude.

The great moments in American judicial history, the judges had backbone and independence. You think about *Youngstown Steel*. You think about, for example, *Brown v. Board of Education*, where the Court came together and knew they were going to face political pressure and still enforced the promise of the Constitution.

You think about *United States v. Nixon*, which I have identified as one of the greatest moments in American judicial history, where Chief Justice Burger, who had been appointed by President Nixon, brought the Court together in a unanimous decision to order President Nixon, in response to a criminal trial subpoena, to disclose information. Those great moments of independence and unanimity are important.

Respect for precedent is another one. We are a system of constitutional precedent. Precedent is not just a judicial policy. It is sometimes stated that it is just a policy. Precedent comes right from Article III of the Constitution.

Article III of the Constitution refers to the judicial power. What does that mean? What does "judicial power" mean? Judicial power, you look at Federalist 78, and what is described there is a system of precedent. So precedent is rooted right into the Constitution itself, and it is constitutionally dictated to pay attention and pay heed to rules of precedent.

Beyond that, being a good judge means paying attention to the words that are written, the words of the Constitution, the words of the statutes that are passed by Congress. Not doing what I want to do, not deferring when the Executive rewrites the laws passed by Congress, but respect for the laws passed by Congress, respect for the rule of law, the words put into the Constitution itself. That is part of being a good judge. That is part of being independent. That is part of precedent.

And then I would say being a good judge, there are human qualities in terms of the interaction. Although these confirmation processes focus on one person, as if you are making all of the decisions, as I said yesterday, I am joining a Team of Nine, if I were fortunate enough to be confirmed. And that means something. It means something in sports. It means something in judging.

I do not make decisions by myself. For the last 12 years, I have not been making decisions by myself. Every case has been in a

panel of at least three judges, and you learn from each other when you are deciding cases. You work with each other when you are deciding cases.

And so having collegiality and civility, as Justice Kennedy showed us so powerfully repeatedly with how he conducted himself over the years. That is very important because those great moments that I was talking about at the beginning like *United States v. Nixon*, like *Brown v. Board*, the Court came together in unanimous decisions. And the unanimity of the decisions added force. That took personal interaction. That took collegiality.

So I think, you know, I have tried to be a very collegial judge. I have tried to be civil. I want, Mr. Chairman, the losing party, the losing party in every case to come out and say, "Kavanaugh gave me a fair shake. He was well prepared. He wrote a clear opinion. He explained everything. I disagree, but at least I get it."

So I want the losing party and I want both parties to walk out at oral argument and say, "He had an open mind. He gave me a fair shake." And I think I have done that for 12 years. I have tried to do that consistently. Everything you do as a judge matters in terms of being a good judge—oral argument, writing opinions, how you decide.

So those are the qualities. I guess the last thing I always remember about it is the thing I said my mom told me from the first instance. Judging is not just about theory. It is not theory. It is not just what a Law Review article is. Judging is real people in the real world, and every decision we make, no matter how high-minded it might sound, affects real people in the real world with real interests. And we have to remember that in how we explain the decisions.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Now following up on the wise words of Senator Sasse yesterday on separation of powers, your record before the Senate includes more than 10,000 pages of judicial writings over your dozen years. We have over 440,000 pages of emails and other records from your legal service at the White House and Judge Starr. And you have written extensively on the issue of our Constitution, separation of power among the three branches. And a key component of the separation of powers is the independent judiciary.

Obviously, everybody learns in eighth grade civics about judges interpreting law. The judiciary must continue to be the least political and least dangerous branch. A judge's sole job is to find and apply the law evenly and fairly without regard to the President who nominated him, the Senators who voted for him, the parties before him, and the political consequences of his judicial decisions.

So, Judge, let us discuss judicial independence from the executive branch. No one, not even the President, is above the law. Some of my colleagues have criticized your views of Presidential authority, suggesting—wrongly, in my opinion—that your views of Presidential authority would not allow any meaningful check on the President, particularly this one.

Please tell us what judicial independence means to you, including whether you have any trouble ruling against a President who appointed you and against the executive branch in any case before you. You have partly talked about independence, but apply it spe-

cifically to a ruling against a President or the executive branch generally.

Judge KAVANAUGH. Thank you, Mr. Chairman.

To begin with, you are correct. No one is above the law in our constitutional system. Federalist 69, Hamilton makes clear all the ways that the executive branch, as designed by the Framers of the Constitution, was different from the monarchy. Under our system of Government, the executive branch is subject to the law, subject to the court system, and that is an important part of Federalist 69. It is an important part of the constitutional structure.

In general, so, too, we, as judges, are separate from the Congress. We are not supposed to be influenced by political pressure from the Executive or from the Congress. We are independent. We make decisions based on law, not based on policy, not based on political pressure, not based on the identity of the parties. No matter who you are in our system, no matter where you come from, no matter how rich you are or how poor you are, no matter your race, your gender, no matter your station in life, no matter your position in Government, it is all equal justice under law.

And again, look at our examples in history. I always will go back to the great moments in our history where these principles, which sound abstract if you are just describing them, were actually implemented. And I go back to *Youngstown Steel*, and you think about it, it is a 6-to-3 decision where the Supreme Court rules that President Truman has violated the law by seizing the steel mills.

Now this is a time of war, a time of war where lots of Americans were killed, and the Supreme Court is under pressure to defer to the President's war effort in a 6-to-3 decision. But what is interesting to me, Justice Clark—we do not usually talk about Justice Clark in that decision. Why is he important?

He is important. He was appointed by President Truman to the Supreme Court. What a moment of judicial independence there to rule in that case.

You think about Justice Jackson, who had been working for President Roosevelt, and then he dissents in the *Korematsu* case. Stands up and says letting racism like this is like letting a loaded weapon lie around.

[Disturbance in the hearing room.]

Judge KAVANAUGH. Dissents against President Roosevelt's decision. Justice Jackson's—

Senator FEINSTEIN. Ask him to suspend.

Judge KAVANAUGH. Justice Jackson's concurrence in *Youngstown*, which is, of course, what has become the law, that three-part test—Category 1, Category 2, Category 3. But again, he writes that concurrence in *Youngstown*. Why is that a moment of judicial independence? He had taken positions contrary to that when he had worked in the executive branch in the Roosevelt administration. Yet, when he is a judge, he sees it differently as an independent judge.

How about Chief Justice Burger? *United States v. Nixon*. Writes the opinion, unanimous. Moments of judicial independence. So it is resisting public pressure, political pressure. It is treating everyone equally, no matter where you are, what station.

When I was a—became a judge on the D.C. Circuit, I had a case called *Hamdan v. United States*. Who is Hamdan?

[Disturbance in the hearing room.]

Judge KAVANAUGH. So in the *Hamdan* case, Hamdan is one of bin Laden's associates. You will never have a nominee—Mr. Chairman, should I proceed?

Chairman GRASSLEY. This is coming out of my time, but that is okay. Let these people have their free speech and interrupt the other 300 million people listening, that this is your opportunity to speak to the American people and for them to make a judge about it. If they want to affect what the other 300 million people hear from you, then that is just too bad. You proceed now.

Judge KAVANAUGH. Hamdan is one of bin Laden's associates involved before September 11th, worst attack ever on American soil. He was prosecuted before a military commission, signature prosecution of the Bush administration.

Comes to the D.C. Circuit. I am on the panel. I write the opinion saying that his military commission prosecution is unconstitutional, violates ex post facto principles.

You will never have a nominee who has ruled for a more unpopular defendant than ruling for Salim Hamdan. And why did I do that in that case? Why did I rule for someone who had been involved in the September 11th? It is because the law compelled it.

As Justice Kennedy showed us in the *Texas v. Johnson* case, we do not make decisions based on who people are or their policy preferences or the moment. We base decisions on the law. Justice Kennedy's example of independence is something I have tried to follow.

And it means, you know, you are not a pro—as I said yesterday, not a pro-plaintiff or pro-defense judge, not a pro-prosecution or pro-defense judge. I am a pro-law judge, and I have ruled for parties based on whether they have the law on their side.

That is part of being an independent judge is ruling for the party no matter who they are, so long as the party is right. If you walk into my courtroom and you have the better legal arguments, you will win.

Chairman GRASSLEY. I think you answered my next question based upon what you said about *Hamdan*. But there are probably other examples. You do not need to go into detail. But you have President—

[Disturbance in the hearing room.]

Chairman GRASSLEY. President Bush appointed you. Are there other cases that—there has been other cases presumably you have ruled against the administration of the person that appointed you?

Judge KAVANAUGH. Absolutely, Mr. Chairman. There were a slew of cases on everything from Freedom of Information Act to some of the administrative law cases. The *Hamdan* one is certainly the one that comes to mind most because of the importance of that case. Yet I ruled that it was unlawful.

Chairman GRASSLEY. Yes. Now did anyone ask you to make any promises or assurances at all about the way that you would rule in certain cases?

Judge KAVANAUGH. No.

Chairman GRASSLEY. Were you asked about your views on *Roe v. Wade*?

Judge KAVANAUGH. No.
[Disturbance in the hearing room.]

Chairman GRASSLEY. We were talking about separation of powers. Have you ever written any decisions where you use the Tenth Amendment? I am talking about division of powers between Federal and States.

Judge KAVANAUGH. Mr. Chairman, most of the cases that come to the D.C. Circuit are at the national level and, therefore, involving questions of separation of powers between the legislative, executive, and judicial branches. Of course, federalism is a critical part of our constitutional structure as well.

The genius of our system, Federalist 39, as described by Madison, is that we have both a national Government and a Federal Government simultaneously. And the House of Representatives really represents in some ways the national part, proportional representation. This body, with two Senators from each State, represents in many ways the Federal part, each State represented equally.

And the federalism system by which the States are allowed to regulate local matters, and some of the Commerce Clause cases, such as *United States v. Lopez* and *United States v. Morrison*, reinforce the idea that there is a core of authority that is exclusively in the province of the States and beyond the scope of the Federal Government.

The Tenth Amendment—
[Disturbance in the hearing room.]

Judge KAVANAUGH. The Tenth Amendment reinforces the structure of federalism that is in our constitutional system. It is important always to remember the role of the States in our constitutional systems, and it is important to recognize as individual citizens something we often forget, particularly in a process like this. Our rights and liberties are protected by the Federal Constitution and by the Federal courts, but they are also protected by State constitutions and State courts.

A great judge on the Sixth Circuit, Judge Jeff Sutton, has written a new book about using State constitutions to help protect your individual liberties and rights, too. This whole document, through the separation of powers and the federalism, tilts toward liberty—

[Disturbance in the hearing room.]
Judge KAVANAUGH. Tilts toward liberty.

Chairman GRASSLEY. Now we have talked about your independence from a President. There is also the question of independence from the legislative branch, equally as important.

You are going to be asked about your personal views on a variety of topics and whether you believe various Supreme Court cases were correctly decided. Presumably, this is because Senators are going to try to predict how you will rule in cases before you. The idea is that if you agree with your personal views—if they agree with your personal views on particular issues of morality or on Supreme Court precedent, they maybe would vote to confirm you. If not, they might not.

Of course, that is improper. Judges should never promise their future votes on the bench in exchange for a Senator's vote for them.

If you answer these questions about your views on specific Supreme Court cases or public controversies of the day, you would be showing the opposite of independence from the legislative branch.

Politicians can make promises about how they will vote on issues. Judges, by the very nature of the job, should never promise any outcome. If a nominee answers these questions, it threatens to undermine judicial independence.

Of course, there may be times where it is appropriate to reconsider certain decisions, especially if more recent opinions have called into question the rationale of the original decisions. So with this in mind, I would like to explore the approach that you would take toward Supreme Court precedent.

Could you tell us your views on the value of precedent? I think you have already done that, but if you want to expand on it, go ahead. Have you ever followed precedent of the Supreme Court when doing so conflicted with your personal beliefs?

Judge KAVANAUGH. My personal beliefs are not relevant to how I decide cases. The role of precedent in our system, which I said is rooted in Article III of the Constitution, it is not just a judicial policy. The role of precedent is to ensure stability in the law, which is critically important.

It is also to ensure predictability of the law. People who order their affairs around judicial decisions need to know that the law is predictable. Whether you are an individual or business or worker, you need to have predictability.

People rely on the decisions of the courts, and so reliance interests are critically important to consider as a matter of precedent. They are one of the reasons we have the system of precedent, so that people can rely on the decisions.

Precedent also reinforces the impartiality and independence of the judiciary. The people need to know in this country that the judges are independent and that we are not making decisions based on policy views. Part of that is to understand we are following a system of precedent, of what has been done before.

The Court, every time someone gets on it, is not just bouncing around to, "What do I think is best?" It is, "What is the precedent of the Supreme Court?" is always part of the analysis, an important part.

And for 12 years, I have been applying precedent of the Supreme Court and of my court. Every day for 12 years, I have not been getting up saying how can I rewrite the law? I have been getting up for 12 years every day saying, okay, how can I apply this Fourth Amendment precedent to this fact pattern that comes before me? Or how can I apply this First Amendment precedent to this fact pattern that comes before me?

So precedent is the foundation of our system. It is part of the stability. It is ensuring predictability, and it is just foundational to the Constitution, as Article III and Federalist 78 make clear.

Chairman GRASSLEY. Now you will be asked by other Members which Supreme Court precedents you like and do not like. But as you know, it is inappropriate for a nominee to answer those questions. And this refers to Justice Ginsburg. She said, "A judge sworn to decide impartially can offer no forecasts, no hints, for that would

show not only disregard for the specifics of a particular case, it would display disdain for the entire judicial process.”

The underlying reason for this, of course, is that making promises or giving hints undermines the very independence that we have discussed. Would you agree with that?

Judge KAVANAUGH. I do, Senator, Mr. Chairman. And one of the things that I have to remember sitting in this seat is that this moment is a moment of judicial independence with how I interact with this Committee.

And what I have done in each of the jobs I have had, and particularly as a judge over the last 12 years, but also in the executive branch, you always ask—I always ask myself and I tell people I am working with to ask how has it been done before? How has it been done before? So, as a judge, how has it been done before as precedent? That is, how has it been done before?

When I am sitting here, what did I do? I went and studied all the nominee precedent. I have studied. I have read Thurgood Marshall’s hearing and Justice Brennan’s hearing, and I have read the hearings of the eight Justices currently sitting on the Supreme Court. It is what I call nominee precedent.

And so all of the nominees currently sitting on the Supreme Court, all the Justices have made clear a couple things. First of all, they cannot discuss cases or issues that might come before them. As Justice Ginsburg said, no hints, no forecasts, no previews.

That also means with respect to at least the vast body of Supreme Court precedent going back, you cannot give a thumbs up or thumbs down on the case. That is Justice Kagan’s formulation. She said repeatedly no thumbs up or thumbs down when she was asked, “What do you do think about this case? What do you think about that case?” I liked her formulation there. No thumbs up or thumbs down.

That nominee precedent, as I call it, is now, in my view, part of the independence of the judiciary, and that nominee precedent is something I need to adhere to when I am here as a nominee now. Because that is—one of my jobs here is not to advance my own interests, but remember I am a representative of the judiciary as a whole, and I have a responsibility to do judicial independence right here, right now as a nominee. So following that nominee precedent is going to be critical.

Now there is an exception that the eight Justices have drawn currently sitting on the Court, if you read all the hearings, for some older cases. And I will be happy to give some older cases where nominee precedent does allow the Justices—has allowed them to talk about a few older cases.

And again, why do we do this? Why is this nominee precedence there? When eight Justices of widely ranging views do this, there must be a reason. The reason is judicial independence. What does that mean? It means two things in this context.

One, the litigants who come before us have to know we have an open mind, that we do not have a closed mind, that we have not committed something in this process that is going to affect how we decide a case because we feel bound by what we promised to this Committee. And believe me, judges do feel bound by what they said to this Committee.

So if I say something and a case comes before me 5 years from now, I am going to feel morally bound by what I said here. And if I have crossed the line of what I should say, then I am not going to have an open mind in that case. That is a violation of judicial independence.

Second, as Chief Justice Roberts described perhaps better than anyone, if I get into some kind of process that appears to be a bargaining process where I say, well, I will agree with this decision in exchange for your vote, it is never that explicit. But that is—as Chief Justice Roberts described it, that is kind of what seems to be going on sometimes. Well, that is a complete violation of judicial independence because then the judges are not making the decisions based on their reading of the law. It is really, as Chief Justice Roberts described it, it is the Senate or the Senate Judiciary Committee really sending a nominee as a delegate to the judiciary and really doing what the Senate Judiciary Committee thinks is the right thing to do.

Chief Justice Roberts explained very forcefully that doing that would be a violation of judicial independence. That nominee precedent weighs heavily on me as a nominee here because it is rooted in judicial independence. And I have said repeatedly already that I am going to be an independent judge. Well, I have to be an independent nominee as well, so I am going to have to adhere to the lines drawn by those prior nominees, Mr. Chairman.

Chairman GRASSLEY. There is only 25 seconds left. I am going to reserve that time and go to Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Good morning, Judge.

Judge KAVANAUGH. Thank you.

Senator FEINSTEIN. I am sorry about the circumstances, but we will get through it.

I wanted to talk to you this morning about guns, and go back to *Roe v. Wade*, if I might. My office wrote the assault weapons legislation in 1993. It was law from 1994 to 2004, and it essentially prohibited the transfer, sale, and manufacture of assault weapons. It did not at the time affect possession.

I happen to believe that it did work and that it was important. And I have watched case after case, and I think I mentioned earlier, school shootings, which are just—I never thought this would happen in our country, that someone would bring a semi-automatic assault weapon into a school and just mow down children and staff.

And so I have been very interested in your thinking on assault weapons. You specifically argued that the DC assault weapons ban was unconstitutional, and I think because you said these weapons were in common use. What did you base your conclusion that assault weapons are in common use, and what evidence or study did you use to do that?

Judge KAVANAUGH. Thank you, Senator Feinstein, for the question.

I understand, of course, your role on that issue and your long leadership on that issue and appreciate that. I faced a decision where, as in every other decision just about on the D.C. Circuit, I had to follow precedent, precedent of the Supreme Court. I do not

get to pick and choose which Supreme Court precedents I get to follow. I follow them all.

And so, in the Second Amendment context, the Supreme Court in the *Heller* decision, written by Justice Scalia, had held that there was an individual right to keep and bear arms. And then in explaining what that meant and what exceptions would be allowed to that right, Justice Scalia's opinion for the Court in Part 3 of the opinion went through this does not mean that there is no gun regulation permissible.

So that was an important part of the opinion, Part 3 of the Supreme Court's opinion, where it pre-identified a number of exceptions that would be allowed. Felon in possession laws, concealed carry laws, possession of mentally ill, possession of guns in schools, possession in certain kinds of buildings, he pre-identified that.

As to the weapons, the way I understood what he said there, and what was said in the *McDonald* case later, was that dangerous and unusual weapons could be prohibited. And what he referred to specifically is machine guns could be prohibited. So it is very important to recognize, under the *Heller* decision, machine guns can be prohibited. And machine—

Senator FEINSTEIN. They were in the Firearms Act a long time ago.

Judge KAVANAUGH. Yes, and that is—

Senator FEINSTEIN. Machine guns have been prohibited.

Judge KAVANAUGH. Yes, Senator. And Justice Scalia's opinion did not disturb that longstanding regulation. In fact, it specifically reaffirmed that machine guns could be prohibited. The Court in *Heller*, the Supreme Court upheld—or struck down a DC ban on handguns, most of which are semi-automatic—

Senator FEINSTEIN. I do not mean—let me interrupt you because I think we are on totally different wavelengths. I am talking about your statement on “common use”—“common use” being a justification. And assault weapons are not in common use.

Judge KAVANAUGH. And Justice Scalia's opinion used that phrase, and I think the next sentence of the opinion talked about dangerous and unusual weapons. And the Court in *Heller* itself, the Supreme Court, struck down a DC ban on handguns.

Now most handguns are semi-automatic. That is something that not everyone appreciates. Most handguns are semi-automatic. And the question came before us of semi-automatic rifles, and the question was, can you distinguish as a matter of precedent—again, this is all about precedent for me, trying to read exactly what the Supreme Court said if you read the *McDonald* case. And I concluded that it could not be distinguished as a matter of law semi-automatic rifles from semi-automatic handguns.

And semi-automatic rifles are widely possessed in the United States. There are millions and millions and millions of semi-automatic rifles that are possessed. So that seemed to fit common use and not being a dangerous and unusual weapon. That was the basis of my dissent.

But in a nutshell, the basis of my dissent was I was trying to follow strictly and carefully the Supreme Court precedent. And I know you have read the opinion—

Senator FEINSTEIN. You are saying the numbers determine common use? Common use is an activity. It is not common storage or possession. It is use. So what you said was that these weapons are commonly used. They are not.

Judge KAVANAUGH. They are widely possessed in the United States, Senator, and they are—they are used and possessed. But the question is, are they dangerous and unusual? They are certainly dangerous. All weapons are dangerous. Are they unusual? And given how prevalent they are in the United States, it seemed under Justice Scalia's test, and if you look at the majority opinion in *McDonald*, the same thing.

I want to reiterate the Supreme Court made clear that machine guns can be banned. Machine guns can be banned.

Senator FEINSTEIN. Let me speak to you. I am talking about the *Heller* case. Let me be specific. And you specifically argued that it was unconstitutional to defend assault weapons because they are—to ban assault weapons because they are in common use. And that, I believe, was your dissent in the case.

Judge KAVANAUGH. Yes, and I was referring to some semi-auto—some kinds of semi-automatic rifles that are banned by DC are widely owned in the United States. And that seemed to be the test that the Supreme Court had set forth in the *Heller* and *McDonald* cases. In other words, if a type of firearm is widely owned in the United States.

Now whether I agree with that test or not was not the issue before me. I have to follow the precedent of the Supreme Court as it is written, and that is what I tried to do in that case. It is a very long opinion.

I also made clear, Senator Feinstein, at the end of the opinion, I am a native of this area. I am a native of an urban/suburban area. I grew up in a city plagued by gun violence and gang violence and drug violence. So I fully understand, as I explained in the opinion, the importance of this issue.

I specifically referenced that Police Chief Cathy Lanier's goals of reducing gang and gun violence was something I certainly applauded, but that I had to follow the precedent of the Supreme Court in that case. And as I read it, that is what it said—I am sorry?

Senator FEINSTEIN. How do you reconcile what you have just said with the hundreds of school shootings using assault weapons that have taken place in recent history? How do you reconcile that?

Judge KAVANAUGH. Senator, of course, the violence in the schools is something we all detest and want to do something about, and there are lots of efforts, I know, underway to make schools safer. I know at my girls' school, they do a lot of things now that are different than they did just a few years ago in terms of trying to harden the school and make it safer for everyone.

Guns, handguns, and semi-automatic rifles are weapons used for hunting and self-defense. But as you say, Senator, you rightly say, they are used in a lot of violent crime and cause a lot of deaths. Handguns are used in lots of crimes that result in death, and so are semi-automatic rifles. That is one of the—that is what makes this issue difficult.

As I said in the last two pages of my dissent in *Heller*, I fully understand the gang violence, gun violence, drug violence that has plagued various cities, including Washington, DC. This was known as the murder capital of the world for a while, this city. And that was a lot of handgun violence at the time.

And so I understand the issue. But as a judge, my job, as I saw it, was to follow the Second Amendment opinion of the Supreme Court, whether I agreed with it or disagreed with it. At the end of the opinion, I cited Justice Kennedy's *Texas v. Johnson* quote, which I read yesterday, as the guiding light for the lower court judges and all judges.

Senator FEINSTEIN. Let me give you a couple of other quotes because I am going to change the subject. Do you agree with Justice O'Connor that a woman's right to control her reproductive life impacts her ability to, quote, "participate equally in the economic and social life of the Nation"?

Judge KAVANAUGH. Well, as a general proposition, I understand the importance of the precedent set forth in *Roe v. Wade*. So *Roe v. Wade* held, of course, and it reaffirmed in *Planned Parenthood v. Casey*, that a woman has a constitutional right to obtain an abortion before viability, subject to reasonable regulation by the State up to the point where that regulation constitutes an undue burden on the woman's right to obtain an abortion.

And one of the reasons for that holding, as explained by the Court in *Roe*, and also in *Planned Parenthood v. Casey* more fully, is along the lines of what you said, Senator Feinstein, about the quote from Justice O'Connor. So that is one of the rationales that undergirds *Roe v. Wade*. It is one of the rationales that undergirds *Planned Parenthood v. Casey*.

Senator FEINSTEIN. Well, let me give you another one—rationale. In the 1950s and 1960s, the two decades before *Roe*, deaths from illegal abortions in this country ran between 200,000 and 1.2 million. That is according to the Guttmacher Institute. So a lot of women died in that period.

So the question comes, and you have said today—not today, but it has been reported that you have said that *Roe* is now settled law. The first question I have of you is what do you mean by "settled law"? I tried to ask earlier do you believe it is correct law?

Have your views on whether *Roe* is settled precedent or could be overturned, and has your views changed since you were in the Bush White House?

Judge KAVANAUGH. Senator, I said that it is settled as a precedent of the Supreme Court, entitled the respect under principles of stare decisis. And one of the important things to keep in mind about *Roe v. Wade* is that it has been reaffirmed many times over the past 45 years, as you know, and most prominently, most importantly, reaffirmed in *Planned Parenthood v. Casey* in 1992.

And as you well recall, Senator, I know when that case came up, the Supreme Court did not just reaffirm it in passing. The Court specifically went through all the factors of stare decisis in considering whether to overrule it, and the joint opinion of Justice Kennedy, Justice O'Connor, and Justice Souter, at great length went through those factors. That was the question presented in the case.

Senator FEINSTEIN. Could I interrupt you to say, since you mentioned *stare decisis*, and I have sat on nine of these hearings. And when the subject comes up, the person says, “I will follow *stare decisis*,” and they get confirmed, and then, of course, they do not.

So I think knowing going into it how you make a judgment on these issues is really important to our vote as whether to support you or not. Because I do not want to go back to those death tolls in this country, and I truly believe that women should be able to control their own reproductive systems within obviously some concern for a viable fetus.

Judge KAVANAUGH. And I understand your point of view on that, Senator, and I understand how passionate and how deeply people feel about this issue. I understand the importance of the issue. I understand the importance that people attach to the *Roe v. Wade* decision, to the *Planned Parenthood v. Casey* decision.

I do not live in a bubble. I understand. I live in the real world. I understand the importance of the issue. And—

Senator FEINSTEIN. Well, my staff just passed me a note. Let me read it to you because I think it is good. Have your views about whether *Roe* is settled precedent changed since you were in the Bush White House?

Judge KAVANAUGH. My—

Senator FEINSTEIN. “Yes” or “no”?

Judge KAVANAUGH. Well, I will tell you what my views—I am not sure what it is referring to about “Bush White House,” but I will tell you what my view right now is. Which is, it is important precedent of the Supreme Court that has been reaffirmed many times. But then *Planned*—and this is the point that I want to make that I think is important. *Planned Parenthood v. Casey* reaffirmed *Roe* and did so by considering the *stare decisis* factors.

So *Casey* now becomes a precedent on precedent. It is not as if it is just a run of the mill case that was decided and never been reconsidered, but *Casey* specifically reconsidered it, applied the *stare decisis* factors, and decided to reaffirm it. That makes *Casey* a precedent on precedent.

Another example of that, because you might say, are there other cases like that, *Miranda*. So *Miranda* is reaffirmed a lot, but then in the *Dickerson* case in 2000, Chief Justice Rehnquist writes the opinion, considering the *stare decisis* factors and reaffirming *Miranda*. Even though Chief Justice Rehnquist, by the way, had been a fervent critic of *Miranda* throughout his career, he decided that it had been settled too long, had been precedent too long, and he reaffirmed it.

So precedent on—

Senator FEINSTEIN. What—

Judge KAVANAUGH. I am sorry to interrupt.

Senator FEINSTEIN. I am sorry to interrupt, but I want to switch subjects, and one last question. What would you say your position today is on a woman’s right to choose?

Judge KAVANAUGH. Well, as a judge—

Senator FEINSTEIN. As a judge.

Judge KAVANAUGH. As a judge, it is an important precedent of the Supreme Court. By “it,” I mean *Roe v. Wade*, and *Planned Parenthood v. Casey*, they have been reaffirmed many times. *Casey* is

precedent on precedent, which itself is an important factor to remember. And I understand the significance of the issue, the jurisprudential issue, and I understand the significance as best I can—I always try and I do hear—of the real world effects of that decision, as I try to do, of all the decisions of my court and of the Supreme Court.

Senator FEINSTEIN. Well, I thank you for that. Let us go to Presidential power for a moment. You were part of Ken Starr's independent counsel team, which conducted a sweeping investigation into possible wrongdoing by President Clinton and the first lady. At the time, you argued for aggressive questioning of the President. You did not take the position that President Clinton was immune from investigation.

Since then, you have taken the opposite position. In fact, you have said that, and I quote, "If the President were the sole subject of a criminal investigation, I would say no one should be investigating that at all." What did you mean by that, and what are the circumstances where a sitting President could be subject to criminal investigation?

Judge KAVANAUGH. And I appreciate the sign there. Senator, the last sign, I should have mentioned while it was up, the Second Amendment sign actually had brackets around part of my quote. And I am not sure if it was the exact quote.

But this one—I just wanted to point that out.

Senator FEINSTEIN. Is this accurate?

Judge KAVANAUGH. Here is what I was saying, Senator. Let me explain it, this one.

Senator FEINSTEIN. Oh.

Judge KAVANAUGH. The last one may or may not have been accurate. I just wanted to point that out for the record. It had brackets for my quote.

This one, so what happens after the Starr investigation? Then I work 5½ years in the White House. So let me just give you, if I can, some context here, and I am going to get specifically to your question.

So I work on the independent counsel investigation, and that is obviously difficult, controversial, a moment for our country that I wish had not happened. We all wish it had not happened. And I reflect on that. I wrote a Georgetown University Law Journal article in 1999 reflecting on some of my thoughts about that. This seems to be a tendency of mine to go through an experience, write an article reflecting on it.

And then I work in the Bush White House for 5½ years, and I write an article in the Minnesota Law Review, Senator Klobuchar, in 2009, when President Obama is in office, I should point out, and I reflected on a number of things I had learned working in the independent counsel office and then working in the White House. And I thought there were a number of things Congress could take a look at that I had experienced.

One of them was I proposed timelines for consideration of judicial nominees. I proposed a 180-day, up-or-down vote for every judicial nominee. That was something that from my experience I thought would avoid controversy and have rules of the road set in advance, and I proposed that specifically for Congress to consider.

Other aspects, I said—
 Senator FEINSTEIN. Well—

Judge KAVANAUGH. Another thing I proposed was, for Congress to consider whether it should look at *Clinton v. Jones* or the principle of *Clinton v. Jones*. So, you recall, *Clinton v. Jones* had said a President is subject to civil suit while in office, the *Paula Jones* suit. That was a controversial decision, but the Supreme Court made clear at the end of the decision, Congress could provide extra deferral of suits, not immunity, but deferral of suits for Presidents, if Congress so wanted.

And so in the Minnesota Law Review article, I put out some ideas about whether Congress may want to think about that. And why did I do that? I think Senator Durbin asked yesterday, what changed that made me think about that from the time? What changed was September 11th. That is what changed.

So after September 11th, I thought very deeply about the Presidency, and I thought very deeply about the independent counsel experience, and I thought very deeply about how those things interacted. And I thought very deeply about seeing President Bush, when he came into the Oval Office on September 12, 2001, in the morning, President Bush said this will not happen again. This will not happen again.

And he was of single-minded focus. Every morning for the next 7 years for President Bush was still September 12, 2001. Single-minded focus. And then thinking back to the independent counsel experience and August 1998. So I proposed some ideas for Congress to consider.

Here is the bottom-line point. They were ideas for Congress to consider. They were not my constitutional views. If a case came up where someone was trying to say this is a constitutional principle, I would have a completely open mind on that because I have never taken a position on the Constitution on that question. I have only put out proposals for you all to study to think about the balance of a President fighting a war, leading a war, and a President subject to, say, ordinary civil lawsuits as in the *Clinton v. Jones* case.

Senator FEINSTEIN. Let me ask you. You have become very good. You are learning to filibuster.

[Laughter.]

Senator FEINSTEIN. But let me ask this question precisely. The Supreme Court has unanimously ruled that a President can be required to turn over information. It upheld the subpoena for the tapes of Oval Office conversations that revealed President Nixon's efforts to cover up the Watergate break-in. This, as you know, was *U.S. v. Nixon*.

You have said that the *Nixon* case might have been wrongly decided. Was *U.S. v. Nixon* wrongly decided in your view?

Judge KAVANAUGH. So that quote is not in context and is a misunderstanding of my position that is up there. I have repeatedly called *U.S. v. Nixon* one of the four greatest moments in Supreme Court history. So I have called that—the four I have always identified are *Marbury v. Madison*, *Youngstown Steel*, *Brown v. Board of Education*, and *United States v. Richard Nixon*.

And why have I—*Brown v. Board*, by the way, the single greatest—

Senator FEINSTEIN. Was it rightly decided?

Judge KAVANAUGH. So I have said that—I have said, yes, that the Court's holding that a criminal trial subpoena to a President in the context of the special counsel regulations in that case for information, a criminal trial subpoena for information under the specific regulations in that case, I have said that holding is one of the four greatest moments in Supreme Court history.

So, not only what I was—I can explain how that misunderstanding came up because that is—I know there was a news story about that, and that is just not correct impression of my views. My views have been consistently why was it one of the greatest moments? It was one of the greatest moments because of the political pressures of the time. The Court stood up for judicial independence in a moment of national crisis.

The Supreme Court, we need the Supreme Court to decide the things we can foresee. But one of the things that is really important for the Supreme Court, we are going to have crisis moments at the Supreme Court on things we cannot even predict, and we need people on the Supreme Court who are prepared for that. And *U.S. v. Nixon*—

Senator FEINSTEIN. My time is going to run out very quickly. Let me just ask you this. Can a sitting President be required to respond to a subpoena?

Judge KAVANAUGH. So that is a hypothetical question about what would be an elaboration or a difference from *U.S. v. Nixon's* precise holding. And I think going with the Justice Ginsburg principle, which is really not the Justice Ginsburg alone principle, it is everyone's principle on the current Supreme Court. And as a matter of the canons of judicial independence, I cannot give you an answer on that hypothetical question.

Senator FEINSTEIN. So you cannot give me an answer on whether a President has to respond to a subpoena from a court of law?

Judge KAVANAUGH. My understanding is that you are asking me to give my view on a potential hypothetical, and that is something that every—each of the eight Justices currently sitting on the Supreme Court when they were sitting in my seat declined to decide potential hypothetical cases.

I can tell you about the *U.S. v. Nixon* precedent, and I did about Chief Justice Burger's role in forging a unanimous opinion, and really all the Justices worked together on that. But Chief Justice Burger, who had been appointed by President Nixon—been appointed by President Nixon, writes the opinion in *U.S. v. Nixon*, 8–to–0. Rehnquist was recused—8–to–0, ordering President Nixon to disclose the tapes in response to a criminal trial subpoena.

A moment of crisis argument, I think July 8, 1974. They decided 2 weeks later. A really important opinion. A moment of judicial independence. Important precedent of the Supreme Court. But how that would apply to other hypotheticals, I best, as a sitting judge and as a nominee, follow the precedent of the nominees who have been here before and as a matter of judicial independence not give you a precise answer on a hypothetical that could come before me.

Senator FEINSTEIN. I understand. Thank you very much for being forthcoming. I appreciate it.

Judge KAVANAUGH. Thank you, Senator.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman GRASSLEY. I assume you want to reserve your 3 minutes?

Senator FEINSTEIN. Can I do that?

Chairman GRASSLEY. Yes.

Senator FEINSTEIN. I will.

Chairman GRASSLEY. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. Before I begin, I would like to enter into the record three letters and an op-ed supporting Judge Kavanaugh's confirmation. The first letter, which I mentioned yesterday in my opening statement, is a letter from 41 attorneys who are members of the Supreme Court Bar. The signers include people like Lisa Blatt, Deanne Maynard, and Kathleen Sullivan. As the letter notes, the signers "hold a broad range of political, policy, and jurisprudential views," but they "speak as one in supporting Judge Kavanaugh's nomination." The letter's authors write, "Based on our experience with Judge Kavanaugh and his work over 12 years of distinguished judicial service, we are confident that he possesses the character, temperament, and intellect that will make him an asset to our Nation's highest court."

Now, the second letter is from Carolyn Williams, a partner at the venerable DC law firm, Williams & Connolly, who served on the ABA Standing Committee on the Federal judiciary. She writes that she has followed Judge Kavanaugh's legal career since 1990 when she was the hiring partner at the firm and he was a law student. Ms. Williams says, that Judge Kavanaugh "has all the qualities litigants and lawyers hope to find in a Supreme Court Justice: superb intellect and legal acumen, fundamental fairness and decency, abiding respect for precedent and the rule of law."

And I also want to enter into the record a letter—a letter and op-ed by Jay Lefkowitz. The op-ed appeared in National Review and is entitled, "Brett Kavanaugh is a Mensch." In it, Mr. Lefkowitz writes that Judge Kavanaugh "has a strong commitment to protecting Americans' freedom of religion, no matter what their faith." And Mr. Lefkowitz should know. He and Judge Kavanaugh worked together in private practice on a pro bono religious freedom case representing a Jewish synagogue in Maryland, and they won the case, vindicating the right of the congregation to build a place of worship in their neighborhood.

[The information appears as a submission for the record.]

Senator HATCH. Now, let me just begin with this. Before I begin, Judge, I would like to ask you to keep your answers to my questions as concise as you can so I can get through as many of them as time allows. Some of my colleagues have suggested that President Trump nominated you because he thought you would rule in his favor should certain issues come before the Court. Suppose you had a case involving President Trump or an issue near and dear to the President, what assurances can you provide that you will not allow the President's personal views on a case or personal interest to impact your decision?

Judge KAVANAUGH. Senator, I am independent judge. For 12 years I have been deciding cases based on the law and the precedent in each case. If confirmed to the Supreme Court, that is how I will do it as well, be part of a Team of Nine. I will decide cases

based on the Constitution, the law, the precedents of the Supreme Court working with that, the other eight Justices, without fear or favor, independently, without pressure from any quarter. And the person who has the best arguments on the law and the precedent is the person who will win in—with me.

Senator HATCH. Well, thank you. If at the end of the process—of this process you are confirmed to the Supreme Court, which I expect you will be, what sort of loyalty will you owe to the—to the President? How will that loyalty differ from the loyalty you owe to, say, the American people?

Judge KAVANAUGH. Senator, if confirmed to the Supreme Court and as a sitting judge, I owe my loyalty to the Constitution. That is what I owe loyalty to, and the Constitution establishes me as an independent judge, bound to follow the law as written, the precedents of the Supreme Court as articulated, subject to the rules of *stare decisis*. And I would do so.

Senator HATCH. Okay. You were appointed to the D.C. Circuit by George W. Bush. I think it is fair to say you were close to President Bush. You worked for him for a number of years. Can you give us some examples of cases in which you ruled against the Bush administration, notwithstanding that President Bush was the one who put you on the bench?

Judge KAVANAUGH. Senator, the prominent example is the *Hamdan* case.

Senator HATCH. Yes.

Judge KAVANAUGH. That was the military commissions case. That was a signature prosecution of the Bush administration. They had established, with congressional authorization eventually after a unilateral effort did not succeed in the courts, established military commissions. The military commissions were to try al-Qaeda terrorists who had committed war crimes. And one case came to us, Salim Hamdan, and the question was, was the prosecution unlawful because the crime of which he convicted was not an identified crime as of 2001 when he was alleged to have committed it, *ex post facto* principles. And I wrote the opinion reversing his conviction, even though it was a signature prosecution of the United States, even though it was a national security case, because that was the right answer under the law. And it does not matter who you are, where you come from, if you are right under the law, you prevail.

Senator HATCH. I would like to turn now to your work in the Bush administration. As you know, my Democratic colleagues are demanding to see every piece of paper or every single scrap of paper you ever touched during your 6 years in the Bush administration, in part because they want to know what role, if any, you played in developing the Bush administration's interrogation policies. Well, 6 years ago, Ranking Member Feinstein, who was then the Chairman of the Senate Intelligence Committee, and a good one at that, issued a lengthy report on the CIA's detention and interrogation program under President Bush. The report detailed the origins, development, and implementation of the program.

In 2014, a declassified version of that report was released to the public. The declassified version or report runs well over 500 pages, and your name appears nowhere in it. Now, I myself spent over 20 years on the Intelligence Committee. I know the quality of its staff

and the work that they do, and I know the Ranking Member and how diligent she is. If you had played a role in the Bush administration's interrogation policies, I think the Ranking Member would have discovered it. Numerous administration lawyers appear in the report, but not you, and that should tell us something.

With that said, Judge Kavanaugh, I want you—I want to ask you for the record, what role, if any, did you play in developing or implementing the Bush administration's detention and interrogation policies?

Judge KAVANAUGH. Well, the policies that are reflected and described in Senator Feinstein's extensive, thorough report were very controversial, as you know, Senator, the enhanced interrogation techniques.

Senator HATCH. Right. Right.

Judge KAVANAUGH. And the legal memos that were involved in justifying some of those techniques also were very controversial when they were disclosed in 2004. And I was not involved—I was not read into that program, not involved in crafting that program nor crafting the legal justifications for that program. In addition to Senator Feinstein's report, the Justice Department did a lengthy Office of Professional Responsibility report about the legal memos that had been involved to justify some of those programs. My name is not in that report, Senator, because I was not read into that program and not involved.

There were a number of lawyers, and this came up at my last hearing, a number of lawyers who were involved, including a couple who were then judicial nominees. At my last hearing, I recall Senator Durbin asking about whether I also was likewise involved as these other judicial nominees had been, and the answer was no, and that answer was accurate, and that answer has been shown to be accurate by the Office of Professional Responsibility report, by Senator Feinstein's thorough report.

And I do want to say on Senator Feinstein's report, that is a—that is an important piece of work that collected facts about a program, that it is important for us to know those facts for the future. And I know it was an enormous effort and a lot of tough work to get all that information for Senator Feinstein and the Intelligence Committee. But I have looked through that report and looked through the Office of Professional Responsibility report. I was not read into that program, Senator. Thank you for—thank you for asking.

Senator HATCH. Okay. Judge, you have been accused of misleading this Committee during your 2006 confirmation hearing regarding your role in developing the Bush administration's detention policy. Now, you have a strong reputation in the legal community for honesty and integrity. Read any one of the dozens we received supporting your nomination, and you will see that right away. Now, some of my colleagues may not give you the opportunity to answer this question fully, so I would like to give you the opportunity now. Did you mislead this Committee in 2006? If not, what is the source of the confusion about your prior testimony?

Judge KAVANAUGH. I told the truth and the whole truth in my prior testimony. I was not read into that program. The subsequent reports of Senator Feinstein and the Office of Professional Respon-

sibility show that. And that is what I did then, and that is the answer now. I was not read—I was not read into that program.

Senator HATCH. Okay. As I mentioned in my opening statement, 18 of your former women law clerks have written to the Committee in support of your nomination. That is all of your former women law clerks who were not precluded by their current or pending employment from signing the letter. Now, these women described the mentoring and encouragement that you have given them in their careers, and they say that you are “one of the strongest advocates in the Federal judiciary for women lawyers.” Quite a compliment. A majority of your clerks, in fact, have been women.

Now, I understand that you were the first judge in the history of the D.C. Circuit to have an all-female class of clerks. Why do you believe it important to encourage young women lawyers and to ensure that both men and women are well represented in the legal profession?

Judge KAVANAUGH. Senator, I believe in equality, equality for all Americans, men and women, also regardless of race, ethnicity. My mom was an example, as I described yesterday, of breaking barriers, showing me first on racial equality by her example of teaching at McKinley Tech. Then when she became a lawyer in the late ’70s, there were not many women prosecutors at the time, definitely male dominated, and how she overcame barriers, was a great prosecutor, became a State trial judge in Maryland appointed by Democratic Governors.

She showed me by her example the importance of women’s equality. During college—you have received a letter from 10 college friends of mine who are women, women athletes at Yale, talked about how I treated them and women’s sports with respect and as equal even when I was in college. You have a letter from 84 women I worked with in the Bush administration who talked about my efforts to work with them in the tense environment of the West Wing, especially after September 11th.

Senator HATCH. Did you say 84?

Judge KAVANAUGH. Eighty-four women signed a letter who had worked in the Bush White House—in the Bush White House and worked in that tense environment. But I came to be a judge in 2006. May 2006. And August 2006, Linda Greenhouse of The New York Times runs a story in The New York Times about the scarcity of women law clerks at the Supreme Court that year. There were seven, I believe, that year out of 37, and she wrote a story about that.

And that seemed to me very odd and unacceptable, and I started thinking about what I could do. First of all, why is that happening, and what can I do about it. What’s the problem, and what can I do. So, the problem seemed to me these networks that people—judges rely on for clerk hirings. Some professor networks were getting—were excluding women, or at least women weren’t fully represented in those. That is true with minorities as well, by the way.

And so, I made sure when I was talking to professors at law schools, I made sure—I wanted to see a broad pool of qualified—well-qualified applicants, including women. And in that year, for example, fall of 2006, which was my first year on the bench—we hire a year ahead, so I am hiring for 2007—I hired three women

for that clerk class of 2007, three out of the four: Zina Bash, Brit Grant, and Porter Wilkinson. Zina is right here.

And that was the start of my efforts to make sure that women were not being excluded, and I really worked on why is this happening. So, Yale Law women did a study about 5 years ago about participation in class, the differences on who gets on in class, and there are slight differences there, men and women, who then get selected as research assistants, slight differences there. And it just keeps building until you get a disparity in the clerk network, and there is a pipeline problem.

And I said I am breaking through that problem. I am not—I am not listening to that. And so, I have been very aggressive about hiring the best and understanding the best include women. And as you say, Senator, a majority of my clerks have been women, 25. I believe 21 of them have gone on to clerk at the Supreme Court, and they are an awesome group. And if confirmed to the Supreme Court, I will continue to do this.

What it takes, and I think—my mom showed me this, President Bush showed me this a little. What it takes is just not accepting the same old answer, “Oh, there is a disparity.” Well, why? And then, do something about it. And I tried to figure out why, and we can talk about minority clerks, too. But on women, why were those disparities existed—existing as described by Linda Greenhouse, and I tried to figure out why, and then I did something about it.

I am very proud of that because I do believe that all people should be treated equally. And the law clerk position, which may sound ministerial, and, to some extent, the job is helping the judge, and shortly out of law school. But those positions are very important launching pads for the next generation of leaders, the people who will be sitting in these seats, the people who will be sitting in my seat. Lots of them are going to come from law clerks.

So, if we are not being inclusive now, that will show up later, and so, it has just been a critical part. It is something I am very focused on at all times is equality in the clerkship hiring process and making sure women are getting the same opportunities that men are. I appreciate the question, Senator.

Senator HATCH. Well, thank you, and I appreciate the answer, and I think everybody in this country should appreciate the answer, and I think it distinguishes you. Late last year, allegations against the former Ninth Circuit Judge Alex Kozinski surfaced when The Washington Post published an article detailing disturbing allegations of misconduct by the Judge. You clerked for Judge Kozinski for 1 year in 1991–1992. Some of your opponents have suggested that you must have known about these allegations. This seems to me to be an effort at guilty by association, which is not the way this Committee should operate in any way.

With that in mind, I want to give you a chance to answer a few questions about Judge Kozinski so that we are all operating on the same foundation of facts. First, how long have you known Judge Kozinski?

Judge KAVANAUGH. I clerked for him in 1991–1992, so I started the clerkship 27 years ago.

Senator HATCH. Second, I understand from media reports that Judge Kozinski operated an email list where he would send inappropriate material. Were you on this email list?

Judge KAVANAUGH. I do not remember anything like that, Senator.

Senator HATCH. How often did you talk with Judge Kozinski on the phone?

Judge KAVANAUGH. Not often. Not often, Senator.

Senator HATCH. How often did you see him in person?

Judge KAVANAUGH. Again, not often. Maybe there was a legal convention or—

Senator HATCH. That is what a lot of people do not seem to understand, you know.

Judge KAVANAUGH. I was not working in the court—he was in the Pasadena courthouse in California with—a small courthouse with 10 other court of appeals judges in that courthouse. I, of course, was working in Washington, DC.

Senator HATCH. When you did see and talk with Judge Kozinski, what type of things did you talk about?

Judge KAVANAUGH. We were among the 12 co-authors of the Bryan Garner-led book on judicial precedent, so for several years that was a project all of us were—the 12 of us, I guess it was, in total were working on that: Diane Wood, Chief Judge of the Seventh Circuit.

Senator HATCH. Right.

Judge KAVANAUGH. Justice Gorsuch was also a co-author, so we worked on that as a group. And then Justice Kennedy for the last 30 years had had Judge Kozinski his—run Justice Kennedy's law clerk hiring process, and in that—in the course of that process, I would have communications with the Judge.

Senator HATCH. Okay. Did you know anything about these allegations?

Judge KAVANAUGH. Nothing.

Senator HATCH. Okay. Before they became public last year?

Judge KAVANAUGH. No. When they—when it became public, you know, the first thought I had was no woman should be subjected to sexual harassment in the workplace ever, including in the judiciary, especially in the judiciary. And when I heard, when it became public, I think it was in December, it was a gut punch. It was a gut punch for me.

Senator HATCH. It was for me, too.

Judge KAVANAUGH. It was a gut punch for the judiciary, and I was shocked and disappointed, angry, swirl of emotions. No woman should be subjected to sexual harassment in the workplace, and I applaud—Chief Justice Roberts appointed a committee of judges to establish better procedures. Chief Justice Garland did the same thing for our court, and those are first steps. I do not think they are a final steps by any stretch. And what—this is part of a much, much larger national problem of abuse and harassment, and one of the things we have learned is we need better reporting mechanisms.

Women, particularly in the workplace, need to know if they are the victim of harassment where to report it immediately, who to report it to. They need to know that they will be safe if they report

it. They need to have a safe working environment and be safe if they report it. They will not be retaliated against, and they will be protected if they report it, and that is part of the steps, or one of the steps, that is, I think, being improved as a result of the working group—or, the committee that the Chief Justice has appointed.

And I am interested in doing everything I can to assist those efforts to make those workplaces safe. Again, it is part of a broader national problem whether it is priests, or teachers, or coaches, or doctors, or business people, or news people. There is a lot—there is a lot—it is a broad national problem that needs to be addressed, including in the judiciary. And I applaud Chief Justice Roberts for doing so.

Senator HATCH. Okay. I would like to talk to you now about the—

[Disturbance in the hearing room.]

Senator HATCH. I would like to talk to you now about the *Chevron* doctrine. Now, this is an important judicial doctrine that takes its name from the Supreme Court case that created it back in the 1980s. In that case, the Supreme Court instructed Federal courts to defer an agency's interpretation of the law if the law is "ambiguous." Some of your academic writings express skepticism about the *Chevron* doctrine, and concern that it allows an administration to impose its policy preference by avoiding the political process.

I can understand why this would be appealing to an administration, but I also think it is a threat to the separation of powers because it transfers power from Congress and the judiciary to the executive branch. That is why I have introduced the Separation of Powers Restoration Act to reverse the *Chevron* doctrine. Many Members of this Committee have cosponsored this legislation. And as someone who has written extensively about the separation of powers, can you tell us why the separation of powers is so important, and how it helps to protect individual freedom?

Judge KAVANAUGH. The separation of powers protects individual liberty because it responds to the concern the Framers had that—something Senator Klobuchar said yesterday from Federal 47, that the accumulation of all power in one body would be the very definition of tyranny. So, Federalist 47 talks about that, Federalist 69. So, the separation of powers, to begin with, protects individual liberty. It does so because Congress can pass the laws, but you cannot enforce the laws. A separate body has to decide to enforce the laws.

And then even if the law is enforced, a citizen may say, well, I want someone who did not pass the law or enforce it to decide whether I violated the law or whether the law is constitutional, and that is why we have an independent judiciary to guarantee, as an independent matter, our rights and liberties. And the three branches, therefore, do separate things because it all tilts toward liberty. It is hard to pass a law, as you know, in the Congress, and then even if it does get passed and affects your liberty, a separate body has to decide, usually a U.S. Attorney's office, to enforce the law, and that is a separate decision. That helps protect your liberty.

And then even if that happens, you go to a court and you say either I did not violate that law as I am accused of doing, or that law is ill—unconstitutional, or they are interpreting that law in a

way that is not consistent with what the law said. The court independently decides that. It is not the Members of Congress or the Executive deciding that. That is how the Constitution's separation of powers tilts toward—toward liberty in all its respects.

Now, as to your specific question, Senator, one of the things I have seen in my experience in the executive branch and in the judicial branch is a natural tendency, but it is a natural tendency that judges need to be aware and then respond to. So, here is the natural tendency. Congress passes laws, but then does not have—cannot update the law. So, maybe it is an environmental law, or maybe it is some kind of law dealing with national security. Let us take those two examples to illustrate.

And then an executive branch agency wants to do some new policy and proposes a new policy to Congress, but Congress does not pass the new policy. What often happens, or too often I have seen, is that the executive branch then relies on the old law as a source of authority to do this new thing, and they try to say, well, the old law is ambiguous, so we can fit this new policy into the old law as justification for doing this new thing. And I have seen this in national security cases. I have seen it in environmental cases. You see it all over the place. It is a natural phenomenon because the executive branch wants to—wants to implement what it thinks is good policy.

Now, when those cases come to court, it is our job to figure out whether the executive branch has acted within the authority given to it by Congress. Have you given them the authority? And my administrative law jurisprudence is rooted in respect for Congress. Have you passed the law to give the authority? I have heard it said that I am a skeptic of regulation. I am not a skeptic of regulation at all. I am a skeptic of unauthorized regulation, of illegal regulation, of regulation that is outside the bounds of what the laws passed by Congress have said. And that is what is at the root of our administrative law jurisprudence.

Senator HATCH. Okay. One of the—one of the most important qualities I look for in a judicial nominee is the ability to impartially interpret the law and apply it to the case before the court. Now, this can often be the most difficult part of a judge's job because it may require the judge to rule against a litigant that may be sympathetic or against a policy that the judge may personally agree with. At Justice Sotomayor's confirmation hearings, Senator Schumer commended her for "hewing carefully to the text of statutes, even when doing so results in rulings that go against so-called sympathetic litigants."

Do you believe that it is important for a judge to interpret and apply the laws that Congress has actually passed rather than seeking to make up or change the law if the judge does not like what the Congress has done? And if so, why or why not?

Judge KAVANAUGH. I agree completely, Senator. That is at the foundation of what I view as the proper judicial philosophy.

Senator HATCH. Okay.

Judge KAVANAUGH. The separation of powers system you described, we have to stick to the laws passed by Congress. You make the policy. We will follow the policy direction that you put into the laws that are enacted, passed by the House and Senate, signed by

the President. We do not rewrite those laws. The executive branch also should not be rewriting those laws beyond the scope of the authority granted.

Senator HATCH. Okay. Some of my colleagues have criticized you for purportedly ruling too often against environmental interests. It seems to me that many of these circumstances boil down to the fact that some of my colleagues do not like the environmental laws Congress has actually passed, and are frustrated that they have not been able to get their own preferred environmental policies signed into law. Now, I have looked through your record, and I found that you have not hesitated at all to uphold environmental regulations when they were actually authorized by statute. Could you give us a few examples of cases where you have upheld environmental regulations because you concluded that Congress had authorized them?

Chairman GRASSLEY. Limit it to as many—few as you can. His time has run out.

[Laughter.]

Judge KAVANAUGH. Senator, as I said yesterday, I am a pro-law judge, and in environmental cases, on some cases I have ruled against environmentalists' interests, and in many cases I have ruled for environmentalists' interest. And they are big cases, cases like the *American Trucking Associations* case where I upheld the California renegotiating for majority over a dissent; stricter air quality standards in the *National Association of Manufacturers* case; EPA rules for particulate matter in the *UARG* case; permanent process applicable to surface coal mining in the *National Mining Association* case; the *Murray Energy* case rejecting a premature challenge to a Clean Power Plant regulation; the *National Resources Defense Council* case versus *EPA*, ruling for environmentalist groups in a case—that was a big money case where the industry wanted an affirmative defense to be created for accidental emissions. The affirmative defense was not in the statutes passed by Congress. The industry came in with their lawyers and said, well just write the affirmative defense into the law, and I wrote the opinion saying, no, it is not in the law, and, yes, that might be a problem for industry, but we follow the law regardless.

And so, there are a large number of cases where I have ruled in favor of environmentalists' interests because that is what the law required in that case.

Senator HATCH. Thank you, Judge. I appreciate it.

Judge KAVANAUGH. Thank you, Senator.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman, and good morning, Judge.

Judge KAVANAUGH. Thank you, Senator.

Senator LEAHY. You and your family. We have a lot of questions, and I know you have done a lot of preparation with some—a couple of our distinguished Republican colleagues about the questions you might be asked. But let me ask you something that normally is not an issue during Supreme Court hearings. You testified before this Committee in both 2004 and 2006 as part of your nomination to the D.C. Circuit Court. Then, you were nice enough to come by my office and chat with me last month. And I asked you if you would

change anything in your prior testimony, and you said, no. Is that still your position?

Judge KAVANAUGH. It is, Senator. I told the truth. I was not read into the programs—

Senator LEAHY. No, no, I am not asking about whether you did or not. I just asked if you would change anything in your—

Judge KAVANAUGH. Well, I would like to explain if I can.

Senator LEAHY. I am going to give you a chance, but I am going to ask you a couple of questions. Go ahead.

Judge KAVANAUGH. Well, I just wanted to explain that at the last hearing in 2006 in particular, you were concerned, understandably, because there had been two judicial nominees who had been involved in the legal memos and the legal discussions around crafting the enhanced interrogation techniques and detention policies. You were concerned whether I also was involved in those, and I made clear in response to those questions that I was not read into that program. That was a hundred percent accurate. It is still accurate today. I think Senator Feinstein's report and the Office of Professional Responsibility report established that I was not involved in those programs.

Now, there were two judicial nominees—

Senator LEAHY. Okay. I am going to go into that in a little bit. I do not want to go over my time as the preceding Senator did. I want to be—stay with—

Judge KAVANAUGH. I just want to—Senator, I just want to be clear—I want to reassure you—

Senator LEAHY. I am going to go—I am going to go into it. I am going to give you a chance to speak a lot more.

Chairman GRASSLEY. Without taking—

Senator LEAHY. Well, let me—let me ask—

Chairman GRASSLEY. I am not going to take time away from you, but I want to explain something. I said yesterday that if a question is asked within the 30 minutes, that he can finish the question and it can be answered. So, I—he did not go over his time.

Senator LEAHY. Sorry, I did not mean to hit a sensitive area.

[Laughter.]

Senator LEAHY. Let me ask you this. Between 2001—I am new here.

[Laughter.]

Senator LEAHY. Between 2001 and 2003, two Republican staffers on this Committee regularly hacked into the private computer files of six Democratic Senators, including mine. These Republican staffers stole 4,670 files, and they used them to assist in getting President Bush's most controversial judicial nominees confirmed. Now, the theft by these Republican staffers became public in late 2003 when the Wall Street Journal happened to print some of the stolen materials. The ringleader behind this massive theft was a Republican staffer named Manny Miranda, who had worked for one of the Members of this Committee. In a way, it was considered by many, both Republicans and Democrats, as a digital Watergate, a theft not unlike what the Russians did in hacking the DNC.

Now, during all this, you worked hand-in-hand in the White House with Manny Miranda to advance these same nominees where he was stealing material. Not surprisingly, you were asked

extensively about your knowledge of this theft during both your 2004, 2006 hearings, and I do not use the word “extensively” lightly. You were asked over 100 questions from six Senators, both Republicans and Democrats. And you testified, and you testified repeatedly, that you never received any stolen materials, you knew nothing about it until it was public. You testified that if you had suspected anything untoward, you would have reported it to the White House Counsel, who would have raised it with Senator Hatch, especially as Mr. Miranda had worked for him.

Now, at the time we left it there. We did not know any better. Today, with the very limited amount of your White House record that has been provided to this Committee, and it is limited, for the first time we have been able to learn about your relationship with Mr. Miranda and your knowledge of these events. So, my question is this: Did Mr. Miranda ever provide you with highly specific information regarding what I, or other Democratic Senators, were planning on asking certain judicial nominees?

Judge KAVANAUGH. Senator, well, let me contextualize because I am looking at what you are putting up here first.

Senator LEAHY. The question—

Judge KAVANAUGH. That—what is up there is a hundred percent accurate. As my memory.

Senator LEAHY. Okay. So, let me ask you this. That is—

Judge KAVANAUGH. “Never knew or suspected,” true. “Never suspected anything untoward,” true. “Had I suspected something untoward, I would have talked to Judge Gonzales”——

Senator LEAHY. And I have already——

Judge KAVANAUGH. “I would have talked to Senator Hatch.” That is all a hundred percent true.

Senator LEAHY. And that is what I had already said. But, did Mr. Miranda ever provide you with highly specific information regarding what I, or other Democratic Senators, were planning in the future to ask certain judicial nominees?

Judge KAVANAUGH. Well, one of the things we would do as a White House is, on judicial nominations—and I am coming to your answer, but I want to explain—is to meet up here, and this happens on both sides all the time, with teams up here about, okay, their judicial nominations: our judicial nominees are coming up, how are we going to get them through, here’s a hearing coming up. And during those meetings, of course, it would be discussed, well, I think here is what Senator Leahy is going to be interested in. That is very common. I am sure in President Obama’s administration when they had similar meetings, they would probably have meetings and say, well, I think this is what Senator Graham will be interested in. That is what you do in meetings with—so, “highly specific” would, I think—I am not sure what you are getting at by “highly specific.”

Senator LEAHY. Judge, I have been here over 40 years. I know—I know what both Republicans and Democratic administrations do in preparing. I am not asking about that. I am asking you why, before this, did Mr. Miranda send you an email asking you, on July 19th, 2002, asking you and another Bush official why the Leahy people were looking into financial ties between two special interest groups and Priscilla Owen, a particular, controversial nominee to

the Fifth Circuit. You had handled the Owen nomination. As you know, as a judge she had received a lot of contributions. Did Mr. Miranda send you an email asking you why the Leahy people were looking into her financial ties?

Judge KAVANAUGH. Is that what this email is?

Senator LEAHY. I am just asking you.

Judge KAVANAUGH. Could I take a minute to read it?

Senator LEAHY. Of course.

Judge KAVANAUGH. Okay.

Senator LEAHY. And this says it was 4 days before her hearing on July 23rd.

[Brief pause.]

Judge KAVANAUGH. Did I send any of the emails on this chain? I do not think so. I think I am cc'd. In any event, if he said why are the Leahy people looking into this—from Manny Miranda—I do not really have a specific recollection of any this, Senator, but it would have been—it would not have been at all unusual for—and this happens all the time I think, which is, the Leahy people are looking into this, and the Hatch people are looking into that, I think.

Senator LEAHY. You say, “all the time.” Two days before the hearing, he told you that the Democrats were passing around a related “60 Minutes” story, and he said his “intel—intelligence suggests that Leahy will focus on all things money.” Well, that appears to come from a stolen email to me—stolen by the Republican staff member, sent to me the night before, and then given to you the next morning. Were you aware that you were getting, from Mr. Miranda, stolen emails?

Judge KAVANAUGH. Not at all, Senator. It was part of what appeared to be standard discussion about—it is common, Senator, for—at the White House, it would be common to hear from our Leg Affairs team. This is, in fact, in this process, that is common to hear, “This is what Senator X is interested in.” “This is what Senator Y is going to focus”——

Senator LEAHY. Was it common to have copies of a private email sent to a particular Senator?

Judge KAVANAUGH. Copies of a private email sent to a particular Senator?

Senator LEAHY. Yes. Would that not jump out at you? For example——

Judge KAVANAUGH. What are you referring to?

Senator LEAHY. Well, Mr. Miranda is telling you about emails sent to me the night before. There would be no way that he would even have that unless he stole it. Did that raise any question in your mind?

Judge KAVANAUGH. Did he refer to that email in this?

Senator LEAHY. Yes.

Judge KAVANAUGH. Where is that, Senator?

Senator LEAHY. I will let you read it.

Judge KAVANAUGH. Well, I am not seeing where you are—I am not seeing what you are referring to.

Senator LEAHY. Okay. Well, let me take you to one that you do have because you have this information from Mr. Miranda. And the very limited amount of material that the Republicans are allowing

us to see of your information about you, that at least did come through. But in January 2003, let me go to something very specific. Mr. Miranda forwarded you a letter from me and other Judiciary Democrats to then-Majority Leader Tom Daschle. The letter was clearly a draft. It had typos and it was not signed. Somebody eventually—we never put it out, but somebody eventually leaked the existence of it to Fox News. I am not sure who. I could guess. It was a private letter. At the time, I was shocked to learn of its existence had been leaked.

But here is the thing. You had the full text of my letter in your inbox before anything had been said about it publicly. Did you find it at all unusual to receive a draft letter from Democratic Senators to each other before any mention of it was made public?

Judge KAVANAUGH. Well, the only thing I said on the email exchange, if I am looking at it correctly, Senator, was “Who signed this,” which would imply that I thought it was a signed letter.

Senator LEAHY. It was sent to you. Were you surprised to get it? I mean, it is obviously a draft. It has got typos and everything in it. Were you surprised the draft letter circulated among Democrats ended up in your inbox from Mr. Miranda?

Judge KAVANAUGH. But I think the premise of your question is not accurately describing my apparent recollection or understanding of it at the time because I would not have said, “Who signed this” if it was a—if I thought it was a draft, and my email says, “Who signed this.”

Senator LEAHY. So, you did not realize what you had was a stolen letter signed by—signed by me, that you had a letter that had not been sent to anybody, had not been made public?

Judge KAVANAUGH. Well, all I see that I said was, “Who signed this.” That is all I see.

Senator LEAHY. Well, let me ask you some more because so much of this came from Mr. Miranda, who was a Republican staffer who was, as we now know, stealing things. Did he ever ask to meet privately with you in an offsite location somewhere other than the White House or Capitol Hill?

Judge KAVANAUGH. I think sometimes, Senator, that the meetings with Senate staffers and White House and Justice Department—

Senator LEAHY. I am just asking you about one particular one, Mr. Miranda.

Judge KAVANAUGH. Yes, sometimes—usually it would be either at the White House or the Senate, but I think sometimes we would meet—or DOJ, but sometimes it could be somewhere else.

Senator LEAHY. Well, did he ask to meet with you privately so he could give you information about Senator Biden and Senator Feinstein?

Judge KAVANAUGH. I am not remembering anything specific, that is certainly possible. And, again, Senator, I just want to be clear here because it is very common when you are in the judicial selection process to determine what are all the Senators interested in for an upcoming nominee or an upcoming hearing. That is the coin of the realm. Senator X is interested in focusing on administrative law. Senator Y is going to ask about environmental law. Senator

is concerned about your past work for this client. And that is a very common kind of discussion.

Senator LEAHY. Did he ever ask to have you meet him not at the White House, not in the—at the Capitol, but at his home?

Judge KAVANAUGH. I do not remember that.

Senator LEAHY. Okay. Did he ever ask you to meet you outside of the White House or the Capitol?

Judge KAVANAUGH. I cannot rule that out, but, again, that would not have been typical.

Senator LEAHY. Did he—did he ever hand you material separately from what would be emailed back and forth?

Judge KAVANAUGH. Not remembering—if you are referring to something in particular, I can answer that.

Senator LEAHY. Well, let me ask you this. Did you ever receive information via Mr. Miranda of information marked, “Confidential” that informed you, or my staff was sharing with, other Democrats?

Judge KAVANAUGH. I do not know the answer to that, Senator, but, again, people on the—it is not always the case, at least my understanding, that the—that the people—for example, your staff and Senator Hatch’s staff were necessarily working at odds. It seemed like a lot of times the staff was cooperating at times, not at other times, obviously, but at times about judicial nominations. And so, it would not have raised anything in particular in my mind if we learned, oh, Senator Leahy is concerned about this.

Senator LEAHY. Did my staff ever send you confidential material from Senator Hatch that was stolen from his emails?

Judge KAVANAUGH. Not the last part, but the—I certainly did talk to your when we working on the airline bill—on the September 20th, 2001 airline bill. I do remember being here all night one night with your staff, and I am sure we did talk that night about what other Senators thought. And that was the airline bill where, as I think you recall, Speaker Hastert was involved, and we were up there with the OMB team. So, and that—I worked hard with your staff on that.

It just struck me as very—as not uncommon at all to be talking with our leg team about what Senators on both sides thing. I did not strike me that it was always armed camps.

Senator LEAHY. But, no, and oftentimes it was not. But here you are getting obviously very private Democratic emails. You were not concerned how Mr. Miranda got them?

Judge KAVANAUGH. Well, I guess I am not sure about your premise.

Senator LEAHY. Were you at all concerned about—

Judge KAVANAUGH. The draft—

Senator LEAHY [continuing]. Where Mr. Miranda got some of the material he was showing you?

Judge KAVANAUGH. I do not recall that, but on the premise of your last question, I want to—I want to step back to that. I am not sure I agree with the premise.

Senator LEAHY. I was just saying, if you are getting something that is marked “Confidential,” would you not assume that is not something being shared back and forth?

Judge KAVANAUGH. Unless it was shared. I mean, this is the thing, if a staffer said here is what we are sending to—you all

should be aware of this because we are going to make a—we are going to be really opposed to this judicial nominee. It seemed—so, just to be clear, it seemed to me sometimes there were judicial nominees you were very opposed to, sometimes you were supportive of, sometimes in between, and there would be messages passed back and forth and sharing of information. Very cooperative, as I recall.

Senator LEAHY. Well, I—

Judge KAVANAUGH. You were transparent, in other words. When you are—when you had problems with a nominee's, I recall, transparency, and when you were supportive. You were at the May 9th, 2001 event at the White House, I recall, where the President announced his first 11 court of appeals nominees, and you were supportive of many of them.

Senator LEAHY. Well, as you know—you know, it is a fact I voted for a lot of Republican nominees.

Judge KAVANAUGH. Yes.

Senator LEAHY. Both to the Supreme Court, the courts of appeals—and the district court.

Judge KAVANAUGH. Yes.

Senator LEAHY. But when I have opposed one, like with Judge Owen, when I was raising some varied questions about funding that she was getting from people that were before her court, that might have raised a red flag that I had some concerns about her. Now, when you worked at the White House, did anyone ever tell you they had a mole that provided them with secret information related to nominations?

Judge KAVANAUGH. I do not recall the reference to a mole, which sounds highly specific, but certainly it is common—again, the people behind you can probably refer to this. But it is common, I think, for everyone to talk each other at times and share information. At least this was my experience—this is 20 years ago almost—where you would talk to people on the Committee.

Senator LEAHY. So, you never received an email from a Republican staff member with information claiming to come from spying, a Democratic mole?

Judge KAVANAUGH. I do not—I am not going to rule anything out, Senator, but if I did, I would not have thought that—I would not have thought the literal meaning of that.

Senator LEAHY. Would it have surprised you that—if you got an email saying you got that from somebody spying on the Democratic—

Judge KAVANAUGH. Well, is there such an email, Senator?

Senator LEAHY. Well, we would have to ask the Chairman what he has in his confidential material.

Judge KAVANAUGH. But here is the—if you are referring to something particular. Here is what I know.

Chairman GRASSLEY. Just stop a minute here. Reference twice in your 30 minutes, and do not take this off of his time, you made reference—you made reference. You are talking about the period of time that he was White House Counsel.

Senator LEAHY. Yes.

Chairman GRASSLEY. That material is available to everybody.

Senator LEAHY. So, that bit of material about him that is marked “committee confidential” is now public and available? Is that what you are saying? If that is what the Chairman is saying, we got a whole new series of questions.

Chairman GRASSLEY. No, not if it—

[Laughter.]

Chairman GRASSLEY. Not if it is “committee confidential.” But you have access to it.

Senator LEAHY. Not, so I—

Chairman GRASSLEY. But do not forget, 80 percent of the material we have gotten from the library is on the website of the Judiciary Committee, so the public has access to it. Proceed.

Senator LEAHY. I want—I want Judge Kavanaugh to have access so that we can ask him these questions under oath and he can see them. So, I would ask the—and we will have another round, but I would ask the Chairman if he might look at some of these that are marked “committee confidential,” which limits the ability of us to ask you specifically and hand you the specific emails. But I would state on what has been public—

Chairman GRASSLEY. Let me answer that for you. There is only one Democratic Senator asked for access to that. Senator Klobuchar got it. If you are interested in it, you could have been asking ever since August the 25th, I believe.

Senator LEAHY. We have been asking to have that—those made public. I do not—I am not interested—if I see this in a closed room where I cannot talk about it. I want Judge Kavanaugh to see the emails which came from Mr. Miranda and—

Chairman GRASSLEY. Give us a citation of the documents, and we will get them for you.

Judge KAVANAUGH. That testimony up there is true, a hundred percent.

Senator FEINSTEIN. Can somebody read it? I cannot see it.

Senator LEAHY. Well, of course, it would be helpful if we allowed the National Archives time to complete their review.

Judge KAVANAUGH. But I just want to reassure you, Senator, because you are asking important questions. I want to reassure that what you have got up on the board is a hundred percent accurate.

Senator FEINSTEIN. Can somebody move it so we can see it here?

Senator LEAHY. Well, I am concerned because there is evidence that Mr. Miranda provided you with materials that were stolen from me, and that would contradict your prior testimony. It is also clear from public emails, and I am restraining from not going into the non-public ones, that you have reason to believe materials were obtained inappropriately at the time.

Now, Mr. Chairman, there are at least six documents that you consider committee confidential that are directly related to this. Just like the three documents I shared that are already public, these other six contain no personal information, no Presidential records, restrictive material. There is simply no reason they cannot be made public. I hope they will be before this next round. You know, it is difficult when to ask a question, I have to ask Republicans, will you allow me to ask a question. I certainly never did that when I was Chairman.

Now, I asked you in 2006 whether you had seen any documents related to President Bush's NSA warrantless wiretapping program, or whether you had heard anything about it. You answered you learned about it with the rest of us in December 2005 when The New York Times reported it. Now, I know it has been 12 years, so here is the video of your sworn testimony. It should be on the TV screens.

[Video is shown.]

Senator CORNYN. Mr. Chairman, can I—

Chairman GRASSLEY. Can I—again, do not take this time away from him. Now, as far as I know in 15 hearings, so I am going to read something in just a minute, but preface it with this. As far as I know, in 15 hearings that I have been involved in of Supreme Court Justices, there has never been such a video shown. So, this is precedential, I want to read this: "The use of a video at a confirmation is highly irregular, but I see no reason my colleagues cannot use a video that was provided by the nominee himself in response to the Senate questionnaire." I have been assured that the video is from Judge Kavanaugh's submission to the Committee. Based on this assurance, we have allowed this video to be shown.

But I want to emphasize that I expect that video to be used fairly. The video clip should not be presented in a way that deprives it of relevant context. This is consistent with requirements in Federal court. That is why I will insist that Judge Kavanaugh have the opportunity before he answers this question to request if any additional video be played, if it provided appropriate context. So, Judge Kavanaugh, I would ask you, do you believe that more context is needed to be able to address the question?

Judge KAVANAUGH. Well, I do not think I have heard the question yet, but I will let you know when I hear the question.

Senator LEAHY. Let me—let me ask you this. I will repeat the question asked before. You said that you heard about this with the rest of us in December 2005. You said, on there, that you had no knowledge of anything related to this until The New York Times article. Now we have a declassified Inspector General report that, on September 17th, which was before the—several months before The New York Times article, John Yoo issued a memo on surveillance of the White House that helped form the legal underpinnings of the NSA warrantless wiretapping program.

When you were in the White House in 2001, did you ever work with John Yoo on the constitutional implications of a warrantless surveillance program?

Judge KAVANAUGH. We are talking about a lot of different things, Senator, here.

Senator LEAHY. Warrantless surveillance program.

Judge KAVANAUGH. That is talking about a lot of different things. So, what you were asking about right there was the specific—what President Bush called the terrorist surveillance program. That was his name for it.

Senator LEAHY. Which is a warrantless surveillance program.

Judge KAVANAUGH. Along with many others, and that is—you were asking me about the terrorist surveillance program, TSP, I think he called it. That story was broken. That testimony is a hundred percent accurate. That story was broken in The New York

Times. I had not been read into that program, and when it came in *The New York Times*, I actually still remember my exact reaction when I read that story. And then the President, that Saturday, I believe, did a live radio address to explain to the country what that program was about. There was a huge controversy, and so, everyone was then working on getting the speech together. And you asked me if I learned about it before then. I said “no,” and that is accurate.

Senator LEAHY. Okay. When you were in the White House, did you ever work with John Yoo on the constitutional implications of any warrantless surveillance program?

Judge KAVANAUGH. Well, I cannot rule that—right in the wake of September 11th, it was all hands on deck on all fronts, and then we were—we were farming out assignments, but we were all involved. On September 12th when we came in—let us just back up. On September 12th when we came into the White House, it was—you know, we have to work on everything. And so, then over time people figured out what issues they were going to work on. You know, the airline bill that I was up here on September 20th when President Bush spoke to Congress that night, as you recall. And then after that, we were in the meeting room together, you and I and others, working on the airline bill, but there were all sorts of other things going on. The Patriot Act was going on.

Senator LEAHY. I was involved with all of those—

Judge KAVANAUGH. Yes, I know—

Senator LEAHY [continuing]. And I remember the discussions. But what I want to know, did you ever raise questions about warrantless surveillance?

Judge KAVANAUGH. I cannot rule anything out like that. There was so much going on in the wake of September 11th, Senator, as you recall, up here, too, but in the White House, in particular, and in the Counsel’s Office, in particular. We had eight lawyers in there. Eight or nine as I recall. And there were so many issues to consider for the President and for the legal team, and those issues—like I said, for President Bush, every day for the next 7 years was September 12th, 2001. You know, for the legal team there was a lot—

Senator LEAHY. For a lot of us it was.

Judge KAVANAUGH. Yes.

Senator LEAHY. Mr. Chairman, I sent a letter, along with Senators Feinstein and Durbin, August 16th of this year, asking we make documents related to this issue public. Without them being public, it is not fair to me and it is not fair to Judge Kavanaugh that I cannot hand him the actual documents, which I think would refresh his memory. And I would ask again, you might look at that before my next turn, can we make those public?

Chairman GRASSLEY. You tell us what documents you want, and I will make them available to you, but I cannot say that they can be made public. Just as I said last year during Justice Gorsuch’s confirmation, I put a process in place that will allow my colleagues to obtain the public release of confidential documents for use during the hearing. All I ask was my colleagues to identify the documents they intended to use, and I would work to get the Depart-

ment of Justice and former President Bush to agree to waive restrictions on the documents.

Senator Feinstein secured the public release of 19 documents last year under this process, and Senator Klobuchar secured the release of four documents this year. If my colleagues truly believe that other committee confidential documents should have been made public, they never told me about that.

Senator LEAHY. Well—

Chairman GRASSLEY. So, let us know what you want, and then you can—you can go ahead and we will get them for you.

Senator LEAHY. I want the same thing that I requested in August—on August 16th because it is directly relevant to Judge Kavanaugh's testimony, directly relevant to his—to the questions I have been asking here, and directly relevant to his own emails with John Yoo. So, I would—before my next turn, if we could take a look at that.

Chairman GRASSLEY. Okay. Well, we will get them for you for your next turn tomorrow.

Senator LEAHY. Now, may—you said everyone agrees the pardon prerogatives of a President, absolute, unfettered, unchecked power to pardon every violator of every Federal law. If the President issued a pardon in exchange for a bribe, "yes" or "no"?

Judge KAVANAUGH. Senator, I think that question has been litigated before, and I do not want to comment about—

Senator LEAHY. Well, let me ask you this.

Judge KAVANAUGH. Scope of the pardon, the scope about—there are a couple—there are a couple of things involved in that question. One is what is the scope—what is the effect of the pardon, and the other question is, can you be separately charged with the bribery crime, both the briber and the bribee, and those are two distinct questions. You would want to—you would want to keep those two questions separate in thinking about how the hypothetical—

Senator LEAHY. Well, then in that, the—

[Gavel is tapped.]

Senator LEAHY. Mr. Chairman, you know, I got interrupted an awful lot during my—

Chairman GRASSLEY. Yes, okay.

Senator LEAHY. I just want to finish this question.

Chairman GRASSLEY. But I—but I made sure that if the timer did not treat—well, give him another minute.

[Laughter.]

Senator LEAHY. Thank you. God bless you. I will be forever thankful.

[Laughter.]

Senator LEAHY. President Trump claims he has an absolute right to pardon himself. Does he?

Judge KAVANAUGH. The question of self-pardons is something I have never analyzed. It is a question that I have not written about. It is a question, therefore, that is a hypothetical question that I cannot begin to answer in this context as a sitting judge and as a nominee to the Supreme Court.

Senator LEAHY. And the other half of that is the obvious one. Does the President have the ability to pardon somebody in ex-

change for a promise from that person they would not testify against him?

Judge KAVANAUGH. Senator, I am not going to answer hypothetical questions of that sort, and there is a good reason for it. When we get—judges do not—when we decide, we get briefs and arguments of the parties. We have a record. We have an appendix with all the information. We have amicus briefs and then—I never—I never decide anything alone. I am on a panel of three, and if I am confirmed to the Supreme Court I would be on a Team of Nine.

Senator LEAHY. Thank you, Mr. Chairman. I hope for the sake of the country that remains a hypothetical question. Thank you very much.

Chairman GRASSLEY. And since I gave you an extra minute, I am not going to let you reserve the 25 seconds.

[Laughter.]

Senator LEAHY. I am done.

Chairman GRASSLEY. Senator Graham.

Senator GRAHAM. Thank you very much.

July 21, 1993: “I certainly do not want you to have to lay out a test here in the abstract which might determine what your vote or your test would be in a case you have yet to see that may well come before the Supreme Court.”

That was wise counsel by Senator Leahy in the Ginsburg confirmation.

Very directly, did you ever knowingly participate in stealing anything from Senator Leahy or any other Senator?

Judge KAVANAUGH. No.

Senator GRAHAM. Did you ever know that you were dealing with anything that was stolen property?

Judge KAVANAUGH. No.

Senator GRAHAM. As to the terrorist surveillance program, did you help create this program?

Judge KAVANAUGH. No.

Senator GRAHAM. Did you give legal advice about it?

Judge KAVANAUGH. No. We are referring to the same program I was talking about?

Senator GRAHAM. Yes, yes. The one that the article was about.

So a bit of a kind of run-through here. You are probably going to get 55 votes, I do not know, 54 to 56 or 57. I do not know what the number will be. There were 11 undecided Senators before the hearing, 3 of them Republicans—I like your chances—8 of them are Democrat. You are in play with about five or six of them. And I just want you and your family to know that in other times someone like you would probably get 90 votes. I want your daughters to know that what happened yesterday is unique to the times that we live in. And I want to give you a chance to say some things to the people who have attended this hearing.

I think there is a father of a Parkland student who was killed. I think there is a mother of a child who has got terrible health care problems. And there are many other people here with personal situations.

What would you like to say to them, if anything, about your job as a Supreme Court Justice?

Judge KAVANAUGH. Senator, I understand the real-world effects of our decisions. In my job as a judge for the last 12 years, I have gone out of my way in my opinions and in oral arguments, if you listen to oral arguments, to make clear to everyone before me that I understand the situation, the circumstances, the facts, for example, as I was saying to Senator Feinstein earlier, in the *Heller II* case about the facts in DC. And I want to reassure everyone that I base my decisions on the law, but I do so with an awareness of the facts and an awareness of the real-world consequences, and I have not lived in a bubble, and I understand how passionately people feel about particular issues, and I understand how personally people are affected by issues. And I understand the difficulties that people have in America.

I understand, for example—well, to start, I understand the situation of homeless people because I see them on a regular basis when I am serving meals and—

Senator GRAHAM. So tell me about that. What interaction do you have with homeless people?

Judge KAVANAUGH. Senator, I regularly serve meals at Catholic Charities at 10th and G with Father John Enzler, who is the head of Catholic Charities DC, and I have known since I was 9 years old when I was an altar boy. He was at Little Flower Parish. And what you learn when you are—I said, I am a Matthew 25, try to follow the lesson of serving the least fortunate among us. You know, when I was hungry, you gave me food; thirsty, you gave me drink; stranger and you welcomed me; naked and you clothed me; sick and you cared for me; imprisoned and you visited me. Six groups that—that is not exclusive, but that is a good place to start with your charitable works in your private time.

Senator GRAHAM. So describe the difference between Brett Kavanaugh, the man, and Brett Kavanaugh, the Judge.

Judge KAVANAUGH. Well, as a man, I am trying to do what I can in community service, as a dad, as a coach, as a volunteer, as a teacher, as a husband, and serving meals to the homeless. The one thing, Senator, you know, we are all God's children. We are all equal. People have gotten there because maybe they have a mental illness; maybe they had a terrible family situation; maybe they did not have anyone to care for them; maybe they lost a job and had no family. But every person you serve a meal to is just as good as me, or better, frankly, because they have—what they have had to go through on a daily basis just to get a meal. And you talk to them. That is the other thing. When you are walking by the street, you see people—and I understand—I am sure I have done this. I am not—I do not want to sound better than someone in describing this, but you do not necessarily look and you do not say, "How is it going?" But when you serve meals to them, you talk to people who are homeless, and they are just as human and just as good a people as all of us. You know, we are all part of one community, and so I think about that. You know, I do not want to sound like I am—I can always do more and more, and do better. I know I fall short. But Father John has been a big influence on that, and thinking about others.

So that is as a person. I try to do—Washington Jesuit Academy, so I tutor up there. I am now on the board of Washington Jesuit

Academy. That is a little different situation. Those are low-income—boys from low-income families, a tuition-free school, one of these 7:30 a.m. to 7 schools. And I started tutoring up there because I wanted to do some more tutoring and just be involved more. Judging is important, but I wanted to be more directly involved in the community. They have tutoring. You do all your homework there because it was a situation, you do not want to go home and have anything else to do. You get three meals there, and you do your homework there. And I help them do their homework, and you see these great kids, and they are in a structured environment, and you make an effect on their lives.

And like I said yesterday, the teachers and coaches throughout America, they change lives. And for me to be able to participate—you know, you cannot change everything at once, but just changing one life, one meal 1 day at the shelter or one kid that remembers something you said in a tutoring program, you know, if we all did that more—and I fall short, too, I know, and I want to do more on that front. But you can make a big difference in people's lives.

I would just bring that into the judging. I think—I judge based on the law, but how does that affect me as a judge? I think, first of all, just standing in the shoes of others. We could all be that homeless person. We could all be that kid who needs a more structured educational environment. And one of the things I was taught by my mom, but also I remember Chris Abell, my sixth-grade English teacher and religion teacher and football coach and baseball coach, one of his—and he drove me to school. One of his—and he is now on the board of Washington Jesuit Academy with me. But one of his lessons in “To Kill a Mockingbird” was to stand in the shoes of others. And I still have the “To Kill a Mockingbird” that we used in sixth grade. It is in my chambers still, the same copy.

Senator GRAHAM. Is it fair to say that your job as a judge is to not so much stand in the shoes of somebody you are sympathetic to, but stand in the shoes of the law?

Judge KAVANAUGH. You are in the shoes of the law, but with awareness of the impacts of your decisions.

Senator GRAHAM. Right.

Judge KAVANAUGH. And that is the critical distinction. You cannot be unaware. When you write an opinion, how is it going to affect people?

Senator GRAHAM. Right.

Judge KAVANAUGH. And understand, try to explain. I think, you know, it is—explaining is such an important feature, and then when people come into the courtroom, and how you treat litigants. So we are all familiar—we have all been in courtrooms where the judge is acting a little too full of being a judge and too—well, we have all been there. I try not to do that. I cannot say I am perfect, but I try to make sure the litigants understand that I get it, whether it is a criminal defendant case—we had a pro se case, a pro se case where a litigant comes in and argues pro se in our court, which rarely happens in our court where the pro se actually argues. And it was a guy who said he had been called the “N” word by his supervisor. And he is arguing pro se, and the question is whether a single instance of the “N” word constitutes racial harass-

ment under the civil rights laws. And I wrote a separate opinion explaining, yes, a single instance of the “N” word does constitute a racially hostile work environment. And I explained—in doing that, I explained the history of racism in this country and how that word—no other word in the English language so powerfully or instantly calls to mind our country’s long and brutal struggle against racism, I wrote in that opinion. And I cited “To Kill a Mockingbird” in that opinion, among other things.

But what I wanted to make clear by bringing this example up is I understood his situation. I tried to understand what that would be like, and I decided the case based on the law, but I understood with the pro se litigant, the point being I always try to be aware of the facts and circumstances.

Senator GRAHAM. Have you ever made a legal decision that personally was upsetting to you?

Judge KAVANAUGH. Well, I am sure I have, and that is what Justice Kennedy talked about in *Texas v. Johnson*. That case, in case people did not know what I was referring to in *Texas v. Johnson*, that is the flag-burning case. Justice Kennedy was in the majority with Justice Scalia and Justice Brennan and Justice Marshall and says that a law against flag burning is unconstitutional under the First Amendment. And that obviously tore Justice Kennedy—you know, it really bothered him because he is such a patriot. But he still ruled the way he did because he read the First Amendment to compel that result, and that is why he wrote that great concurrence in that case. And that concurrence is such a great model for judging, a great model of independence and a great model, to your point, Senator Graham, of we follow the law but we are aware—we are aware, and you are a better judge if you are aware.

Senator GRAHAM. Well, I just want to say this to my colleagues. Everything he said I think has been verified by the people who know him the best. I cannot say I have read 307 of your opinions. I can tell you without hesitation I have not. I did not read Sotomayor’s opinions or Kagan’s writings. But what I chose to do was look at the people who knew them the best, and I think Bob Bennett, who defended President Clinton during impeachment—I know him very well—said that Brett is “a judge’s judge, someone doing his absolute best to follow the law rather than his policy preferences. Brett is an all-star in both his professional and his personal life.”

I have yet to find anybody that I find credible, really anybody at all, that would suggest that you were unfair to litigants. I have yet to find a colleague that thought you were a politician in a robe. But you are a Republican. Is that true?

Judge KAVANAUGH. I registered—

Senator GRAHAM. Was. Okay.

Judge KAVANAUGH. Yes.

Senator GRAHAM. The only reason—I am glad to hear you say that. It makes a lot of sense given who you worked for.

Judge KAVANAUGH. I have not—well, I will let you finish your question.

Senator GRAHAM. You worked for a lot of Republicans.

Judge KAVANAUGH. Yes.

Senator GRAHAM. Like the President, who was a Republican.

Judge KAVANAUGH. President Bush I worked for, yes.

Senator GRAHAM. So that—

[Disturbance in the hearing room.]

Senator GRAHAM. So I remember—I remember—

[Disturbance in the hearing room.]

Senator GRAHAM. I will tell you what I remember when she leaves.

So, I asked Elena Kagan about a statement that Greg Craig made. Do you know Greg Craig, by any chance?

Judge KAVANAUGH. I have met him. I have not seen him in many years, but yes.

[Disturbance in the hearing room.]

Senator GRAHAM. He was one of the defenders of President Clinton during the impeachment hearing, and somewhere in here I have got Greg Craig's statement about Kagan. I am looking for Greg Craig's statement.

Here we go. Here is what—"Kagan was a progressive in the mold of Obama himself." "Elena Kagan is clearly a legal progressive and comes from the progressive side of the spectrum," according to Ronald Klein. The first was Greg Craig.

And I had an exchange with Justice Kagan when she was the nominee: "I am not trying to trick you. I do not have anything on Greg. He said, on May 16th, that you are largely progressive in the mold of Obama himself. Do you agree with that?"

Ms. Kagan, "Senator Graham, you know, in terms of my political views, I have been a Democrat all my life. I worked for two Democrat Presidents, and that is what my political views are."

And I asked, "Would you consider your political views progressive?"

Ms. Kagan, "My political views are generally progressive."

Which is true. I really appreciate what she said, because I expect President Obama to go to someone like Elena Kagan who is progressive, shares his general view of judging, and who happened to be highly qualified.

Sotomayor. President Obama nominated Sotomayor because he wanted someone whose philosophy of judging was his—which, as applied to the law and constitutional principles was, be ready to adopt them to a modern context. So President Obama nominated Sotomayor because he wanted someone whose philosophy of judging was his.

I expect that to happen. If Donald Trump is President in 2020, he will be our next President. If it is somebody else, I expect that to happen.

To my colleagues on the other side, what do you really expect? You should celebrate, even though you do not vote for him—and I do not know why you would not—the quality of the man chosen by President Obama. Elena Kagan and Sotomayor came from the progressive wing of the judging world and of legal thought. They are absolutely highly qualified, good, decent people, and they got—let me see if I can find the vote totals. Ms. Kagan got 63 votes and Sonia Sotomayor got 68. It is going to bother me that you do not get those numbers. But what bothers me is, they should have gotten 90. They should have gotten 95. Anthony Kennedy got 97. Antonin Scalia got 98. Ruth Bader Ginsburg got 96. So what is

happening? Between then and now, advise and consent has taken on a different meaning.

It used to be the understanding of this body that elections have consequences, and you would expect the President who won the election to pick somebody of their philosophy. I promise you that when Strom Thurmond voted for Ruth Bader Ginsburg, he did not agree with her legal philosophy. And I doubt if Senator Leahy agreed with Justice Scalia. Senator Leahy has voted for a lot of Republicans. I have voted for everyone presented since I have been here because I find them to be highly qualified, coming from backgrounds I would expect the President in question to choose from.

So, as to your qualifications, how long have you been a judge?

Judge KAVANAUGH. I have been a judge for 12 years.

Senator GRAHAM. How many opinions have you written?

Judge KAVANAUGH. I have written over 300 opinions.

Senator GRAHAM. Okay. Do you think there is a lot we can learn from those opinions if we spent time looking at them?

Judge KAVANAUGH. Yes. I am very proud of my opinions, as I mentioned, and I tell people do not just read about the opinions. Read the opinions. I am very proud of them.

Senator GRAHAM. You were nominated by President Trump on July the 9th, my birthday, which I thought was a pretty good birthday present for somebody who thinks like I do—and I think that may have something to do with that—at 9 o'clock. By 9:23, Chuck Schumer says, "I will oppose Judge Kavanaugh." By 9:25, Senator Harris, "Trump Supreme Court Justice nominee Judge Kavanaugh represents a direct and fundamental threat to the rights and health care of hundreds of millions of Americans. I will oppose his nomination."

Elizabeth Warren at 9:55, "Brett Kavanaugh's record as a judge and a lawyer is clear, hostile to health care for millions, opposed the CFPB, corporate accountability, thinks President Trump is above the law," on and on and on.

Nancy Pelosi at 10:11, Bernie Sanders at 10:18, "If Brett Kavanaugh is confirmed to the Supreme Court, it will have a profoundly negative effect on workers' rights, women's rights, and voting rights for the decades to come."

All I can say, within an hour and 18 minutes of your nomination, you became the biggest threat to democracy in the eyes of some of the most partisan people in the country who would hold Kagan and Sotomayor up as highly qualified and would challenge any Republican dare vote against them. You live in unusual times, as I do. You should get more than 90 votes, but you will not. And I am sorry it has gotten to where it has. It is got nothing to do about you.

If you do not mind—and you do not have to—what did you tell your children yesterday about the hearing?

Judge KAVANAUGH. They did as they—I will tell what they told me. I do not think—they gave me a big hug and said, "Good job, Daddy." And Margaret, before she went to bed, made a special trip down and said, "Give me a special hug."

Senator GRAHAM. I just wish we could have a hearing where the nominee's kids could show up. Is that asking too much?

[Disturbance in the hearing room.]

Senator GRAHAM. So what kind of country have we become? None of this happened just a couple years ago. It is getting worse and worse and worse, and all of us have an obligation to try to correct it where we can.

Roe v. Wade, are you familiar with the case?

Judge KAVANAUGH. I am, Senator.

[Laughter.]

Senator GRAHAM. Can you, in 30 seconds, give me the general holding of *Roe v. Wade*?

Judge KAVANAUGH. As elaborated upon in *Planned Parenthood v. Casey*, a woman has a constitutional right, as interpreted by the Supreme Court under the Constitution, to obtain an abortion up to the point of viability, subject to reasonable regulations by the State, so long as those reasonable regulations do not constitute an undue burden on the woman's right.

Senator GRAHAM. Okay. As to how the system works, can you sit down with five—you and four other judges and overrule *Roe v. Wade* just because you want to?

Judge KAVANAUGH. Senator, *Roe v. Wade* is an important precedent of the Supreme Court. It has been reaffirmed—

Senator GRAHAM. But do you not have to have a case as a—I mean, you just cannot—“What are you doing for lunch?” “Let us overrule *Roe v. Wade*.” It does not work that way, right?

Judge KAVANAUGH. I see what you are asking, Senator. Right. The way cases come up to us in that context or in other contexts would be a law is passed—

Senator GRAHAM. Can I give you an example? Because I can do this quicker.

Judge KAVANAUGH. Yes.

Senator GRAHAM. So some State somewhere or some town somewhere passes a law that runs into the face of *Roe*. Somebody will object. They will go to lower courts, and eventually it might come up to the Supreme Court challenging the foundations of *Roe v. Wade*. It would take some legislative enactment for that to happen. Is that correct?

Judge KAVANAUGH. That is correct.

Senator GRAHAM. If there was such an action by a State or a local government challenging *Roe* and it came before the Supreme Court, would you listen to both sides?

Judge KAVANAUGH. I listen to both sides in every case, Senator. I have for 12 years, yes.

Senator GRAHAM. When it comes to overruling a longstanding precedent of the Court, is there a formula that you use, an analysis?

Judge KAVANAUGH. So, first of all, you start with the notion of precedent. And as I have said to Senator Feinstein, in this context this is a precedent that has been reaffirmed many times over 45 years, including in *Planned Parenthood v. Casey*, where they specifically considered whether to overrule, and reaffirmed and applied all the stare decisis factors. So that importantly became precedent on precedent in this context. But you look at—there are factors you look at whenever you are considering any precedent.

Senator GRAHAM. So there is a process in place that the Court has followed for a very long time. Is that correct?

Judge KAVANAUGH. That is correct, Senator.

Senator GRAHAM. *Citizens United*, if somebody said *Citizens United* has been harmful to the country and made a record that the effects of *Citizens United* has empowered about 20 or 30 people in the country to run all the elections, and some State or locality somewhere passed a ban on soft money, and it got to the Court, would you at least listen to the argument that *Citizens United* needs to be revisited?

Judge KAVANAUGH. Of course. I listen to all arguments. You have an open mind. You get the briefs and arguments. And some arguments are better than others. Precedent is critically important. It is the foundation of our system. But you listen to all arguments.

Senator GRAHAM. Okay. Where were you on September 11, 2001?

Judge KAVANAUGH. Initially, I was in my then office in the EOB, and then after the first, as I recall, as the first building was hit, I was in the Counsel's office on the second floor of the West Wing for the next few minutes. Then we were all told to go down to the bottom of the West Wing. And then we were all evacuated, and I think the thought was Flight 93 might have been heading for the White House. It might have been heading here. And Secret Service—we were being hustled out, and then kind of panic, started screaming at us, "Sprint," "Run," and we sprinted out. My wife was a few steps ahead of me. She was President Bush's personal aide at the time, and we sprinted out. She was wearing a black and white checked shirt, I remember, and we sprinted out the front gate kind of into Lafayette Park, and no iPhones or anything like that, BlackBerrys, at that point in time, we did not have that, and our cell phones did not work, so we were all just kind of out there. And then I remember somehow ending up seeing on TV—down more on Connecticut Avenue there were TVs out, Mayflower Hotel. I remember I was with Sara Taylor who worked at the White House, and we watched—we were watching as the—I was standing with her when the two—when the two buildings—when the buildings fell.

Senator GRAHAM. So when somebody says post-9/11, that we have been at war and it is called the "War on Terrorism," do you generally agree with that concept?

Judge KAVANAUGH. I do, Senator, because Congress passed the Authorization for Use of Military Force, which is still in effect, and that was passed, of course, on September 14, 2001, 3 days later.

Senator GRAHAM. Let us talk about the law and war. Is there a body of law called "the law of armed conflict"?

Judge KAVANAUGH. There is such a body, Senator.

Senator GRAHAM. Is there a body of law that is called "basic criminal law"?

Judge KAVANAUGH. Yes, Senator.

Senator GRAHAM. Are there differences between those two bodies of law?

Judge KAVANAUGH. Yes, Senator.

Senator GRAHAM. From an American citizen's point of view, do your constitutional rights follow you? If you are in Paris, does the Fourth Amendment protect you as an American from your own Government?

Judge KAVANAUGH. From your own Government, yes.

Senator GRAHAM. Okay. So, if you are in Afghanistan, do your constitutional rights protect you against your own Government?

Judge KAVANAUGH. If you are an American in Afghanistan, you have constitutional rights as against the U.S. Government. That is long-settled law.

Senator GRAHAM. Is there not also a long-settled law that goes back to the *Eisentrager* case? I cannot remember the name of it.

Judge KAVANAUGH. *Johnson v. Eisentrager*.

Senator GRAHAM. Right, that American citizens who collaborate with the enemy are considered enemy combatants?

Judge KAVANAUGH. They can be.

Senator GRAHAM. Can be.

Judge KAVANAUGH. They can be. They are often—they are sometimes criminally prosecuted, sometimes treated in the military—

Senator GRAHAM. Well, let us talk about “can be.” I think the—

Judge KAVANAUGH. Under Supreme Court precedent.

Senator GRAHAM. Right. There is a Supreme Court decision that said that American citizens who collaborated with Nazi saboteurs were tried by the military. Is that correct?

Judge KAVANAUGH. That is correct.

Senator GRAHAM. I think a couple of them were executed.

Judge KAVANAUGH. Yes.

Senator GRAHAM. So if anybody doubts there is a longstanding history in this country that your constitutional rights follow you wherever you go, but you do not have a constitutional right to turn on your own Government and collaborate with the enemy of the Nation. You will be treated differently.

What is the name of the case, if you can recall, that reaffirmed the concept that you could hold one of our own as an enemy combatant if they were engaged in terrorist activities in Afghanistan? Are you familiar with that case?

Judge KAVANAUGH. Yes. *Hamdi*.

Senator GRAHAM. Okay. So the bottom line is, on every American citizen, know you have constitutional rights, but you do not have a constitutional right to collaborate with the enemy. There is a body of law well developed, long before 9/11, that understood the difference between basic criminal law and the law of armed conflict. Do you understand those differences?

Judge KAVANAUGH. I do understand that they are different bodies of law, of course, Senator.

Senator GRAHAM. Okay. If you are confirmed—and I believe you will be—what is your hope when all of this is said and done and your time is up, how would you like to be remembered?

[Brief pause.]

Judge KAVANAUGH. A good dad. A good judge.

Senator FEINSTEIN. A good husband.

Senator GRAHAM. I think he is getting there.

Judge KAVANAUGH. Good husband.

[Laughter.]

Senator GRAHAM. Thanks, Dianne. You helped him a lot.

It is going to be better for you tonight.

[Laughter.]

Judge KAVANAUGH. I owe you—I owe you. Good son, I will quickly add. Good friend. I think about the pillars—the pillars of my life

are being a judge, of course; being a teacher, I have done that, and either way this ends up I am going to continue teaching; coaching, as I mentioned, a huge part of my life, I will try to continue that. Senator Kennedy advised me when we met, "Make sure you keep coaching even if you get"—I am going to follow that. Volunteering and being a dad and a son and a husband, and being a friend. You know, I talked about my friends yesterday. I did not really expect—I got a little choked up talking about my friends.

Senator GRAHAM. That was well said. You have got to tighten it up because I just ran out of time.

Judge KAVANAUGH. Okay. Thank you, Senator. I can go on, as you know, but I will stop there.

Senator GRAHAM. Thank you.

Chairman GRASSLEY. We are about ready to break for lunch and the vote that we have, and it will be 30 minutes. But before I do that, I have letters that Senator Feinstein asked me to put in the record from—70 letters from people in opposition to your nomination.

[The information appears as submissions for the record.]

Chairman GRASSLEY. And then we also have letters in support of Judge Kavanaugh from hundreds of men and women across the country holding diverse political views. They strongly support his confirmation. Without objection, those will also be entered in the record.

[The information appears as a submission for the record.]

Chairman GRASSLEY. And then I wanted to explain the exchange that I had with Senator Leahy, just so people do not think that that is something that I did on my own. We had previously sent out a letter and only Senator Klobuchar up to that point had taken advantage of the letter to be able to ask for documents that were committee confidential so that they could use them at the hearing. And the only thing I have done for Senator Leahy that was not already in that letter was to remind people that we did the same thing for the Gorsuch nomination to the Supreme Court, and it is a policy that Senator Leahy when he was Chairman of the Committee followed. So the only courtesy was extended to Senator Leahy, the fact that he did not make the request by the timeline that was in the letter, which I think was August 25th.

We are going to adjourn 30 minutes for a lunch break, and I think that we will be back here exactly in 30 minutes. If not, Judge Kavanaugh, we will let your staff know if it is going to be a little later, because you never know what happens in the United States Senate when you have a vote.

[Whereupon, at 12:16 p.m., the Committee was recessed.]

[Whereupon, at 12:46 p.m., the Committee reconvened.]

Chairman GRASSLEY. Welcome back, Judge Kavanaugh.

The next person to ask questions is Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Judge KAVANAUGH. Senator.

Senator DURBIN. Judge Kavanaugh, Mrs. Kavanaugh, thank you for being back today to face this next round.

If I had to pick an area of clear expertise when it comes to Brett Kavanaugh, it would be the area of judicial nominations. You have been engaged in that at several different levels, including your own

personal experience. And so I would like to ask you if you would comment on the strategy of your own nomination. Specifically, I would like to ask you whether those who were planning that strategy sat down and cleared with you their decision on the release of documents.

Judge KAVANAUGH. No. I was not involved in the documents process or substance.

Senator DURBIN. No one told you that you would be the first Supreme Court nominee to assert executive privilege to limit the access to 100,000 documents relating to your service in the White House?

Judge KAVANAUGH. Senator, there are a couple of things packed into your question. So, I did study the nominee precedent, read all the hearings. This came up in Justice Scalia's hearings, so I read that. There were all his memos from being the head of the Office of Legal Counsel, and he was asked about that. And I know with Chief Justice Roberts, there was 4 years of information when he was Principal Deputy Solicitor General that those were not disclosed either.

Senator DURBIN. But as for White House documents, you are breaking new ground here, or I should say covering up old ground here.

Judge KAVANAUGH. Well, I guess—I was not involved in the documents discussions or process or substance in terms of the decisions that were made. But in terms of thinking about the issue, in terms of questions that could come to me, like Justice Scalia and Chief Justice Roberts received, or at least Justice Scalia did, I guess I do not distinguish. It is all—executive branch documents, Justice Department documents, and White House documents are not different.

Senator DURBIN. But you realize that when it comes to the role of the National Archives, we are being asked to give you special treatment.

Judge KAVANAUGH. I cannot comment because I do not know.

Senator DURBIN. Judge Kavanaugh, this is your field, judicial nominations. This is your nomination.

Judge KAVANAUGH. Let me ask you what the question is. Sorry.

Senator DURBIN. You are now embarking on this journey in this Committee, denying us access to documents which were routinely provided for other judicial nominees. You had to have known that was taking place.

Judge KAVANAUGH. Senator, I think what Justice Scalia said in his hearing when he was asked about his Office of Legal Counsel memos is the right thing, which is that is a decision for the Senate and the executive branch to work out. As a nominee, I will—and there are long-term privileges and protections, as he mentioned, that were in effect for that discussion. It is not for the nominee to make that decision.

Senator DURBIN. Well, that is an interesting comment, because the way you are being presented to the American people, with only 10 percent of the public documentation that could be provided to this Committee, it is going to reflect on you and your nomination. And, of course, you know that.

Judge KAVANAUGH. Well, I guess I—again, looking at the nominee precedent, Senator, that was true in Justice Scalia’s case also. All his memos from 1974 to 1977, when he was head of the Office of Legal Counsel, a consequential time, at least as I understand it, those might not have been disclosed. He was asked about that at his hearing. Chief Justice Roberts, 4 years of Deputy Solicitor General memos, which would have been—

Senator DURBIN. So you are perfectly fine with this notion.

Judge KAVANAUGH. No. I said I am—it is up to the Chairman and you and the Committee, the Senate and the executive branch—

Senator DURBIN. In fairness, Judge Kavanaugh, I think it is up to you. I think it is up to you. If you said at this moment to this Chairman and to this Committee, stop, pause, hit the pause button, I do not want any cloud or shadow over this nomination, I trust the American people, I want them to trust me, I am prepared to disclose those public documents—take Senator Leahy’s line of questioning. He was not the only victim of Manny Miranda. I was, as well. I did not realize that this Republican staffer had hacked into my computer, stolen my staff memos, and released them to the Wall Street Journal until they showed up in an editorial.

So now, your knowledge of this—your role in this, we are limited to even discuss because of the fact that we are classifying and withholding information about your nomination. First is Mr. Bill Burck, who has some magic power to decide what the American people will see about your role in the White House. Then the decision by those who put your nomination before us to take 35 months of your service as staff secretary to the President of the United States and to exclude the documents. Then the unilateral classification of documents coming to this Committee as Committee classified in a manner no one has ever seen in the history of this Committee.

Judge Kavanaugh, that reflects on your reputation and your credibility. If you said at this moment, I do not want to have a cloud over this nomination, I am prepared to suggest to the Committee and ask the Committee humbly, please withhold further hearings until you disclose everything, why will you not do that?

Judge KAVANAUGH. Senator, I do not believe that is consistent with what prior nominees have done who have been in this circumstance. It is a decision for the Senate and the executive branch. Justice Scalia explained that very clearly, I thought, in his hearing.

Senator DURBIN. Are you happy with that decision?

Judge KAVANAUGH. I do not—it is not for me to say, Senator. This is a decision—the long-term interests of the Senate and the executive branch, particularly the executive branch, are at play. Justice Scalia, again, explained that well, I thought, in his hearing—

Senator DURBIN. I was not here for Justice Scalia, but I will tell you that—

Chairman GRASSLEY. Let me interrupt without taking time away from you. So, do not charge him for this time. But here is something that—the nominee does not need any help for me to answer this, but we do not care what the nominee thinks. We have to follow the Presidential Records Act, and that is what we are following, is the law.

Senator DURBIN. Mr. Chairman, with all due respect, following the Presidential Records Act involves the National Archives. The National Archives is not involved in this process. It is a Mr. Bill Burck, who was a former assistant to the nominee, who has decided what will be withheld, whether it is going to be Committee confidential. So it is not the Presidential Records Act, please.

Chairman GRASSLEY. Well, still, let me make clear here, we anticipated some of this, so let me read. Criticize the Committee process for obtaining Judge Kavanaugh's records. They have accused us of cutting the National Archives out of the process, so this is where I want to set the record straight.

President Bush acted consistently with Federal law when he expedited the process and gave us unprecedented access in record time to Judge Kavanaugh's record, but we have worked hand in glove with the Archives throughout this process, and the documents this Committee received are the same as if the Archives had done the initial review.

In fact, the Archives is not permitted by law to produce records to the Committee without giving both President Bush and a current President an opportunity to review. The National Archives was not cut out of the process. As President Bush's representative informed the Committee, quote from his letter, "Because we have sought, received, and followed NARA's"—that is the same as when I use the word, "Archivist"—"views on any documents withheld as personal documents, the resulting production of documents to the Committee is essentially the same as if NARA had conducted its review first and then sought our views and the current administration views, as required by law."

In other words, the documents this Committee received are the same as if the Archives had done the initial review. We are just able to get the documents faster by doing it this way, which gave the Senate and the American people unprecedented access in record time to a Supreme Court nominee record.

Continue.

Senator DURBIN. Mr. Chairman, the National Archives have stated publicly that the way we are handling the records for this nomination is unprecedented, and they have had nothing to do with it. They have asked until the end of October to produce records, and they have been told, "we do not need you, we are going to finish this hearing long before then."

I would like to ask that it be placed in the record the statement from the National Archives related to the records related to Judge Kavanaugh. Do I have consent to place this in the record?

Chairman GRASSLEY. I am sorry, what?

Senator DURBIN. The statement from the National Archives?

Chairman GRASSLEY. Yes, without objection.

Senator DURBIN. Thank you.

[The information appears as a submission for the record.]

Senator DURBIN. And now I am going to throw you a pitch which you have seen coming for 12 years. I want to talk to you about your 2006 testimony which you gave before this Committee. It was at a different time. We were very concerned about the issue of torture and detention and interrogation.

Yesterday I asked you to show the American people that you have nothing to hide by coming clean with us on this issue, and I would like to refer specifically to some of the questions that were raised because of that 2006 testimony. I believe, we have here a statement of my question, as well as your response. And I am sure you have seen this because it has been reported in the paper that you have been waiting for this question for a long time.

When I was, back in the day, a trial attorney preparing a witness for interrogation, testimony, deposition, giving testimony at trial, I said two things: tell the truth, and do not answer more than you are asked—do not volunteer information. Judge Kavanaugh, you failed on the second count.

The question I asked you: “What was your role in the original Haynes nomination and decision to renominate him? And at the time of the nomination, what did you know about Mr. Haynes’s role in crafting the administration’s detention and interrogation policies?”

Your response: “Senator, I did not—I was not involved and am not involved in the questions about the rules governing detention of combatants or—and so I do not have the involvement with that. And with respect to Mr. Haynes’s nomination, I’ve—I know Jim Haynes, but it was not one of the nominations that I handled.”

Judge KAVANAUGH. Could you raise it a little higher? I cannot see the bottom.

Got it, okay.

Senator DURBIN. I asked you about this when we had a meeting in my office.

Judge KAVANAUGH. Yes.

Senator DURBIN. And I still do not understand your answer in terms of how you could state clearly and unequivocally, “I was not involved and am not involved in the questions about the rules governing detention of combatants.” You were involved in the discussions about access to counsel for detainees. You confirmed this during the meeting that we had in my office, and there are multiple media reports as well. You were involved in discussions regarding detained U.S. combatants Yaser Hamdi and José Padilla. You confirmed that in our meetings, and there are emails that support that fact.

You were involved—and this is one that I want to be specific about. You were involved with President Bush’s 2005 signing statement on Senator John McCain’s amendment banning cruel, inhuman, and degrading treatment of detainees, and you confirmed that in the meeting.

There were no exceptions in your answer given to me in 2006, not for litigation or detainee access to counsel or the McCain Torture Amendment. So if those three, based on the limited documents which we have been given, are obvious, what were you trying to tell me here? Did you really disclose accurately your role?

Judge KAVANAUGH. Yes. I understood the question then and my answer then, and I understood—

[Disturbance in the hearing room.]

Judge KAVANAUGH. I understood the question then and the answer then, and I understand the question now and the answer now to be 100 percent accurate. You were concerned about whether I

was involved in the program that two other nominees had been involved in, and the report that Senator Feinstein produced, the Justice Department report, they showed that I was not. In other words, the program, crafting the program for the enhanced interrogation techniques for the detainees—

Senator DURBIN. Judge Kavanaugh, that is not the question. Do you see me asking you whether you crafted the program? I did not. I asked you about your involvement in the Haynes—and then you went further—

Judge KAVANAUGH. Crafting—

Senator DURBIN. Yes, and then you went further. You violated the second rule I give to every witness. You answered more than I asked.

Judge KAVANAUGH. I adhered to the first one. I told the truth.

Senator DURBIN. Well, you volunteered more information than I asked, and you went further than you should have, because in the three specific instances that I have given you, you clearly were involved in questions about rules governing detention of combatants.

Judge KAVANAUGH. So, I understood the question then, and I understand it now, and my answer about that program. I told the truth about that, and the reports that have come out subsequently have shown that I have told the truth about that. My name is not in those reports.

Now, for the 2005 signing statement, by that time I am in the staff secretary office, and everything that went to the President's desk—everything that went to the President's desk, with a few covert exceptions, would have somehow crossed my desk on the way. So you ask—I said on the signing statement it would have crossed my desk on the way. So would a speech draft on the Iraq war. Those things would have crossed my desk, prepared by others, not prepared by me, but they cross my desk on the way to the President.

Senator DURBIN. In the 2006 hearing you told Senator Arlen Specter you gave President Bush advice on signing statements, including, "identifying potential constitutional issues in legislation." Did you make any comments regarding the December 30, 2005 signing statement on the McCain Torture Amendment, including potential constitutional issues?

Judge KAVANAUGH. I cannot recall what I said. I do recall that there was a good deal of internal debate about that signing statement, as you can imagine there would be. I remember that it was controversial internally, and I remember that I thought—and I cannot remember all the ins and outs of who thought what, but I do remember that the Counsel to the President was in charge ultimately of signing statements in terms of the final recommendation to the President.

Senator DURBIN. And just a few months later you, under oath, told us you were not involved in any of the questions about the rules governing detention of combatants.

Judge KAVANAUGH. Senator, again, at least I understood it then and I understand it now to be referring to the program that we were talking about that was very controversial that Senator Feinstein spent years trying to dig into, and I was not read into that program. I told the truth about that.

Senator DURBIN. Let me go to another area of questioning, if I can. Thank you very much.

In your dissent in *Garza v. Hagan*, you wrote that the Court had created “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand, thereby barring any Government efforts to expeditiously transfer the minors to their immigration sponsors before they make that momentous life decision.” You argued that permitting the Government additional time to find a sponsor for a young woman in the case did not impose an undue burden, even though the Government’s conduct in the case had already forced her to delay her decision on an abortion by several weeks.

We are talking about a young woman, characterized as Jane Doe, who discovered that she was pregnant after crossing the border into the United States. She made a personal decision that she was not ready to be a parent and did not want to continue her pregnancy. She went through every step necessary to comply with Texas State law, as well as steps forced on her by the Federal Government. She visited a religious anti-abortion crisis pregnancy center, she underwent an ultrasound for no medical purpose, and she went before a judge and obtained a judicial bypass of the State’s parental consent requirements.

In other words, this young woman complied with every legal requirement, including Texas State requirements, placed in front of her so she could move forward with her decision, a decision affecting her body and her life.

Do you believe that this was an abortion on demand?

Judge KAVANAUGH. Senator, the *Garza* case involved, first and foremost, a minor. It is important to emphasize it was a minor.

Senator DURBIN. Yes.

Judge KAVANAUGH. So she is in an immigration facility in the United States. She is from another country. She does not speak English, and she is by herself. If she had been an adult, she would have a right to obtain the abortion immediately. As a minor, the Government argued that it was proper or appropriate to transfer her quickly first to an immigration sponsor. Who is an immigration sponsor, you ask? It is a family member or friend who she would not be forced to talk to but she could consult with, if she wanted, about the decision facing her.

So we had to analyze this first as a minor, and then for me, the first question always is, what is the precedent? The precedent on point from the Supreme Court is there is no case on exact point, so you do what you do in all cases: you reason by analogy from the closest thing on point. What is the closest body of law on point? The parental consent decisions from the Supreme Court, where they have repeatedly upheld parental consent laws over the objection of dissenters who thought that is going to delay the procedure too long, up to several weeks.

I am getting to the point, I am getting to the point.

Senator DURBIN. Before you get to the point, you have just bypassed something. You have just bypassed the judicial bypass, which she received from the State of Texas when it came to parental consent. That has already happened here, and you are still stopping her.

Judge KAVANAUGH. I am not. The Government is arguing that placing her with an immigration sponsor would allow her, if she wished, to consult with someone about the decision. That is not the purpose of the State bypass procedure. So I just want to be very clear about that.

Senator DURBIN. But, Judge, the clock is ticking.

Judge KAVANAUGH. It is.

Senator DURBIN. The clock is ticking, 20-week clock is ticking. She made the decision early in the pregnancy, and all that I described to you, the judicial decisions, the clock is ticking, and you are suggesting that she should have waited to have a sponsor appointed who she may or may not have consulted in making this decision.

Judge KAVANAUGH. Again, this is—I am a judge. I am not making the policy decision. My job is to decide whether that policy is consistent with law. What do I do? I look at precedent, and the most analogous precedent is the parental consent precedent. From *Casey*, has this phrase, page 895: “minors benefit from consultation about abortion.” It is a quote talking about consultation with a parent—

Senator DURBIN. So, you are adding a requirement here beyond the State of Texas requirements that there be some sponsor chosen who may or may not be consulted for this decision, and the clock is ticking on her pregnancy.

Judge KAVANAUGH. A couple of things there, Senator. You said, “you are adding.” I am not adding, I am a judge. The policy is being made by others. I am deciding whether the policy is then consistent with Supreme Court precedent.

There are two things to look at in this context, Senator. First, is the Government’s goal reasonable in some way? And they say we want the minor to have the opportunity to consult about the abortion. Well, the Supreme Court precedent specifically says, specifically says that that is an appropriate objective. Second—

Senator DURBIN. Was it a State requirement?

Judge KAVANAUGH. The second question—

Senator DURBIN. Was that a State requirement?

Judge KAVANAUGH. The second question is the delay, your point, and the parental consent cases of the Supreme Court recognized that there could be some delay because of the parental consent procedures. And, in fact, Justices Marshall, Brennan, and Blackmun repeatedly dissented in cases because they thought the delay was too long.

I quoted all that in my *Garza* opinion, and I made clear it had to happen very quickly, and I looked at the time of the pregnancy to make sure, on safety—I specifically talk about safety. I specifically say the Government cannot use this as a ruse to somehow prevent the abortion. I spent a paragraph talking about she was in an undeniably difficult situation.

So, as I was saying to Senator Graham earlier, I tried to recognize the real-world effects on her. I said consider the circumstances. She is a 17-year-old, by herself, in a foreign country, in a facility where she is detained, and she has no one to talk to, and she is pregnant. Now, that is a difficult situation, and I specifically recognized and tried to understand that. And then as a judge,

not the policymaker, I tried to understand whether the Government's policy was consistent with the Supreme Court's precedents, and I did the best I could.

And I said—on those parental consent precedents—I said, some people disagree with those precedents and think those kinds of statutes should not be allowed. But precedent is not like a cafeteria where I can take this but not that. I had to take *Casey* completely. *Casey* reaffirmed *Roe*—

Senator DURBIN. I have some other questions, so I would ask if you would please—

Judge KAVANAUGH. Well, it is an important question, though, and I want to—

Senator DURBIN. It is a critical question.

Judge KAVANAUGH. And I did my level best in an emergency posture. So I had basically 2 days to do this case.

Senator DURBIN. A 2-to-1 en banc decision which you dissented from. Correct?

Judge KAVANAUGH. I did the best to follow precedent, and as I always try to do, to be as careful as I can to follow the precedent of the Supreme Court.

Senator DURBIN. Let me ask you a personal question. What is the dirtiest, hardest job you have ever had in your life?

Judge KAVANAUGH. I worked construction in the summer after I was 16 for a summer, 7 a.m. to 3:30 p.m. My dad dropped me off every morning at 7, 6:55. He wanted me to be early. And that is probably the one.

I also, I should say, Senator, I had what—a one-person lawn business, I guess, for many summers, business. I cut a lot of lawns, and that is how I made some cash when I was—I started that probably eighth grade, maybe seventh grade. I cut my parents' lawn, but then I cut a lot of lawns in the neighborhood and actually distributed flyers all over the place to say if you need your lawn cut, call me. So lawn cutting, and then the construction job, the one summer.

Senator DURBIN. My dirtiest job I ever had was four summers working in a slaughterhouse. I always wanted to go back to college. I could not wait to get out of there. It was unbearable. It was dirty, it was hot. The things I did were unimaginable, and I would not even start to repeat them.

Then came a case before you called *Agri Processor Co. v. NLRB*. At least a third of the workers, Judge Kavanaugh, in our Nation's slaughterhouses are immigrants. In visits to Iowa, Illinois, Delaware, you pick it, you are going to find a lot of immigrants doing these miserable, dirty, stinking, hot jobs. Many of them are undocumented. The work is low-paid and dangerous. And as the GAO has noted, immigrants are pressured not to even report injuries on the job.

The *Agri Processors* case was a notorious meat packing company owned by Sholom Rubashkin, who was convicted of 86 counts of fraud and money laundering in 2009. His 27-year sentence recently was commuted by President Trump.

Agri Processors had, at the core of its business model, the exploitation of undocumented workers. Half their workers, almost 400 of them, were not authorized. Workers alleged the company fostered

a hostile workplace environment that included 12-hour shifts without overtime pay, exposure to dangerous chemicals, sexual harassment, and child labor. A truck driver at Agri Processor's Brooklyn warehouse told reporters, "We were treated like garbage, and if we said anything, we got fired immediately."

Judge Kavanaugh, you bent over backward to take the company's side against these workers. In a 2008 D.C. Circuit case, *Agri Processor v. NLRB*, your dissent argued that this company's workers should be prohibited from unionizing because they did not fit your definition of an "employee." To reach this conclusion, you imported a definition of "employee" from a totally different statute. You ignored the plain language of the controlling statute, the National Labor Relations Act, which has a broad definition of "employee," as well as binding Supreme Court precedent. The majority in this case—and you were a dissenter—the majority in this case noted that their opinion stuck to the text of the National Labor Relations Act and to the 1986 Immigration Reform and Control Act, which did not amend the National Labor Relations Act.

They said that your dissent, these other judges said about your dissent, would, quote, "abandon the text of the controlling statute and lead to an absurd result." The majority in this decision included one Republican- and one Democratic-appointed judge.

Judge Kavanaugh, you claim over and over again, to be a contextualist, to be carefully weighing every word of a statute. So why did you go out of your way to interpret the word "employee" in a way that benefited this horrible business and disadvantaged these exploited workers? Why did you not stick to the plain language of the controlling statute and the binding Supreme Court precedent?

Judge KAVANAUGH. Because the Supreme Court precedent compelled me to reach the result that I reached, and here is why, Senator. Let me explain.

The Supreme Court had a case in 1984 called the *Sure-Tan* decision. The *Sure-Tan* decision considered the interaction of the National Labor Relations Act and the immigration laws. What the Supreme Court did in *Sure-Tan* is, had this question and said it is at that time permissible to consider an immigrant unlawfully in the country as an employee under the National Labor Relations Act. In Part 2(b) of the opinion—you have to read Part 2(b) of the opinion, of the Supreme Court decision. If you read Part 2(b) of the opinion, the Court then goes on to say that because the immigration laws do not prohibit employment of people unlawfully in the country, it makes clear, the Supreme Court makes clear—this is when it is being considered in Congress in '84 and ends up in the '86 Act. The Court makes clear, as I read Part 2(b), and I think I am correct on this, that if the immigration laws did prohibit employment of someone here unlawfully in the country, then that would also mean that they cannot vote in the union election.

So what I was doing there, Senator, was all about precedent. I read that and, in my opinion, if you look at the dissenting opinion, I really parsed this very carefully, and I went deep into this case. So I went back and pulled from the *Sure-Tan* case. I asked for the Marshall papers, the Thurgood Marshall papers from the library to read all the memos that went back and forth among the Justices

in the *Sure-Tan* case. I cited the oral argument to make sure that what I was reading in there actually reflected what had been going on in the Supreme Court, and it is quite clear from the oral argument they were aware that the immigration law was about to be changed, and they were aware of the interaction between the labor law and the immigration law.

So I think I stand by what I wrote then, and I think I correctly analyzed Part 2(b). Now, Senator—

Senator DURBIN. I have to—I am running out of time here.

Judge KAVANAUGH. I know, but if it ends—if the Supreme Court *Sure-Tan* opinion had ended at Part 2(a), 100 percent would agree with you and my decision would have been different. If you read Part 2(b), I think you see—

Senator DURBIN. You said earlier today you do not get to pick and choose which Supreme Court precedent you follow. The majority in the *Agri Processor* case was following Supreme Court precedent. In the *Sure-Tan* case, the Supreme Court, a 7-to-2 decision, said that undocumented immigrants are employees under the National Labor Relations Act. I quote: “Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of employee.” That is a quote from the case.

Judge KAVANAUGH. That is Part 2(a). You have to go to Part 2(b).

Senator DURBIN. Well, hang on. Let me tell you some people who went to both parts and could not disagree with you more. Everyone else who looked at this question—the administrative law judge, the National Labor Relations Board, including Republican appointees, two Appeals Court Judges, including one Republican appointee—followed the Supreme Court precedent and came to the opposite conclusion that you did.

I understand you may have preferred the *Sure-Tan* dissent, but you failed to follow Supreme Court precedent. This was a case where the National Labor Relations Act included those who were undocumented who could unionize to protect themselves in the workplace. You went out of your way to dissent all the way along and make sure they did not, in your view, have that right, that they did not have that right to unionize.

Judge KAVANAUGH. I very respectfully disagree, Senator. And the reason I disagree is that the Supreme Court did say that the immigrant was covered under the definition of NLRA. If it ends there, I am with you 100 percent. But then the Supreme Court goes on to say that we consider also in resolving this question that conflict between the National Labor Relations Act and the immigration laws and makes clear, as I read it, if the immigration laws had made employment of someone here in the country unlawfully illegal, then that would be prohibited in the case. And I went back, like I said. If you look at Justice—I mean, I quote the oral argument transcript from *Sure-Tan* in my dissenting opinion.

Look, I had no agenda in any direction on—I am a judge. So I am just trying to resolve the precedent—

Senator DURBIN. Let me just close. Let me close by saying this. “I am just a judge, I just follow precedent.” Gosh, we have heard that so often, and I hope it is the case, but we know that there is much more to your job than that.

Judge KAVANAUGH. I agree.

Senator DURBIN. The fact that you were a dissenter and everyone else saw this the other way should give us pause when you say, "I am just following precedent."

Judge KAVANAUGH. Well, I respectfully, Senator—that opinion, I am proud of that opinion because I think it carefully details the law in that case following the Supreme Court precedent. And to your point that other judges disagree, there was a case I had about 10 years ago or 8 years ago called *Papagno*. It was a case where I ruled in favor of a criminal defendant on a restitution matter. Every other court before that disagreed. I wrote the majority opinion with Judge Edwards and Judge Griffith. Every other court after us disagreed. Finally we got to the Supreme Court this year in the *Lagos* case, and they agreed with our one opinion, the *Papagno* opinion. Just to point out that just because other courts might have disagreed does not necessarily mean we were necessarily wrong, because the Supreme Court ultimately decides that.

I understand your questions, and I appreciate them. Thank you.

Chairman GRASSLEY. Senator Cornyn.

Senator Lee is going to chair while I have another appointment.

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, I was grateful that today's hearing, at least as far as the Committee is concerned, is a lot more dignified and civil. But unfortunately, some of the hijinks continue even on the Senate floor. I know that Senator McConnell asked consent for the Judiciary Committee to continue to meet during today's session of the Senate. Senator Schumer objected, so Senator McConnell was left with no option but to adjourn the Senate and allow the Committee to continue to meet. That is unfortunate.

So, Judge, I believe we met in the year 2000, and just to take a little walk down memory lane here, when I was Attorney General of Texas and had a chance to argue a case in front of the Supreme Court of the United States, you, Ted Olson, and Paul Clement, I believe—

Judge KAVANAUGH. Yes.

Senator CORNYN [continuing]. Helped me get ready. I regret you did not have better material to work with.

[Laughter.]

Judge KAVANAUGH. It was an honor, Senator. It was an honor. Senator CORNYN. It was a great experience, an educational experience. I got to appreciate your skills as a lawyer from that time and have followed your career closely since, and I am proud to support your nomination based on my personal knowledge of your skills and your temperament and your character and your fidelity to the rule of law.

But I do want to pick one bone with you. This is not unique to you. Based on that experience, that case, as you may recall, involved a tradition in the Santa Fe Independent School District, unfortunately, which was the site of the shooting here in more recent days. But back then, the practice before football games was that the students would be able to volunteer to offer a prayer before the football game. They were not required to do so. The school did not pick them. They could offer an inspirational saying or read a poem or anything else. But that was the practice.

Well, until the ACLU filed suit, and unfortunately it was held to be unconstitutional and a violation of the Establishment Clause. I am not going to ask for your opinion because this issue will likely come back before the Court, but since I mentioned it to Judge Gorsuch—Justice Gorsuch, I am going to mention it to you.

The thing that has stuck in my craw for the last 18 years is the dissent written by Chief Justice Rehnquist which takes exception to the majority's decision saying they distorted existing precedent. But he goes on to say, even more disturbing than its holding is, the tone of the Court's opinion. It bristles with hostility to all things religious in public life. Neither the holding nor the tone nor the opinion is faithful to the meaning of the Establishment Clause when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed "a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God."

Since I had you here, I thought I would mention that. I am not asking for your opinion since likely you will be called upon to decide cases involving the Establishment Clause in the future. But since we had that history together, I thought I would tell you that still sticks in my craw.

Judge KAVANAUGH. I understand, Senator. We remember, certainly, cases I lost—I remember, and they still stick in my craw too, Senator.

Senator CORNYN. Well, I just marvel that under the First Amendment, that a variety of voices can speak, and that is generally a good thing, but it can be about violence, sexism, it can be about almost anything, but you cannot speak about religion in a public forum.

Judge KAVANAUGH. There have been cases from the Supreme Court I think in more recent years, cases like the *Good News Club* case, cases like the *Trinity Lutheran* case, cases like the *Town of Greece* case where I think the Supreme Court has recognized the importance, of course, of religious liberty in the United States, and also has recognized, I think, that religious speakers, religious people, religious speech is entitled to a space in the public square and not to be discriminated against.

I think the *Trinity Lutheran* case is an important one on that. The *Good News Club* case, that is a case where there was an after-school program at a school gym, I think, or an auditorium, and that religious group was excluded, and the Supreme Court made clear, no, you cannot just exclude the religious group.

So I think there have been some developments since then in terms of religious equality and religious liberty that are important. Those cases are always difficult factually, but the principle you are espousing, I do think, is reflected in some more recent Supreme Court precedent.

Senator CORNYN. Well, I will just conclude with this. As I understand the Constitution, it requires the Government to be neutral. As Chief Justice Rehnquist said in this case, the Government demonstrated hostility to religious speech in the public square. That is just one person's opinion. And again, I am not asking you for any opinion with regard to—

[Disturbance in the hearing room.]

Senator CORNYN [continuing]. That may come before the Court.

[Disturbance in the hearing room.]

Senator CORNYN. Mr. Chairman, I hope that time will not be subtracted from my 30 minutes.

Senator LEE [presiding]. It will not be.

Senator CORNYN. Thank you.

So, Judge Kavanaugh, I am intrigued by your comment that you made earlier about the role of precedent. We have heard a lot about precedent. You alluded to this book that you and others, other judges wrote with Bryan Garner on the law of judicial precedent. I checked it out. It is 900 pages long, and I have not read every page of it either.

Judge KAVANAUGH. I do not think it is meant—it is not meant to be read word for word. It is a treatise where you go to a section that might be on point or something.

Senator CORNYN. But let me just ask you a more basic question, and then we can work our way into that.

When people go to court, should they expect a different outcome if the judge was nominated by a Republican from a court where the judge was nominated by a Democrat?

Judge KAVANAUGH. No. That is an important principle of judicial independence and the judicial role where “the judge is umpire” vision that Chief Justice Roberts articulated, and I have talked about many times, as critical. When you go to a baseball game, the umpire is not wearing the uniform of one team or another, and that is a critical principle.

Senator CORNYN. Well, it strikes me as an important point given the suggestion that one of the reasons that people have objected to your nomination—I believe the quote was, you “have Republican blood flowing in your veins.” That strikes me as a strange and bizarre statement.

Judge KAVANAUGH. I have been a judge for 12 years, Senator, with 307 opinions. I am very proud of that record and have been an independent judge for 12 years. As a judge, you are not a Republican or Democrat, as a Federal judge.

Senator CORNYN. And you talked a little bit about the constitutional basis for a judge’s obligation to apply existing precedent. Could you expand on that a little bit more? Because I think most people are under the impression this is sort of a discretionary matter and you can sort of cherry pick between what precedents you decide to follow and which ones you do not follow.

Judge KAVANAUGH. Well, there has been a debate sometimes about what are the origins of precedent, why do you follow precedent. And as I see it, there are a number of reasons you would cite: stability, predictability, impartiality, reliance interests. But all of those are not mere policies in my view.

As I see it, the system of precedent comes from Article III itself. When Article III refers to, the judicial power shall be vested in one Supreme Court and such inferior courts as Congress shall, from time to time, establish—to my mind the phrase, “judicial power.” You think about, what does that entail? And you look at the meaning, the meaning at the time of judicial power, and you look, one source of that is Federalist 78. In Federalist 78, it is well explained

that judges make decisions based on precedent. And precedent, therefore, as I read “judicial power,” has constitutional origins and a constitutional basis in the text of the Constitution.

Senator CORNYN. And I think you have touched on this as well. Judges, unlike legislators, do not run for election. You do not have a platform, “Vote for me, this is what I will do if elected into office.”

One of the most important elements of limiting the important role of judges, I think, under the Constitution is that you are required to decide a case on a case-by-case basis rather than issuing some sort of oracle saying, “Henceforth the law will be thus,” assuming you could get eight other judges on the Team of Nine we talked about to agree with you.

[Disturbance in the hearing room.]

Senator CORNYN. Could you talk about the importance of deciding cases on a case-by-case basis?

Senator LEE. We will add another 20 seconds.

Senator CORNYN. Thank you.

Judge KAVANAUGH. Absolutely, Senator. It is important to understand, and I think Senator Graham alluded to this as well. As judges, you do not just issue policies or issue opinions out of the blue. You decide, as Article III says, cases and controversies, and that means there is a process. Litigants come into the Federal trial court, for example, and litigate against one another, and there is a process there, a trial or a summary judgment motion. The district judge renders a decision. Then that comes up to the court of appeals in my case, and there is briefing and oral argument. I like to say there is a process. I like to say process protects you. That is one of the things I always like to keep in mind.

You go through a process to help make the decisions, a deliberative process, and we have a process. Judges are very focused on process and having that oral argument, having the briefing, and then talking to your colleagues. You change your mind. Senator, you have been a judge, of course. You change your mind sometimes based on the comments of colleagues. So that process is important.

Then to your point about how you are deciding that case, you write an opinion. You are not trying to resolve every issue imaginable in the opinion. You are trying to resolve this case under the principles and precedents, the text of the law in question, the text of the statute in question, and decide that case or controversy. That is how judges build up a system of precedent over time, by deciding one case at a time and not trying to do more than they can or more than they should.

[Disturbance in the hearing room.]

Senator CORNYN. Judge, do you not think that what you have described for us in deciding cases on a case-by-case basis has an important foundation in fairness to the litigants, the parties that come to your court? Because how would somebody feel if they know you have already announced, in all cases that have to do with subject X, I have made up my mind, I do not care what the facts are? Is that not unfair to the litigants?

Judge KAVANAUGH. It can be, Senator, at least where an overbroad ruling may resolve things that people who are affected by it may have thought that, well, I was not part of that case; why am I now affected in a particular way?

I think one of the things I can say about how I have tried to write my opinions, the 300 opinions, is that I am always concerned about—

[Disturbance in the hearing room.]

Judge KAVANAUGH. I am always concerned about unintended consequences. This is one of the reasons I always go through so many drafts of my opinions and really work through them, is even just a sloppy footnote or an ambiguous word in an opinion—it is true when you are drafting laws here too, but—

[Disturbance in the hearing room.]

Judge KAVANAUGH. You are concerned about unintended consequences, which is why it is so important to be clear in the opinions and to be exactly precise and not—

[Disturbance in the hearing room.]

Judge KAVANAUGH. To decide too much.

[Disturbance in the hearing room.]

Senator CORNYN. Judge, let me ask you to tell us a little bit about September 11, 2001. Where were you when you heard that the planes hit the World Trade Center, and in Washington, DC, another plane hit the Pentagon here?

Judge KAVANAUGH. I remember I was in the West Wing when they hit the second tower. I remember that, up in the upstairs Counsel's office, with a couple of other people in the Counsel's office. And then we were ushered downstairs and then told to get out, run out, because there was fear, as we later learned, about Flight 93. I do not know whether it was headed to the Capitol or the White House or some other target, of course. And the heroes of Flight 93 saved so many Americans, a sacrifice that we still, of course, all celebrate in the sense of celebrating their lives and their heroism for saving all of us here in Washington. But I ended up out in Lafayette Park with the rest of the staff, bewildered.

It changed America, it changed the world, it changed the Presidency, it changed Congress, it changed the course, all the issues that came before us. It was a new kind of war, as President Bush described, with an enemy that did not wear uniforms and that would attack civilians. So new kinds of laws had to be considered in Congress, had to work through that. And President Bush had to focus so intently. As I have said before, my remembrance of September 12, his basic mentality of this will not happen again. Having traveled with him from 2003 to 2006 everywhere as staff secretary and seeing him up close, I still think every day I was with him during those years, every morning when he got up, it was still September 12, 2001, this will not happen again.

And to see that focus—of course, he had to do all the other things of the Presidency and all the other legislative and regulatory and ceremonial aspects. But he was so focused on that, and I am sure that has been true of the succeeding Presidents as well, because the threat still exists, of course.

Senator CORNYN. Well, as we came to learn, Osama bin Laden—and al-Qaeda—was responsible for that attack and has now morphed into other organizations like ISIS and the like.

But I want to ask you, you had to then sit in judgment later on in a case, the *Hamdan* case, which you alluded to earlier, where the defendant was Osama bin Laden's personal bodyguard and

driver. He was captured by U.S. forces in Afghanistan after 9/11 and detained in Guantanamo Bay. He subsequently went through a military tribunal, and then that case was appealed to your court.

Just correct me if I am wrong, but notwithstanding the experience that you and everybody you cared about, having been through this terrible travesty of 9/11, you ruled in favor of Osama bin Laden's bodyguard and driver; correct?

Judge KAVANAUGH. That is correct. I wrote the majority opinion.

Senator CORNYN. How could you do that? How could you possibly do that?

Judge KAVANAUGH. The rule of law applies to all who come before the courts of the United States.

Senator CORNYN. Even an enemy combatant?

Judge KAVANAUGH. Equal justice under law. Everyone is entitled to—

Senator CORNYN. Even a non-citizen?

Judge KAVANAUGH. Yes. Non-citizens who are tried in U.S. courts have constitutional rights. And really, my model on that, my judicial model for thinking about something like that, because I thought about what you are asking about, Justice Jackson, of course, Robert Jackson, who had been Franklin Roosevelt's Attorney General, in the *Korematsu* case, even though that was one of President Roosevelt's policies, the majority opinion now overruled, but Justice Jackson dissented and ruled against the Roosevelt policy. Justices Clark and Burton, two appointees of President Truman, are the two deciding votes in *Youngstown Steel*. That is a 6-to-3 decision. Those two are the deciding votes, therefore. They both were appointees of President Truman, and it is wartime against Korea. They get to the Supreme Court. They are the deciding votes in the *Youngstown Steel* case, which was an extraordinary national moment, one of the great moments.

So your conception of the role of the judge is that it is about the law. It is distinct from policy, and our judiciary depends on having people in it, and we are fortunate to have a wonderful Federal judiciary, people in it who understand the difference between law and policy and are willing to apply principles of equal justice under law to anyone who comes before the court. Even the most unpopular possible defendant is still entitled to due process and the rule of law, and I have tried to ensure that as a judge.

Senator CORNYN. Well, it is hard for me to imagine a more unpopular defendant than Osama bin Laden's driver and personal bodyguard. So I find the suggestion that somehow you are prejudiced against the small guy in favor of the big guy, or that you are picking and choosing who you are going to render judgment in favor of based on something other than the rule of law, I think this answers that question conclusively for me, the fact that you could separate yourself from the emotional involvement you had, along with so many people you worked closely with in the White House on September 11, and you could then as a judge, after you put on the black robe and take the oath of office, you could then render a judgment in favor of Osama bin Laden's bodyguard and driver because you applied the law equally to everybody that comes to your court.

Let me allude to something I think Senator Sasse was eloquently speaking about yesterday in terms of the separation of powers, a very important aspect of our constitutional system and one that I know you have dealt with often on the D.C. Circuit Court of Appeals, and that has to do with what I have read some judges talk about, some constitutional scholars talk about, a conversation between the branches.

In other words, when the D.C. Circuit Court or the Supreme Court decides a case, they finally decide that case, but they do not finally decide what the policy is for the United States or the American people; correct?

Judge KAVANAUGH. That is correct, Senator. I think one of the important things that judges can do is to adhere, of course, to the laws passed by Congress, but then in writing the opinion make clear—and I have done this before, and a lot of my colleagues do this—is that perhaps the statute needs updating. But if it does, that is the role of Congress to update the statute. Or sometimes there will be a hole in a statute or something that seems unintended in a statute, and to alert Congress to that.

Chief Judge Katzmann of the Second Circuit, who is a great judge I serve with on the Judicial Branch Committee, which is appointed by the Chief Justice, he has written a book about statutory interpretation, but he has also been the leader of a project to make sure that Congress is alerted to potential statutory issues that look like they might have been things that perhaps Congress would not have intended, or at least Congress would want brought to its attention so it could fix.

[Disturbance in the hearing room.]

Judge KAVANAUGH. So that project has been very successful. That is Chief Judge Katzmann's project, and it is one—even without that project, how you write your opinion, I think, is important. We do not update the statutes. You update the statutes. But it is good for us to write our opinions in a way that points out potential issues that Congress might want to be aware of.

Senator CORNYN. And that is part of the conversation between the two co-equal branches of Government.

Judge KAVANAUGH. Absolutely, and I think that is an important dialogue to have between Congress and the judiciary, and the back-and-forth is very important on that front, and I think that is one thing I am always thinking about in my opinions. You write the laws, but if the law looks like there is some issue with it, some flaw or something that might be an unintended consequence, in the opinion you can identify it, and that can be something that Congress can turn its attention to sometimes, because I am well aware that statutory drafting is a very difficult process.

It is something that I think judges actually need to be more aware of, how difficult the legislative drafting process is. Even if you are doing it as one person, it would be difficult. But then you are doing it as a collective body, and then you are doing it with the House and with the President involved. There are a lot of people in it, and it is hard to have, with all the compromises inherent in that, hard to have crystal clarity on every possible topic.

So as judges I think, number one, we have to recognize the process that you go through as legislators. That means adhere to the

compromises that are made, the text as written. But also when we write our opinions, if there seems to be something that is not working out, it is appropriate I think for judges to point that out in their opinions.

Senator CORNYN. And, of course, even if it is the constitutional basis for your opinion, that can be changed by constitutional amendment. Correct?

Judge KAVANAUGH. Well, that is correct as well. The Framers did not think the Constitution was perfect by any stretch. They knew it had imperfections. For starters, the original Constitution did not have the Bill of Rights, the first 10 Amendments. So there was a lot of discussion at the ratifying conventions about having a Bill of Rights, and that was quickly done in the First Congress in New York in 1789, of course, by James Madison taking the lead on that.

But so, too, they did not think it was perfect. They have an amendment process that specified in Article V of the Constitution, and that amendment process was intended to be used, and we have seen it used to correct structural issues: the Twelfth Amendment on Presidential elections; the Seventeenth Amendment, of course, as you all know well, on Senate elections; the Twenty-second Amendment, which limited Presidents to only two terms; the Twenty-fifth Amendment, which corrected some issues with respect to the Vice Presidency. So too, of course, the Thirteenth, Fourteenth, and Fifteenth Amendments, the most important amendments in the Constitution in many respects, because it brought the promise of racial equality that had been denied at the time of the original Constitution into the text of the Constitution.

So the job of the people, which is the Congress and the State legislatures, is to amend the Constitution. It is not the job of judges to do that on our own. Obviously, that is a basic divide of constitutional responsibility that is set forth right in the text of Article V of the Constitution.

Senator CORNYN. I cannot remember who said it, I think Justice Jackson perhaps, who said the Supreme Court is not final because it is always right; it is right because it is final, or words to that effect. But I always thought the more I got into that, the more I disagreed with that, because it is a conversation between the branches, and if the American people believe that it is a constitutional matter, the way the Constitution is being interpreted, it is within our power as the American people to change our own Constitution by amendment. There are provisions in the Constitution itself to do that.

It is hard, and it should be hard, but ultimately the authority that we delegate to the Government finds its origin in the consent of the governed. It is not something dictated to us from on high, from the marble palace or somewhere like that here in Washington. It is ultimately our Government, our responsibility, our authority that provides legitimacy to the Government itself. Do you agree with that?

Judge KAVANAUGH. I agree, of course, with that, Senator. The people, we the people form the Constitution of the United States and the sovereignty. The people are the ultimate authority. And you are right about Justice Jackson's line. I think it is a clever line, but ultimately I agree with you. I have always had a little bit of

a problem with that line, we are infallible because we are final. No, both parts of that are wrong in some sense, because I never want to think of the Court as infallible, and I also never want to think of it necessarily in the way you are describing either, because the people always have an ability to correct through the amendment process.

Now, the amendment process is hard and has not been used as much in recent decades. But, of course, at the beginning of the country the amendments were critical, and *Dred Scott*, of course, the awful example of just a horrific Supreme Court decision that is then corrected in part, at least on paper, in the Fourteenth Amendment—the Thirteenth and Fourteenth Amendments, and that is an important example, I think, probably the best example, frankly, of the point you are making about the people being able to respond to a horrific decision of the Supreme Court.

Senator CORNYN. Well, in fairness to Justice Jackson, maybe he was thinking, as I originally thought, about the expression as being binding on lower court judges, trial judges, appellate court judges, and the Supreme Court does have the final word in that food chain of the judiciary, but not in terms of the fundamental authority of the American people to decide what laws should govern them.

Judge KAVANAUGH. I think that is probably right, Senator. I do not want to be—Justice Jackson is one of our greatest Justices. So to question anything, whether it is the *Korematsu* dissent or *Barnett* or *Youngstown* or *Morissette* on mens rea, Justice Jackson wrote some of the greatest opinions, and the example of judicial independence as well.

But on that one line, I take your point.

Senator CORNYN. Let me just ask you one last question. We talked a lot about the role of precedent, and Senator Feinstein talked about stare decisis, that basically cases that have been decided provide the precedent for future cases.

But on occasion, the Supreme Court has decided that its decisions were just wrong and has chosen to overrule those previous decisions. I am thinking of *Plessy v. Ferguson*, for example, which was a scar on our body politic that said that separate but equal educational facilities met the constitutional requirement of the Fourteenth Amendment.

But can you talk about the extraordinary circumstances under which the Supreme Court would revisit a precedent?

Judge KAVANAUGH. Well, *Brown v. Board of Education*, of course, overturned *Plessy*. *Plessy* was wrong the day it was decided. It was inconsistent with the text and meaning of the Fourteenth Amendment, which guaranteed equal protection.

The Supreme Court in *Strauder v. West Virginia* in 1880, a jury selection case, had said, what is this amendment but that the law shall be the same for the Black and the White? And the Supreme Court, unfortunately, backtracked from that clear principle in the *Plessy* decision, and a horrific decision which allowed “separate but equal,” and then *Brown v. Board* corrected that in 1954, of course, corrected it on paper. It is still decades, and we are still seeking to achieve racial equality. The long march for racial equality is not over.

But *Brown v. Board*, as I have said publicly many times before, the single greatest moment in Supreme Court history, by, in so many ways, the unanimity which Chief Justice Warren achieved, which is a great moment; the fact that it lived up to the text of the Equal Protection Clause; the fact that it understood the real-world consequences of the segregation on the African-American students who were segregated into other schools and stamped with the badge of inferiority; that moment in *Brown v. Board of Education* is so critical to remember, and the opinion is so inspirational. I encourage everyone to—it is a relatively short opinion, but it is very powerful. It is very focused on the text of the Equal Protection Clause—and correcting that awful precedent of *Plessy v. Ferguson*—a great example of leadership.

And just the last point I will mention on process, they knew they were going to face popular backlash. They knew they were—but they still did it. So that shows independence and fortitude. But they also had re-argument, which I think is a good—they had argued originally and then decided there was a lot going on and maybe not everyone is seeing it the same way as the Justices, and they had a re-argument. I think it is a good lesson on process protecting us, and keep working at it and keep working at it and see—you know, the Team of Nine that I mentioned yesterday, and mentioned today, keep working at it as a Team of Nine, and they came out unanimous. Chief Justice Warren, thankfully, led the Court in that decision. That was a great moment, the greatest moment in Supreme Court history.

Senator CORNYN. Thank you, Judge.

Senator LEE. Thank you. I awarded two additional minutes to Senator Cornyn because he was interrupted, by my count, 5 times during his testimony.

Senator Whitehouse is next.

Senator WHITEHOUSE. Thank you. Good afternoon, Judge Kavanaugh.

Judge KAVANAUGH. Thank you, Senator.

Senator WHITEHOUSE. Are you good for another half hour?

Judge KAVANAUGH. I am good.

Senator WHITEHOUSE. All right, good. In my office, you told me that you could provide no assurance to me that you would uphold a statute requiring insurance companies to provide coverage for pre-existing medical conditions. Is that still true, here in public?

Judge KAVANAUGH. Well, I think, Senator, it is important to understand the principle at play here. The principle—

Senator WHITEHOUSE. We have talked a lot about that, but is the statement you made—have I recited it accurately, and is it still true today, that you can give no assurance that you would uphold—

Judge KAVANAUGH. Well, Senator, judges like to explain their decisions.

Senator WHITEHOUSE. Yep, but I get to ask the questions. Usually you get to ask the questions because you are the appellate judge, but today for half an hour I get to. So, is it still true that you can give no assurance that you would uphold a statute requiring insurance companies to cover pre-existing medical conditions?

Judge KAVANAUGH. So, to prepare for this moment, I went back and read——

Senator WHITEHOUSE. I really would like you to be as careful with your time as you can, because I have a very limited amount of time with you. So, the quicker you can get to the answer—it could be as simple as “yes” or “no.”

Judge KAVANAUGH. But I can enhance your understanding of my answer if I explain it, I think.

Senator WHITEHOUSE. I really just want your answer on the record. I think I am pretty capable of understanding it on my own.

Judge KAVANAUGH. But, well, then everyone to understand my answer. So, there is nominee precedent of how Justices and nominees in my position have answered in the past. I will be succinct, if I can. And all eight sitting Justices——

Senator WHITEHOUSE. I know. You have actually said this in the hearing, so people who are listening and interested have actually already heard you say this.

Judge KAVANAUGH. Well, I think it is really important, so I want to——

Senator WHITEHOUSE. Say it again, then.

Judge KAVANAUGH. I want to underscore it. All eight sitting Justices of the Supreme Court have made clear that it would be inconsistent with judicial independence, rooted in Article III, to provide answers on cases or issues that could come before us. Justice Ginsburg, “no hints, forecasts.” Justice Kagan, talking about precedent, “no thumbs are up or down.”

And I went back. Justice Thurgood Marshall was asked repeatedly in his hearing, “What do you think about *Miranda*?” “What do you think about *Miranda*?” “What do you think about *Miranda*?”

Senator WHITEHOUSE. Got it. Everybody else does it, and your answer is still “no.”

Judge KAVANAUGH. So, the reason everyone else does it, though, is rooted in judicial independence and my respect for precedent. So, it is a combination of my respect for precedent, nominee precedent, and my respect for judicial independence. So, I cannot give assurances on a specific hypothetical.

Senator WHITEHOUSE. Okay, thank you. Let me go on to another subject, which is executive privilege. Executive privilege is a principle that is founded in the Constitution in the separation of powers, correct?

Judge KAVANAUGH. The Supreme Court so ruled in the *United States v. Richard Nixon* case. So, that was the first—the key issue in *United States*——

Senator WHITEHOUSE. That is all right. I just needed the answer to the question, and you have answered it.

Judge KAVANAUGH. But the source is important.

Senator WHITEHOUSE. As a privilege, it needs to be asserted, does it not? That is true of privileges generally?

Judge KAVANAUGH. I do not know where you are—where this is going, but the——

Senator WHITEHOUSE. It is a pretty straightforward question. Do privileges not need to be asserted in order to apply?

Judge KAVANAUGH. Well, privileges are recognized.

Senator WHITEHOUSE. Once they are asserted.

Judge KAVANAUGH. I think as a general proposition.

Senator WHITEHOUSE. Fair enough. I am only asking a general proposition.

Judge KAVANAUGH. Yes, in attorney-client privilege, you would assert the attorney-client privilege.

Senator WHITEHOUSE. Yes, assert it.

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE. And who asserts executive privilege?

Judge KAVANAUGH. Ordinarily—well, that is a complicated question, Senator, actually. That—

Senator WHITEHOUSE. Who does it come back to? Ultimately, who asserts executive privilege?

Judge KAVANAUGH. So, it depends what you are talking about. So, what kind of executive privilege document you are talking about, it depends. In my experience—

Senator WHITEHOUSE. Ultimately, it is the President.

Judge KAVANAUGH. There is not—there is not as much precedent on that. There is some. The Supreme Court, this was—the Supreme Court in the *United States v. Richard Nixon*—

Senator WHITEHOUSE. Is it not fair to say that executive privilege belongs to the President of the United States, the Chief Executive?

Judge KAVANAUGH. Yes, it can also belong to the former President in the case of former Presidential records. That is one caveat I want to put on that.

Senator WHITEHOUSE. Okay, fair caveat. Is the assertion of executive privilege by the President subject to judicial review?

Judge KAVANAUGH. Well, of course, because under the precedent, *United States v. Richard Nixon*—

Senator WHITEHOUSE. Yes.

Judge KAVANAUGH. Said two things. It said, one, that executive privilege is constitutionally rooted. The special prosecutor in that case argued that actually there was no such thing as executive privilege, and the Supreme Court rejected that argument and held that the executive privilege is rooted in the separation of powers and in Article II. But second—

Senator WHITEHOUSE. The reason I am asking does not have much to do with you. It goes back to a point that we were talking about earlier in the hearing, which is that we have received hundreds and hundreds of pages of documents of your record that looked like this. They both say “committee confidential” across them at an angle, and then across the front they say “constitutional privilege.” And as a Member of the Senate—this is not a question, I am speaking to my colleagues—I find myself in a quandary here about being denied those particular documents because I cannot find any assertion of the privilege.

These documents just suddenly appeared and somebody had put “constitutional privilege” on the page and wiped out all the text that was on the page. And my understanding is that there is ordinarily a process for getting to that determination that allows for ultimately a judicial review, and we have failed to get subpoenas out of the Committee for documents, so we cannot trigger it that way. And there is no apparent assertion of executive privilege that I can find in the record of how this particular paper got here.

So, I just wanted to establish some of the basic ground rules of executive privilege with you because I think we agree on that. I think that is basically commonly agreed and put that into the context of what we are looking at, and particularly with respect to Chairman Leahy's questioning earlier. If some of the documents he is looking for have now been protected by this non-assertion assertion of executive privilege, we have a problem. It is a continuing problem in the Committee. We have had other witnesses come and do non-assertion assertions of executive privilege, and so I am sorry to drag Committee business before you, but I do think it is important that we try to get this right.

Judge KAVANAUGH. Can I make one addendum based on my experience from the time, which is I do not think formal assertions usually occur until after there has been a subpoena, at least from my time working in the Bush—

Senator WHITEHOUSE. Which is why not being able to get a subpoena kind of bolixes up the process, yes indeed. The role of the Federalist Society in bringing you here today has been of interest to me. As you know, we spoke about it quite a lot when you and I met in my office. Mr. McGahn, who is sitting very patiently behind you—I can see him over your shoulder—

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE [continuing]. Has said that the Federalist Society was insourced into the White House to make these recommendations, specifically to make the recommendation that you should be the nominee. You have said this regarding President Bush, that he thought it was, and I am quoting here, "improper to give one group, especially a group with interests in many issues, a preferred or favored position in the nomination process." That was—those were words speaking, I guess, to the Federalist Society National Lawyers Convention. On another occasion, you wrote a draft speech for Attorney General Gonzales or White House Counsel Gonzales—probably White House Counsel Gonzales—look at the date—to deliver to the Federalist Society. And you said in that speech, "As a matter of constitutional principle, it is simply inappropriate, we believe, to afford any outside group a quasi-official role in the President's nomination process." How do you square those comments about the role of the American Bar Association in the nomination process with the role of the Federalist Society in your nomination process, assuming that Mr. McGahn was speaking accurately when he said they had been insourced to the White House for this process?

Judge KAVANAUGH. Right. So, I can speak to the ABA part of that. President Bush in 2001 had to make a decision of how the ABA should play its usual rating role with respect to nominees, and the ABA takes files, amicus briefs, and takes policy positions on issues. And, therefore, after some deliberation, it was decided that there was nothing wrong with the ABA rating the nominees, but to give an organization that files amicus briefs and takes policy positions a preferred role in the constitutional nomination process was unfair in some ways and favoring—

Senator WHITEHOUSE. Would it be a fair description of the Federalist Society's role in your selection as the nominee to say that it was preferred over other groups?

Judge KAVANAUGH. Well, my experience was when Justice Kennedy retired on the Wednesday, Mr. McGahn called me later that afternoon, said we need to talk on Friday. He came over to my office on Friday evening or late afternoon. We talked for three or 4 hours, interview and going through the usual kinds of questions you would go through when you are embarking on a process like this. And then I met with the—interviewed with the President on Monday morning, interviewed—

Senator WHITEHOUSE. So, is it your testimony that you do not what the role of the Federalist Society was in your selection?

Judge KAVANAUGH. My experience—my personal experience and what I know is that President Trump made the decision for starters. President Trump made the nomination, and I know he, as I explained yesterday, I know he spent a lot of time in those 12 days on this issue, and I was aware of that. I also know that Mr. McGahn was directly involved with me and spent a lot of time on it. And I also know that the Vice President—

Senator WHITEHOUSE. But you have no knowledge to share with us today about the role of the Federalist Society and how they were insourced into the White House. That is a mystery to you as well as to us.

Judge KAVANAUGH. I am not sure what Mr. McGahn meant. I think by that comment—I think Federalist Society members are—the lawyers in the administration are Federalist Society members, and so it should not be a surprise that—because it is an organization—

Senator WHITEHOUSE. Leonard Leo's role specifically from the Federalist Society?

Judge KAVANAUGH. I do not know.

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. I do not know the specifics.

Senator WHITEHOUSE. Well, let us go from specifics to generals, and let me put up a graphic that shows some of the folks who fund the Federalist Society.

Senator WHITEHOUSE. It is a pretty significant group of people who tend to share very conservative and pro-corporate points of view. It reflects that at least 14 of the donors are actually anonymous, which is a very unfortunate part of our current political world. Actually, probably more than that because Donors Trust here is an organization whose sole purpose is to launder the identity off of big donors so that a recipient of funds can report that they got the money from Donors Trust rather than the true party in interest. So, we do now know how much anonymous money flowed through them, but I would contend that this is a pretty strong group of right-wing, conservative, pro-corporate funders.

And presuming that to be true, should that give you or anyone in this process pause that groups like this may have had such a significant role in selecting you to be in this seat today?

Judge KAVANAUGH. Senator, Mr. McGahn was the one who contacted me. I interviewed with the President, and I know the President was—I am the President's nominee. He was directly involved in making that decision. I am sure he consulted with Mr. McGahn and others. I know he consulted widely with a lot of people to get input on the—very widely to get input on the—at least the people

who were the finalists. So, that part of it, my 12-day experience, was with the White House Counsel's Office and the President and Vice President, too.

Senator WHITEHOUSE. Okay. So—

Judge KAVANAUGH. And I also do not—I am not familiar with all the—

Senator WHITEHOUSE. Whatever the role of the Federalist Society was in all of this, it was, and there is plenty of reporting. We do not need to litigate that. Between us, you do not know is what you have testified, and that is fine.

Judge KAVANAUGH. On my process, and, again, yes.

Senator WHITEHOUSE. But you are fairly familiar with the process generally because you used to run it in the Bush White House or have a significant role in it, the process of judicial nomination selection. Judicial nominee selection, correct? You have been inside that machine.

Judge KAVANAUGH. I did not run it. Judge Gonzales, when I was in the Counsel's Office, was the Counsel. He—

Senator WHITEHOUSE. But you have been inside the process.

Judge KAVANAUGH. I have—I have been inside the process, yes.

Senator WHITEHOUSE. So, the next thing that happens going forward is that we see the Judicial Crisis Network showing up, and they spend millions and millions and millions and millions of dollars to run ads urging Senators to support you. Now, I do not know whether we can show that those were the same funders because they are engaged in what is called, as you know, dark money funding. They do not report their donors. But I would be prepared to make a very substantial guess that there is enormous overlap between the funders of the Judicial Crisis Network campaign for your confirmation and the Federalist Society donor group, to the extent that we are aware of it since so many of them are anonymous.

Hypothetically, should the American people have concern about the role of very, very big spenders and influencers doing things like being involved in the selection of a Supreme Court nominee and running dark money campaigns to support the confirmation of a nominee? Is there any cause for concern there as a general proposition?

Judge KAVANAUGH. Senator, there are a lot of premises in your question that I am not sure about.

Senator WHITEHOUSE. I am not asking you accept the premises as true. I am asking it as a hypothetical.

Judge KAVANAUGH. Well, I—

Senator WHITEHOUSE. If there were very, very significant big special interest funding behind the organization that was responsible for selecting you and recommending to the President that he nominate you, and again from a very similar group in supporting the dark money campaigns that are being run on your behalf for your confirmation, would that be a matter of concern, or is that all just fine and we should not even care about getting the answers?

Judge KAVANAUGH. So, two things, Senator. One is, I have described the process I went through with Mr. McGahn, the President, and the Vice President—

Senator WHITEHOUSE. Yes.

Judge KAVANAUGH. And the selection. And that is what I know about my process. Two, on the ads, there were a lot of ads against me, as well, and I have seen those, and, you know, our family has seen those. And then there were ads for me, and we have seen those, too. And as Chief Justice Roberts said in his hearing, it is a free country, and there are ads for and against, and obviously we—as Senator Durbin said—

Senator WHITEHOUSE. Should we as citizens know who they are, who is funding the ads, just as a matter of citizenship? Is that—

Judge KAVANAUGH. Well, I think that is, first and foremost, a policy question for the Congress to decide on what disclosure requirements it wants to put in. And then if those disclosure requirements were put in or State governments could try to make disclosure requirements. I think, some have tried, and then there would undoubtedly be challenges to that, and what is the First Amendment implications of that. And that would come to a court, and I would keep an open mind on that case under the precedent and First Amendment law, and we would think about that.

The policy question, I think, is really for Congress in the first place to determine, assess, study exactly what kind of disclosure requirements should be in place.

Senator WHITEHOUSE. Yes.

Judge KAVANAUGH. I understand—

Senator WHITEHOUSE. The potential hazard there is that the unleashed power of unlimited political dark money then becomes like a ratchet, the obstacle to solving that problem. And I hope you can understand that as a matter of political principle.

Judge KAVANAUGH. I do understand the concerns about money in the political system. When I worked for—and the time it takes all of you and when I worked for President Bush in the 2004–2003–2004 timeframe, for example, and how many fundraisers he had to do, and going back to the September 11th point and the time and burdens on the Presidency, he had to do a lot of fundraisers. Running for President while being President—

Senator WHITEHOUSE. It has gotten a lot easier since now you can just get a huge special interest to set up a 501(c)(4) and drop tens of millions of dollars in, and it is [snapping of fingers] like that, and the public does not know who is behind it. Only the—a very few people are in on what the deal is. So, it has gotten easier since President Bush, but not better.

Judge KAVANAUGH. Well, I think for some Members, particularly in the House, if you have a—if you are running for re-election and a third party group comes in against you, and you do not have—you have to go out fundraising and spend even more time, I think—at least as I understand it, that is part of the concern I have heard over the years just generally, is the time that each of you has to spend and the Members of the House have to spend.

Senator WHITEHOUSE. So, let me just continue on forward through this problem of funders. On the Court, on the D.C. Circuit and potentially on the Supreme Court, you will often see cases brought by groups, like, for instance, the Pacific Legal Foundation. Are you familiar with that group?

Judge KAVANAUGH. I have seen briefs by the Pacific Legal Foundation.

Senator WHITEHOUSE. Do you know what they do?

Judge KAVANAUGH. I will take your description.

Senator WHITEHOUSE. Okay. My description is that they get money from right-wing conservative and corporate interests, and they look for cases around the country that they believe they can use to bring arguments before the Court. I argued against them in the Supreme Court at one point. They came all the way across the country to the shores of Winnapaug Pond, Rhode Island, to hire a client whose case they could take to the Supreme Court with a purpose to make a point. And they are not alone in doing this. There are a number of similar groups who perform this service.

And it causes me to think that sometimes the true party in interest is actually not the named party before the Court, but rather the legal group that has hired the client and brought them to the Court more or less as a prop in order to make arguments trying to direct the Court in a particular direction. Is that an unreasonable concern for us to have about the process?

Judge KAVANAUGH. Senator, I think there are public interest litigation groups spanning the ideological spectrum that look for cases to weigh in on as amicus briefs—in amicus briefs, and there are—also, of course, there have been historically—you look for—as I understand it, people try to identify suitable plaintiffs to challenge—and this, again, is across the entire ideological spectrum.

Senator WHITEHOUSE. What are the signals that that has gotten out of hand, that there is something rotten in Denmark?

Judge KAVANAUGH. That is an interesting question, Senator, and I think it is an important one, but it is not one that I think I have a great answer to.

Senator WHITEHOUSE. Well, let me propose one thought to you, which is that the Supreme Court at least should fix its rules on who the amici are who turn up, and require some disclosure of who is really behind them. The only thing the Supreme Court requires is to disclose who paid for the brief. The brief itself is not a very big expense. And so, very powerful interests can come in behind an amicus group that has a lovely name like Citizens for Peace and Prosperity and Puppies, and nobody knows who is really in interest. So, that would be one thing that I think would be a concern.

Judge KAVANAUGH. Can I—

Senator WHITEHOUSE. Another thing that would be a concern, I would think, would be when you see these special interest groups rushing out trying to lose cases in order to get before a friendly court. It really seems improbable that somebody who has actually tried cases, and who has been around courtrooms a lot, and who has seen a lot of litigation and a lot of great litigators, I have never seen anybody once try to lose a legitimate case. So, in the wake of Justice Alito's signaling about what then became *Friedrichs* and *Janus*, to see these groups rush out and ask the Court to rule against them so they can get—hot foot up to the Supreme Court where they expect a good outcome, to me that—there is just something that does not seem right about that. That seems to me a little bit like faux litigation; that there is something else going on other than real parties having real arguments, and the Supreme Court ultimately settling properly prepared real disputes.

Do you have any concern about the optics of people rushing to lose cases below to come before what they think is a friendly Supreme Court? Does that seem just a little bit odd?

Judge KAVANAUGH. I will—

[Disturbance in the hearing room.]

Judge KAVANAUGH. Acknowledge, Senator, I am not entirely familiar with that phenomenon.

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. I would be interested in more—

Senator WHITEHOUSE. I might follow up with you with a, you know, question for the record to get your more deliberate thoughts about it.

Judge KAVANAUGH. And on your amicus thought, I am interested in the specifics of your proposal, and certainly if confirmed, I would—

Senator WHITEHOUSE. Because here is the concern. You know perfectly well that the Court depends on—as much as anything—on its reputation. You do not have a purse and you do not have an army, you stand on your reputation in the judiciary, and you must not only act justly, but be seen to act justly. And what I have laid out is a scenario in which very big special interests have a significant role in funding the group that I believe, and much reporting says, is responsible for getting you to the top of the greasy pole of—

[Applause.]

Senator WHITEHOUSE [continuing]. Of nominee selection. And that the same funders are behind the Judicial Crisis Network operation that is politically pushing for you.

[Disturbance in the hearing room.]

Senator WHITEHOUSE. That the—

Senator LEE. Senator Whitehouse, we are going to add 1 minute to your time.

[Disturbance in the hearing room.]

Senator WHITEHOUSE. That some portion of the Supreme Court's docket is made up of strategic cases rather than real litigation in which somebody has gone out to find an appropriate plaintiff, hire the client, bring them in. And by the way, when they are done with them, they fire the client rather unceremoniously, in my experience. And then when the proper case comes up, you see this flood of special interest amici with terrible transparency into who is behind them. In one case, we tracked one of these big funding groups behind 11 different amicus briefs in the same Supreme Court case. So, the whole amicus thing begins to have a really rank odor to it.

And then at the end of the day, where things really start to go haywire, in my view, is when you go back to those 5-to-4 decisions that I talked about yesterday, which I think is the most heart-breaking thing that I experienced in my political life. I used to argue in front of appellate courts. It was what I did, not at your level, but I have been in front of the First Circuit a lot. I have been in front of the Supreme Court once. I have been in front of the Rhode Island Supreme Court more than I can remember. I kind of thought that I was a reasonably good appellate lawyer, and the idea that our Supreme Court is deciding as many as 80 cases under Justice Roberts on a pure partisan divide, I think that has a real

signaling problem. And I hope that you will at least consider that that is something that the Court needs to cure rather than make worse in order to continue having its credibility.

I think 80 cases in which all the Republicans go one way and cannot bring a single Democrat appointee with them, that is a tough data point. And then when you look at that tough data point and you see that more than 90 percent of those cases, if you look behind at the outcome, it had a big—one of the interests that I mentioned that are very, very important to big special interests that were implicated. And then when you look at the win/loss rate in those cases, and it is 100 percent—100 percent—for this crowd of big special interests. And then here is where you come in at the end. This is the Roberts' Five majority in those 5-to-4 cases where these conservative groups have come in to make their pitch. They have won 92 percent of the time in those 5-to-4 cases.

If you figure they have thrown a couple of long balls, you know, like Hail Marys, and maybe that is the 8 percent, that is a hell of a record. And then if you look at your record on the D.C. Circuit where these conservative groups come in, you line right up: 91 percent, 92 percent. And I think when you put the whole saga together, from the big special interests lurking behind the Federalist Society, to the big special interest funding, the Judicial Crisis Network, to the big special interests behind the Pacific Law Foundation and the Washington Law Foundation, and this little array of, I would say, strategic litigators who are funded by corporative interests and right-wing interests, and then these amici, we do not know who is behind them, and then you see this result, that is a tableaux that is an alarming one, I think, for the Court. And I would urge you to think hard about whether that is the direction you would want to continue to go as an Associate Justice of that Court, because at some point, those numbers catch up with you. At some point, as I said yesterday, pattern is evidence of bias.

Judge KAVANAUGH. Senator, a couple of thoughts. First, on the amicus briefs, at least in my experience, I pay attention to the quality of the arguments in the briefs, not the identity of the parties on them. But I take your point on the disclosure. I would be interested in the specifics of anything you are talking about disclosure requirements for the Supreme Court.

Two, I do believe deeply in the idea that we are a Team of Nine and need to be working together. And I take—I take the point, too, that it is very important if I am confirmed that I work with, as best I can, and I will, to maintain the confidence of all the American people in the independence and impartiality of the Supreme Court at all times. I am aware that we ultimately—

[Disturbance in the hearing room.]

Judge KAVANAUGH. I am aware everything I do, if I were to be confirmed, would help affect that, how I decide, what I write in opinions, how I treat litigants in oral argument, where I speak, when I speak, where I teach, what I say on the outside, everything goes into how I behave, what I do in my volunteer time. Everything goes into the impressions of me as one part, if I am confirmed, of the Supreme Court. And I take very seriously your broader point about maintaining confidence of all the American people and the

integrity and impartiality and independence of the Supreme Court. So, I appreciate that broader point.

[Disturbance in the hearing room.]

Senator WHITEHOUSE. My time has expired, Chairman. There will be a second round, correct?

Senator LEE. There will be. I am happy to give you an additional minute in light of the fact that you had two additional interruptions, if you would like.

Senator WHITEHOUSE. Well, I—just to make a final point, actually I think this is not an offshore storm. It has made landfall when you see polling that shows that 49 percent of Americans think a corporation will get a fairer shot in the United States Supreme Court than an individual, seven times as many that think it is the other way. Now, you still have a few to work with who are undecided on that question, but the fact that about half of the American people already believe that corporations will be treated more fairly in the United States Supreme Court than human beings will, and the alignment of that with the facts that I have shown you about the Supreme Court's record of 80 partisan decisions, 92 percent involving big corporate special interests and a hundred percent win rate for them in those cases. I think we are at a tough place right now, and I think we really need to get back away from that. So, thank you.

Senator LEE. Thank you, Senator Whitehouse.

Judge Kavanaugh, I want to get back to a couple of questions that colleague, Senator Whitehouse, was asking you a minute ago. Just to be clear, did anyone from the Federalist Society contact you about the vacancy after Justice Kennedy made his announcement that he would be stepping down from the Court?

Judge KAVANAUGH. No.

Senator LEE. And during the campaign of President Trump, as I recall, he came out with two different lists, two different lists of possible Supreme Court nominees. The first list had 11 names on it. The second list, if I am not mistaken, had 21 names on it, which included the previous 11. There were reports at the time that some outside groups had had some involvement in that. Were you involved in the first list? Were you included in the first list?

Judge KAVANAUGH. I was not.

Senator LEE. Were you included in the second list?

Judge KAVANAUGH. I was not.

Senator LEE. Okay. So, you were—you became under consideration only after President Trump took office, correct?

Judge KAVANAUGH. That is my understanding. That is when I became identified.

Senator LEE. And after he was staffed up, after he had his own staff, his own staff within the White House. Within the Supreme Court, is it the case that there is an aisle, much as there in the United States Senate or the United States House of Representatives?

Judge KAVANAUGH. There is no aisle or separate caucus rooms in the Supreme Court, either literally or figuratively, in my view.

Senator LEE. And under most circumstances in most years, in recent—in the last decade or so, the number of cases that are decided on a 5-to-4 margin have been very low, less than 20 percent as

far as I can count. Is that roughly consistent with your understanding?

Judge KAVANAUGH. That is.

Senator LEE. Meaning that the configuration of 5-to-4 is much less common than basically all of the others. It is dwarfed in comparison to those cases that are decided either 9-to-0, which is often the biggest contingent, or 8-to-1, or 7-to-2, or 6-to-3. Now, even in those cases that are decided 5-to-4, does the fact that it was decided 5-to-4 make it any less of a legitimate decision? Does it make the judgment any less binding on the parties in that case?

Judge KAVANAUGH. No, it is still a decision of the Court no matter what the—what the ultimate majority opinion is composed of.

Senator LEE. And would it behoove a lawyer who is an officer of a court to call into question the subjective motivations of a court simply because of the fact that the Court decided a case on a 5-to-4 basis?

Judge KAVANAUGH. Well, if I were a lawyer arguing before the Supreme Court, I probably would refrain from questioning the motivations of the Justices. I think each of the Justices, I know them. They are all committed to the Constitution of the United States in impartially discharging their duties. Of course, they have different perspectives on certain issues, but they are all—I think we are fortunate to have eight hardworking Justices who have outstanding records and are committed to the Constitution and committed to the independence of the judiciary.

Senator LEE. What about in the—in the circuit court, in the D.C. Circuit where you have served? Would it be fair to suggest that a case is somehow less legitimately decided if that case were decided along the lines of the—which President appointed which member of the D.C. Circuit?

Judge KAVANAUGH. The precedent stands either way.

Senator LEE. Thank you. I want to get back to a separation of powers point that has come up along various lines of questions asked my colleagues today. Is the Constitution relegated to the judicial branch? Is it something that is to be upheld and interpreted only by those who wear black robes?

Judge KAVANAUGH. No, Senator. Let me take you through the process, I think. So, Congress, of course, passes laws, and in considering laws, Congress will also often assess the possible constitutionality of the laws passed. So, in the first instance, when you are considering the passage of a law, you might assess the First Amendment implications, or if it is national security, the Fourth Amendment implications, and—or the due process Fifth Amendment implications.

Senator LEE. And we have all taken our own oath to uphold the Constitution.

Judge KAVANAUGH. Right, so you do your best, and then the executive branch as well, the constitutional—whether to sign the bill, for example, for the President, if the President has a constitutional concern or a policy concern, but the President could veto the bill for that reason. That has certainly happened historically. And then when it comes to the Court, of course, we are—we assess in cases or controversies the constitutionality of a law that is challenged there in the context of a specific case or controversy. We do not—

President Washington, George Washington, asked the Supreme Court for an advisory opinion in his first term on a disputed legal issue. Actually, it might have been his second term. But President George Washington asked for an opinion, and the Supreme Court respectfully wrote back and said, we do not provide advisory opinions on—we only decide cases or controversies. Thereby, I think, underscoring the point you are making with your question, which is constitutionality of laws is assessed in the——

[Disturbance in the hearing room.]

Judge KAVANAUGH. Is assessed in the first instance by Congress and the Executive.

Senator LEE. So, it would be not—it would not be inappropriate for us as Members of the legislative branch to decide to protect something that we believe is constitutionally protected, regardless of where we might place our bets on what the courts would do it. If we see a particular right that might be jeopardized by an act of Congress we are considering, it would not be inappropriate for us to say, look, we are not sure exactly how far the Supreme Court will go here. Out of an abundance of caution, out of respect for the Constitution, we are going to draw the line more carefully so that we make sure that we do not step into unconstitutional territory.

Judge KAVANAUGH. That has happened historically, and I think happens today. And that underscores how the Constitution tilts toward liberty in so many different ways. It tilts toward liberty because it is hard to pass a law, as you know, with both Houses and the President, and then not only might there be policy objections, but Members of Congress might say, well, even if the Supreme Court would uphold this law based on my assessment of the Supreme Court, I have a First Amendment objection, a Fourth Amendment objection, Eighth Amendment, Cruel and Punishments Clause objection, Equal Protection objection, and based on my view of the Constitution, I am going to vote “no” on this law. That is another way in which the constitutional structure all fits together and tilts toward liberty.

Senator LEE. For that very reason, it would probably lead to some bad results if we were to not do that. In other words, if we were always inclined to say let us just pass this, if it is unconstitutional, the Court will do something about it. And, of course, you have instances in which they could create problems.

Judge KAVANAUGH. Yes, Senator. I think Justice Kennedy has written eloquently about this. Each official—each officer in Congress, each Member of Congress, each Senator, the President takes an oath, of course, constitutional oath, to abide by the Constitution. And that is very important for each Member to understand and underscore, as I know all of you do, and that is an important part of the separation of powers process. I do not think that the Framers thought, well, let us pass something even though we ourselves, meaning the Members of Congress, think there is a constitutional problem here. That is not how it has worked historically, nor do I think that is how the Framers necessarily intended for Congress to work.

Senator LEE. And there are myriad of instances moreover in which we might enact something that for one reason or another might not be challenged for a long time, or might be difficult to

challenge due to justiciability issues, somebody lacking standing, absence of a ripe controversy and so forth.

Judge KAVANAUGH. That particularly happens in the national security context, I think, Senator, because there is often not someone with standing, especially if it is something being done in a foreign country against foreign citizens that might be difficult to get into court in some way or another.

Senator LEE. One of the reasons I focus on this today is there was an exchange you had with one of my colleagues earlier today about the indefinite definition of American citizens apprehended on U.S. soil. There was some discussion surrounding this, suggesting that *Ex Parte Quirin* might somehow justify this. You do not need to respond to this, but I think it is a point that needs to be mentioned.

Justice Scalia mentioned in his dissent in *Hamdan* that *Ex Parte Quirin* was not this Court's finest hour. And, in fact, what happened was the case was argued. It was decided the next day. The saboteurs were taken out and executed the next week. Then the opinion itself was issued many months later. So, again, I'm not asking you to opine on the ongoing validity of *Ex Parte Quirin*, but the point is, you seem to agree that Congress certainly has the authority to protect liberty, notwithstanding the possibility that the Supreme Court might not step in, in a particular case.

Judge KAVANAUGH. Absolutely. A couple of points in response to that, Senator, if I might. Justice Scalia, of course, dissented in that case joined by Justice Stephens, one of his more powerful dissents on individual liberty.

[Disturbance in the hearing room.]

Judge KAVANAUGH. One of his more powerful dissents protecting individual liberty there, ruling, Justice Scalia with Justice Stephens, that it was impermissible to hold an American citizen in long-term military detention, and I thought that was an important opinion of his. When I gave a talk once about Justice Scalia, I identified that as one of his most important opinions and a very powerful opinion.

On the *Quirin* opinion itself, it also dealt with some—many who were not American citizens. But you are right, there was an American—there were American citizens involved. The Court, you are right, of course—you have studied this as much as anyone, but the Court did resolve the case very quickly. And the opinion, I have spent many an hour trying to decipher certain paragraphs of that opinion for cases I have had. It is not easy.

I will—I will say the Court to its credit—give it a little credit—did have an 8-hour or something oral argument. The Attorney General of the United States argued *Quirin* personally, and I have read the transcript of that to try to figure out what was going on in the opinion that did not unlock the box completely for me on what was going on in the *Quirin* opinion. But your point, Justice Scalia did say it is not—was not the Court's finest hour. It was a rush. It was a rush. And rushes—sometimes the Court has to rush, but rushed decisions in a judicial context sometimes are not always the best.

Senator LEE. On that point, would you be open to the idea of bringing back the era of the 8-hour oral argument?

Judge KAVANAUGH. I do not—the 8—hour oral argument. We did have one in a—in an en banc case maybe 2 years ago that went all afternoon.

Senator LEE. That sounds like—

Judge KAVANAUGH. After we got back to the conference room, I do not think anyone was saying we should do that in every case.

Senator LEE. Understood. Understood. Let us talk about judicial philosophy for a minute. I would like to discuss Federalist 78. In Federalist 78, Hamilton discusses the dichotomy between will on the one hand and judgment on the other; “will” being something that is exercised by the political branches, primarily by the Congress, by the legislative branch, and “judgment” being something exercised by the judicial branch. What is the difference between those two?

Judge KAVANAUGH. The judicial branch is deciding cases or controversies according to law. The legislative branch is making the policy, exercising the will. The judicial branch can never exercise the policymaking role that is reserved to the Congress. Now, admittedly that is speaking to the level of generality and there are tough cases at the margins always in trying to figure out what the line is here.

But as a general proposition, it is important for every judge to go in with the mindset of I am not the policymaker. I am the law interpreter, the law applier in a particular case. And I think that is a very important part of the Federalist papers that is woven into the constitutional structure into Article III. And that judges—I certainly have tried for 12 years as a judge on the D.C. Circuit to incorporate that basic foundational principle into how I approach each case. And it is a very critical bedrock principle of what judges do in our constitutional system.

Senator LEE. Now, within that framework, when we enact a law, what determines what it is that you have interpret, that you have to interpret? Is it what we say or is what we subjectively intended?

Judge KAVANAUGH. It is what is written in the text of the statute, Senator. Just Kagan said it well at a talk 2 years ago, maybe 3, at Harvard Law School. I was present in the audience. She said we are all textualists now. She was talking about Justice Scalia, who, of course, brought about significant change in the focus of all Federal judges. I have seen it across the supposed philosophical spectrum. All Federal judges pay very close attention to the text of the statute, and that is why I think Justice Kagan said we are all textualists now because she explained that every judge really cares about the words that are passed by Congress.

Now, why is that? I think about it both from a formal and a functionalist perspective. As a formal matter, the law passed by Congress is the binding law, is what is signed by the President. It is what has gone through Senate and the House, and that is the law. But also as a practical or functional matter, I think having seen the legislative process, I know how compromises come together in the House and the Senate, within the Senate, within the House. There are negotiations late at night over precise words and compromises inevitably. Legislation is compromise. The Constitution was a compromise Legislation is a compromise.

And when we depart from the words that are specified in the text of the statute, we are potentially upsetting the compromise that you all carefully negotiated in the legislative negotiations that you might have had with each other. And so, that is a danger that I try to point out when we are having oral argument in a case or we are deciding cases, that if we deviate from what Congress wrote, we are potentially upsetting this careful compromise. Even if we think we would have struck the compromise in a different place as judges, that is not really our role. So, I think both as a formal and functional matter, it is important to stick to the text.

There are canons of interpretation, which occasionally cause you a presumption of mens rea, presumption against extra territoriality and the like that cause you to superimpose a presumption on the text. But otherwise, sticking to what you passed is very important.

Senator LEE. But you certainly consider yourself a textualist, and if you follow Justice Kagan's statement, we are all textualists now. That is what judging is. Judging is—

Judge KAVANAUGH. Judging is paying attention to the text, in statutory cases paying attention to the text of the statute informed by those canons of construction such as presumption against extraterritoriality, presumption of mens rea, presumption against implied repeals, things like that, that are settled canons, although some of the canons are not so settled, which is a whole separate half hour of discussions.

Senator LEE. How does textualism relate to or differ from originalism?

Judge KAVANAUGH. So, originalism, as I see it, has—to my mind means, in essence, consequential textualism, meaning the original public meaning of the constitutional text. Now, originalism, it is very careful when you talk about originalism to understand that people are hearing different things sometimes. So, Justice Kagan, again, at her—at her confirmation hearing said we are all originalists now, which was her comment. By that, she meant the precise text of the Constitution matters, and by that, the original public meaning, of course, informed by history, and tradition, and precedent. Those matter as well.

There is a different conception that some people used to have of originalism, which was is there original intent. In other words, what did the people—some people—

Senator LEE. Subjectively.

Judge KAVANAUGH. Subjectively intend the text to mean, and that has fallen out of the analysis because, for example, let us just take the Fourteenth Amendment, Equal Protection Clause. Well, it says right in the text, “equal protection.” “Equal” means “equal.” As the Supreme Court said in *Strauder*, what is that but the law shall be the same for the Black and the White, and *Brown v. Board* focuses on the text. But there were some racist Members of Congress involved in that who did not think it should apply in that way to certain aspects of public life, but we do not—if you are doing—paying attention to the text, you do not take account of those subjective intentions, nor is it proper as a general proposition to take account of the subjective intentions.

They can be evident in certain cases, the First Amendment, for example, of the meaning of the words—

Senator LEE. Of the original public meaning.

Judge KAVANAUGH. Of the original public meaning. They can be evidence of that, but you are not—you do not follow the subjective intention. So, original public meaning, originalism, what I refer to as constitutional textualism, what Senator Cruz yesterday, I think, referred to as constitutionalism or constitutionalist. I think those are all referring to the same things, which is the words of the Constitution matter.

Of course, as I have said repeatedly, you also look at historical—the history. You look at the tradition. Federalist 37 tells us to look at the liquidation of the meeting by historical practice over time. And then you look at precedent, which is woven into Article III, as I said in Federalist 78. But the—you know, start with the words as Justice Kagan said, we are all originalists now in that respect of paying at least some attention to. More than some. Paying attention to the words of the Constitution.

Senator LEE. So, if we stipulate, for our purposes today, as we are having this conversation, that originalism refers to basically textualism applied in the constitutional sphere with an eye toward identifying the original public meaning of the constitutional text at issue, you are an originalist.

Judge KAVANAUGH. That is correct, and as Justice Kagan said, I think that is what she meant, we are all originalists now. And I do not—I think she said what she meant and meant what she said when said that.

Senator LEE. Sure. What, by the way, would be the argument against that? To me, that sounds like judging. Why would one argue against being that type of judge, against being a textualist originalist?

Judge KAVANAUGH. Well, there are different philosophies of what a judge does, but I think that judges, you know, what the role of a judge is. But I think the law—Article VI of the Constitution says this Constitution shall be the supreme law of the land, and the word “law” is very important there. It is not a set of aspirational principles. It is law that can be applied in court, and what is the law? The law are the words that were ratified by the people, and, therefore, can be applied in the—in the courts of the United States. And it says the “supreme law.” What does it mean by that? It means when you pass a statute that is inconsistent with the Constitution, the supreme law controls, namely the Constitution controls over a contrary statute, and that is, of course, also discussed in Federalist 78 as well of what is the supreme law of the land, and the Constitution is the supreme law.

Again, precedent, historical practice subsequent to the passing of the text. We see that, for example, in the Establishment Clause cases. The Court will often look at the text. What is the historical practice and precedent, which I have said is rooted in Article III. Those things all go into it, but the words, the original public meaning are an important part of constitutional interpretation, and has been, I think, throughout.

Senator LEE. Let us suppose Congress in its infinite wisdom—with its approval rating that ranges between 9 and 11 percent, making us slightly less popular than Raul Castro in America, and slightly more popular than the influenza virus, which is rapidly

gaining on us—what if we decided that, you know, we are all busy. There are parades to attend. There are political rallies to organize. We get tired of the busy, drudgerous work of actually making laws, and we also do not want to make ourselves accountable for the laws we pass. It is much easier to just pass a broader statement. So, we say we hereby pass a law that says we in the United States of America shall have good law, and we hereby delegate to the herewith created United States commission on the creation of good laws the power to promulgate, and interpret, and enforce good laws in the United States. What constitutional issues do you see there?

Judge KAVANAUGH. Senator, the Congress is, of course, assigned the legislative power in Article I of the Constitution, so if it delegates wholesale the constitutional power to another body, then that naturally poses a question of whether the body exercising that power ultimately has improperly exercised the legislative power, and whether that rule or what have you that is enacted by that body is lawful because it was not enacted by Congress. So, the Framers intended that Congress would enact the laws, and that the Executive would enforce the laws, and that the judiciary would, of course, resolve cases and controversies arising under those laws.

Senator LEE. And yet in some respects, it is not that far removed from some of what we do today. We may not pass something as extreme as what I have described in my hypothetical, but in some cases we will essentially say we shall have good law in area X, and we hereby give commission Y the power to make and enforce good laws in that area. So, is there some point at which we cross a threshold of unconstitutional delegation?

Judge KAVANAUGH. Well, the Supreme Court, as you know, Senator, has a non-delegation principle, and at least under current precedent, it is allowed the delegation—and I do not want to get too specific here, but it is allowed some delegation. Some Justices or judges would say actually when the Executive enacts rules pursuant to those delegations, that is the exercise of Executive power, but I think there has been some pushback on that. And in any event, the Supreme Court has doctrine on the non-delegation principle, and the line is debated on where that should be drawn. But there is precedent that does suggest that at some point, Congress can go too far in how much power it delegates to an executive or independent agency.

Senator LEE. And when we do that at some point, we are shirking our own responsibility because we are making lawmakers rather than laws, and we are also consolidating into one body the power to make and enforce laws, which is not only something that can lead to tyranny, it is the very definition of “tyranny” itself.

I want to get to the campaign finance discussion that you were having a few minutes ago with Senator Whitehouse. With regard to *Citizens United*, did the Supreme Court uphold the disclosure requirements at issue in *Citizens United*?

Judge KAVANAUGH. It did. I believe that was an 8-to-1 margin.

Senator LEE. And, in fact, you have written on this, that there is a distinction for First Amendment purposes, for constitutional purposes, between laws mandating disclosure and laws banning the doing or the saying of something. Is that not right?

Judge KAVANAUGH. That is what the Supreme Court has said in certain context, and that is the law as set forth by the Supreme Court. *Citizens United* is a good example of that, Senator.

Senator LEE. And in a case called *EMILY's List v. FEC*, you wrote that disclosure requirements trigger rights that receive “less First Amendment protection” than speech prohibitions—other types of speech prohibitions.

Judge KAVANAUGH. And I think that followed from Supreme Court law and is consistent, I believe, with subsequent Supreme Court law. Of course, the subsequent Supreme Court law controls.

Senator LEE. Do you have a favorite among the Federalist Papers?

[Laughter.]

Senator LEE. I am not asking you to choose here between Liza and—

Judge KAVANAUGH. Yes, no, that is right. Yes. So, I like a lot of Federalist Papers. Federalist 78, of course, the independent judiciary, the role of the judiciary. Federalist 69, which says the Presidency is not a monarchy is a very important one. Hamilton explains all the ways in which the Presidency is not a monarchy in our constitutional system. I think that is very important. Federalist 10, which talks about factions in America, and explains that having the separation of powers in the federalism system, dividing power in so many different ways would help prevent a faction from gaining control of the entire—all the power for the people of the United States. And that makes it frustrating at times because it is hard to pass new legislation, but that also—that division of power helps protect individual liberty, and I think that comes a bit from Federalist 10.

Federalist 37 and 39 talk about, on the one hand, how we were just talking, laws or the Constitution over time can be the term liquidated by historical practice. What does that mean? That means that as the branches fill out the meaning of the Constitution over time with practices, those can be relevant in how the Court subsequently interprets certain provisions. We see that in *Dames & Moore v. Regan*, for example. We talk also about the national and Federal Government, so the combination in 39, the combination that we have this odd—that is the genius, right—of having a national government plus State governments, and then within the national government, the House is proportional representation, the Senate is State representation. That interesting compromise which Madison, by the way, was opposed to, but that compromise at the Convention.

Federalist 47, which Senator Klobuchar mentioned yesterday, the accumulation of all power in one body is the very definition of tyranny. I start—so, I start my separation of powers class every year with that exact quote that you read yesterday, Senator Klobuchar, because that is very important. 51, if men were angels, we do not—we would not need government. So, sorry, I have got eight kids.

[Laughter.]

Senator LEE. No, it is brilliant, and I think that is a greatest hits list. If these were on Spotify, I would say you put together a list of those. Let us close in the minute and a half I have got left, and I gave myself an additional 30 seconds because of the two interrup-

tions there. Tell me how you were informed by Federalist 51, and how that relates to your role as a jurist, your role as a jurist now on the D.C. Circuit, the role that you would play if you were confirmed to the United States Supreme Court. This understanding that government is an exercise in understanding human nature. If we were angels, we would not need government, and if we had access to angels to govern over us, we would not need all these rules, these cumbersome rules that make government so inefficient and so frustrating. Why is that important, and how does that affect you as a judge when trying to interpret the Constitution and trying to interpret acts taken pursuant thereto?

Judge KAVANAUGH. That is an—that is an interesting question, Senator. I think we recognize that we are all imperfect, first of all. All of us as humans are imperfect, and that that includes judges, and that includes legislators, and it includes all of us are imperfect. And so, we recognize that in how we go about setting up our Government. If there were some perfect group of people, we would put all the power in that one body, but because we are imperfect, putting all the power in that one body would be, as Senator Klobuchar was saying, the definition of tyranny.

So, I think the way we deal with the imperfection while also having a government, because we are imperfect, is dividing the power, separating the power. And, again, to my mind, that all reinforces why the Framers, the genius—despite the flaws in the Constitution, and there were flaws—the genius of separating the legislative, executive, and judicial powers, tilting toward liberty in all those respects, and then having a federalism system where we would still have State governments that can further protect liberty and be laboratories of democracy as well. I think all that, because we are imperfect and because we recognize the imperfections.

It is also why we have things like a jury system and even within the judiciary we did not trust a judge to do trials on his or her own, criminal trials or civil trials. We have a jury system to recognize, and we have usually 12, and that is designed to recognize that we are imperfect, and sometimes that is why we group decision-making. That is why we have 535 legislators. That is why we have nine Justices. We do not usually have one person, and so, too, in juries.

So, I think that all maybe stems from the same philosophical understanding that we are imperfect beings, and that we divide power, and that we make sure that no one person in a jury situation or other situations where our liberty can be affected is exercising total control.

Senator LEE. Great. Thank you very much, Judge. My time has expired. I am not the Chairman of this Committee, even though I am playing him on TV. I understand that under the previous order entered before he left, we are supposed to take a 10-minute break. We will stand in recess for 10 minutes.

[Whereupon the Committee was recessed and reconvened.]

Chairman GRASSLEY. Welcome back, Judge Kavanaugh.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I was just visited by your wife, who is here, and she just told me you celebrated your 64th wedding anniversary. Is that correct?

Chairman GRASSLEY. Well, nobody's going to believe that.

Senator KLOBUCHAR. Yes, well, that is what she told me. I thought this was very romantic that you are gathered here.

[Laughter.]

Senator KLOBUCHAR. I want to start, Judge Kavanaugh, going back to where we started yesterday, and that is about the documents, the production of documents from the time that you worked in the White House. Do you personally have any objections to the release of the documents from your time as staff secretary?

Judge KAVANAUGH. Senator, I am not going to take a position. That is, in my view, a decision for the Committee in consultation or discussion with the executive branch and the—

Senator KLOBUCHAR. So you are not going to say whether or not you have a problem with it?

Judge KAVANAUGH. I do not think it is my role to say one way or another, at least, as I analyze the current situation. That is a decision for the Committee and the executive branch and the Presidential library. They are President Bush's documents ultimately.

Senator KLOBUCHAR. Since right now we are not able to review those documents in addition to the 102,000 that the White House has deemed "theirs," that we are not able to see and asserted a privilege that has never happened before in a Supreme Court nomination hearing, is there anything in those documents or in the staff secretary documents that you think we would like to know that is relevant to some of the topics we have discussed today? I mean, you must know what is in them.

Chairman GRASSLEY. Before you answer, without taking time off of her time, it is incorrect that "committee confidential," no Senators can see those records. Any—all 100 Senators can see those records. In fact, we set up separate terminals so people can go there. We have not had very many people take us up on the offer.

Senator KLOBUCHAR. Okay. But, Mr. Chairman, not to go into my time either, to respond to you, I was not talking about those 189,000 documents. I was talking about the ones that we are not allowed to see at all from the staff secretary time, as well as the 102,000 that the White House has asserted privilege on that we are not able to see. So I am not even talking about the 189,000. Okay. Thank you.

Chairman GRASSLEY. I stand corrected.

Senator KLOBUCHAR. All right.

So, again, I asked if there is anything in those documents you think would be relevant to our discussion here?

Judge KAVANAUGH. Senator, those documents are President Bush's documents and for the Committee and the Bush Library and the executive branch to negotiate about. And as discussed, I have 12 years of judicial record, and this is not a new issue. This is an issue that came up in Justice Scalia's hearing and Chief Justice Roberts' experience with the SG documents with Justice Kagan.

Senator KLOBUCHAR. Those are Solicitor General. I am talking about the ones in the White House time.

Judge KAVANAUGH. I guess I am not seeing a distinction. They are both executive branch documents, so there is one executive branch.

Senator KLOBUCHAR. I think one is involving the ongoing Solicitor General, but I have just one more question on this line. You just said that rush decisions are not always the best in answer to the discussion with Senator Lee. Do you think a good judge would grant a continuance to someone who just received 42,000 documents on the day before the start of a trial?

Judge KAVANAUGH. Senator, I am not—that is a decision for the Committee, and I am not familiar with the circumstances of the document.

On the Solicitor General documents, I just want to say one thing. With Chief Justice Roberts, it was not active cases. Those 4 years of his documents from the time he was Solicitor General from 1989 to 1993—he was nominated in 2005. It is my understanding that those documents—so my only point is it is not a new issue, but it is also not for the nominee to decide because they are the President's, former President's documents.

Senator KLOBUCHAR. Okay. Why don't we move on to the Executive power issues. Yesterday I mentioned your submission to the University of Minnesota Law Review. We thank you for making our law review so famous over the last month or so. In that article, you said that a President should not be subject to investigations while in office. You said in our meeting that Congress would likely act quickly if the President does something, in your words, "dastardly," a word you also used in the article. And I am struggling with the practical implications of that. What about a President who commits murder or if she jeopardizes national security or he obstructs an investigation or a white-collar crime? How do you differentiate between these crimes when you characterized them as "dastardly"?

Judge KAVANAUGH. So I think there are several issues going on in that question, Senator. The first thing I want to underscore is that what I wrote in the Minnesota Law Review was in 2009 when President Obama was President or becoming President, was thoughts on a variety of topics reflecting on my experience—

Senator KLOBUCHAR. I just want to pick up the tempo a little with my questions because I have so many of them. Could we get to that point about the "dastardly," if there is a way to differentiate?

Judge KAVANAUGH. Yes, but just to underscore it is real important. That was a proposal to be considered. It was not a constitutional position. I did not take any constitutional position on the issues you are raising. I want to underscore that. And if a constitutional question came to me, I would have an open mind and decide that.

On your point—

Senator KLOBUCHAR. But there is not any clear text in the Constitution that speaks to the question, so instead these are your own recommendations based on your own views and experience. Would that be a fair characterization?

Judge KAVANAUGH. But there are two different things going on. The one is about special counsel investigations, for example, or criminal investigations or civil lawsuits, and that is a question for Congress to consider whether they want to supplement the protection provided by *Clinton v. Jones* because there was a lot of criticism of *Clinton v. Jones*.

The second question, getting right to your point, is what is an impeachable offense, and that is actually a decision for you, not for me, because the House and the Senate—

Senator KLOBUCHAR. But I am just figuring out how whether we know something is dastardly or not if we cannot even investigate it.

Judge KAVANAUGH. Well, I think I am going to repeat that is a question for the—you are asking for—is it a high crime or misdemeanor?

Senator KLOBUCHAR. I am asking about your position that you stated in this law review article that a President is not subject to investigations while in office.

Judge KAVANAUGH. The “dastardly” comment—

Senator KLOBUCHAR. You are only saying that they should be subject to investigation as part of an impeachment and that there is no other investigation that could occur? Is that—

Judge KAVANAUGH. No. I was—first of all, on constitutional position on criminal investigation and prosecution, I did not take a position on the constitutionality, period. The idea that I talked about was something for Congress to look at if it wanted, so that is point one. Point two is the idea that if the—what is an impeachable offense, and that really is a question for the House and the Senate.

Senator KLOBUCHAR. Let me move on. This is about actual opinions and really along the same lines, and I know Senator Coons is going to talk to you about the special counsel statute, and we are very concerned about that. But in the *Seven-Sky v. Holder* case, I quote, this is you: “Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

And so then you told me when we had the talk in my office that you attempted to clarify your views two years later in the *Aiken County* case, but it seems inconsistent to me. So is it the case, your views, as expressed in actual opinions, not law review articles, that a President can just ignore a law until a court upholds it, like you said in *Aiken County*, or that a President can continue to ignore a law even after a court upholds it, like you said in *Seven-Sky*?

Judge KAVANAUGH. So ignore is not—the concept there, as I think we discussed when we met, and we had a good back-and-forth on that—the concept is prosecutorial discretion, and that is the concept I referred to in the *Aiken County* opinion to explain the footnote you are referencing. And prosecutorial discretion is, of course, firmly rooted—*United States v. Richard Nixon* case says the executive branch has the absolute—“exclusive authority and absolute discretion whether to prosecute a case.” That is an exact quote from *United States v. Richard Nixon*. And then *Heckler v. Chaney* says that that applies also in the civil context. And the limits—so prosecutorial discretion is well recognized. In other words, the U.S. Attorney’s Office might prosecute gang violence, but let low-level marijuana offenses go, in terms of an exercise of prosecutorial discretion.

Senator KLOBUCHAR. So if a court has held a statute constitutional, do you believe that a President should have to enforce it?

Judge KAVANAUGH. So, for example, let us talk about, for example, the marijuana laws. Those are constitutional. But a U.S. Attorney or the Attorney General could say, “We are not going to devote our resources to low-level marijuana offenses.” Those are perfectly constitutional.

Senator KLOBUCHAR. Let me just try one other example, the *Texas* case on pre-existing conditions. The administration has taken the position that that is unconstitutional, that part of the Affordable Care Act down in the *Texas* case, taking the position that you could actually throw people off of their insurance if they have a pre-existing condition. So let us say that that law is found to be constitutional. Could the President choose not to implement the part of the law providing protections for pre-existing conditions?

Judge KAVANAUGH. Senator, that is a pending case, so I cannot talk about it.

Senator KLOBUCHAR. Okay. This is just my concern because of this expansive view of Executive power where it brings us and where we end up.

I want to move on to some consumer issues. In 2016, you wrote an opinion, which was later overturned by the full D.C. Circuit, in which you found the Consumer Financial Protection Bureau unconstitutional. The majority recognized that millions of people were devastated by the financial crisis, and they upheld this Bureau, and we know now, in real time, the Bureau has helped about 30 million consumers obtain more than \$12 billion in relief. But you dissented in the case, and I want to talk about the consequences of this legally. I know you focused on the Bureau’s structure. We talked about that. You looked at the relevant history, and you said that agencies like the CFPB, the Consumer Financial Protection Bureau, amount to a headless fourth branch of our Government, and that they “pose a significant threat to individual liberty.”

So does it follow that you think that other independent agencies are also constitutionally suspect?

Judge KAVANAUGH. The Supreme Court has, of course, upheld since 1935, the *Humphrey’s Executor* decision, the concept and practice of independent agencies. On the *CFPB* decision, the structure of that agency deviated from the traditional historical practice of independent agencies—

Senator KLOBUCHAR. So you think the *Humphrey’s* case that was 80 years ago was correctly decided?

Judge KAVANAUGH. It is a precedent of the Supreme Court, and it has been reaffirmed many times. But on that *CFPB* case, I need to get this out, which is, I did not say that the agency had to stop operating. It could continue operating, and it still operates. What my constitutional concern was, was the structure with the single-member head, which had never been done before for an independent agency of that kind, and my remedy would not have been to invalidate the agency at all but would have been to make that person removable at will, and then you could have, if you wanted, amended the statute to have a multi-member agency.

Senator KLOBUCHAR. It also concerns me because other agencies like, say, the Social Security Administration, which you note in the dissent, in the opinion, they are also just headed up by one person,

right? So then, does it follow that that agency, as well, would be unconstitutional?

Judge KAVANAUGH. Again, Senator, my—let us go from the back door, which is the remedy, if there is a problem, is not that the agency has to stop operating. The remedy is that the person, a single person, would be removable at will instead of for cause. But the agency would continue to operate and perform its—

Senator KLOBUCHAR. But it would not have anyone heading it up.

Judge KAVANAUGH. No. It would have a single person heading it up, but removable at will in the case of the *CFPB*, so the agency—

[Disturbance in the hearing room.]

Senator KLOBUCHAR. I want to turn to what the majority felt about your dissent, and I think they recognized that the dissent would threaten many, if not all, independent agencies. I think they specifically mentioned the FTC, and I would add other ones like the Federal Reserve, Securities and Exchange Commission. Does it follow that you think these agencies are unconstitutional?

Judge KAVANAUGH. No, I did not say anything remotely like that, respectfully, Senator, in the case. All I was talking about was a single-headed independent agency.

Senator KLOBUCHAR. But that is like Social Security.

Judge KAVANAUGH. But the SEC, the FTC, those are the traditional—the FERC, the NLRB, are all—the Fed, are all multi-member independent agencies. And so those agencies are all the traditional *Humphrey's Executor* agencies. And the concern I explained with the single-director independent agency goes back to your point about Federalist No. 47, which is if you have an independent agency that is completely unaccountable to Congress or the President and it is one person in charge, that becomes an extremely powerful position.

Senator KLOBUCHAR. Okay. But Social Security has been like that for a long time, and so my issue is, when we were talking about Executive power, you talked about how Congress has to step in, right? That is a lot of the argument you have made to some of my colleagues—Senator Sasse; Congress has to step in. But in this case, Congress stepped in. Congress said we had this major financial crisis. That is why we started this agency. We have done this. And then you come in and in a minority opinion here, and you say that it is unconstitutional. And I would throw another Federalist Society back at you, Federalist quote. You quoted Hamilton yesterday from Federalist 83 when he said, “the rules of legal interpretation are rules of common sense.” Right?

Judge KAVANAUGH. Yes. I agree with that.

Senator KLOBUCHAR. All right. So it just does not make common sense to me that we would throw an agency out like that or—

Judge KAVANAUGH. But I did not.

Senator KLOBUCHAR [continuing]. Even the head of it. You are basically putting your judgment in the place of Congress.

Judge KAVANAUGH. But I did not throw the agency out. I said the agency could continue operating as it was. The only change would be instead of being for-cause removal, it would be at-will removal. That was the only—there was a judge, not me, on our court who

said because of that constitutional flaw, the whole agency had to stop operating. I specifically and explicitly rejected that as a remedy and said, no, the agency can continue operating, doing its important consumer functions.

Senator KLOBUCHAR. Okay. But let us go to one where you actually did throw out the rules, and that is net neutrality. Right? And that is in my mind a bedrock of a free and open Internet, allowing consumers and small businesses to have an equal playing field. But in *U.S. Telecom Association v. FCC*, in your own opinion you went out of your way to dissent against the protections. This was the full D.C. Court against you, and the rules were upheld by a panel of judges appointed by Presidents from both parties. And here you relied on something else that you came up with called the “major rules doctrine,” and I know it has been mentioned in dicta, in a 2015 case, but in claiming that the FCC lacked authority to issue net neutrality rules because they were, in your words, “major.”

So, again, it feels to me like Congress set up the FCC, and the FCC is doing their job in a really complex policy matter. They put forward these rules on net neutrality. And then you insert your judgment to say that they are unconstitutional. So tell me why I am wrong.

Judge KAVANAUGH. The major rules doctrine, or major questions doctrine, is rooted in Supreme Court precedent, and, therefore, as a lower-court judge, I was bound to apply it. It was applied by the majority opinion in the *Brown & Williamson* decision. The godfather of the major rules, or major questions doctrine is Justice Breyer who wrote about it in the 1980s as a way to apply *Chevron*. The Supreme Court adopted that in the *Brown & Williamson* case, applied it in the *UARG* case, the one you referenced Justice Scalia’s opinion. And what that opinion says is, it is okay for Congress to delegate various matters to the executive agencies to do rules, but on major questions of major economic or social significance, we expect Congress to speak clearly before such a delegation, and that had not happened, in my view, with respect to net neutrality, and I felt bound by precedent, therefore, to apply the major questions or major rules doctrine.

Senator KLOBUCHAR. So minor rules would be okay, but not major? And I know in the decision you said, well, you will know the difference when you see it, and I think that is why the other judges on the court, appointed by both parties, went with the traditional and precedential view of how to look at this, and you used the 1986 law review article by Justice Breyer, and then in dicta, from the *King v. Burwell* case in 2015. And it just—what I am trying to show here is this pattern where to say, oh, Congress should step in and do everything, you are stepping in in these cases.

Judge KAVANAUGH. So I would say it is a pattern of adhering to precedent.

Senator KLOBUCHAR. Okay. Well, it just seems that the precedent to me when you look at, for instance, *Chevron*, and I know the White House touted the fact that you have overruled the Federal agency action 75 times, and they said that you led the effort to rein in executive agencies in the press release when you were announced. How do you explain—what does that mean, how you led the effort?

Judge KAVANAUGH. I do not know. I do not know what that is referring to. I know my record. I am sure I have upheld agency decisions dozens and dozens and dozens and dozens of times. We get agency cases. That is what we do on the D.C. Circuit, and I have upheld them, I am sure, in the same range, if not many more times. And so I think my record will show that I have ruled both ways on those kinds of cases. I do not think I have a pro this or pro that record.

Senator KLOBUCHAR. One last question in this area on consumers. The major rules doctrine actually raises questions to me about your view of *Chevron*, and as you know, it is that 1984 case—I would think it is settled law, but I will ask you that—where courts generally defer to reasonable interpretations of agencies. And what would you replace it with if you are not going to uphold it?

Judge KAVANAUGH. The precedent says that courts should defer to reasonable agency interpretations of ambiguous statutes, and the whole question of ambiguity has become a difficult inquiry. At least it has been in my 12 years of experience in the D.C. Circuit. How much ambiguity is enough? And I wrote a law review article in the *Harvard Law Review* about that problem of judges disagreeing about ambiguity and how much is enough. But I also said in that article that *Chevron* serves good purposes in cases where it is somewhat of an overlap with the *State Farm* doctrine, so statutory terms like “feasible” or “reasonable” are terms of discretion that are granted to agencies and that courts should be careful not to unduly second-guess agencies. And I have written an opinion, *American Radio Relay League*, where I made clear that courts should not be unduly second-guessing agencies.

Senator KLOBUCHAR. Okay. I want to move to campaign finance since those were the documents that I received and we are able to make public. Of course, I think they all should be made public, the ones that—and I do not like this Committee classification, what happened, but the Chairman did allow me to make those public. And in those documents, in one email from March 2002, you discuss limits on contributions to candidates saying, “And I have heard very few people say that the limits on contributions to candidates are unconstitutional, although I for one tend to think those limits have some constitutional problems.”

I just want to know with the *Buckley v. Valeo* case from 1976 being settled law, it seems like you have some issues with those rulings. How do you view the precedent created by *Buckley*? And would you respect it?

Judge KAVANAUGH. The *Buckley* divide, as you know, Senator, is that expenditures on the one side, Congress does not have substantial authority to regulate contribution limits; on the other side, Congress does have authority to regulate and has done so.

With respect to contribution limits, however, there are cases where the contribution limits are too low, so subsequent to the email you are talking about, the Supreme Court has twice struck down contribution limits, one in a case *Randall v. Sorrell*—

Senator KLOBUCHAR. I am aware of these cases.

Judge KAVANAUGH. Justice Breyer wrote. So I do not think there is—*Buckley v. Valeo* is an important precedent. There is a lot of

case law subsequent to those emails: *McConnell*, *Wisconsin Right to Life*, *Citizens United*, which fleshes out some of those—

Senator KLOBUCHAR. I mean, my issue is that we have had past nominees who said they would honor precedent, and then they joined the *Citizens United* opinion. And when I was hearing your discussion with Senator Whitehouse in which you talked about how Congress should step in again, and they did with the McCain-Feingold bill, and we tried, and then it was struck down basically with *Citizens United*. And so, that is the problem. We are left with nothing now but a constitutional amendment. And I personally view this as lawmaking from the Court, the *Citizens United* case. So I am trying to figure out where you are on this. Do you think contribution limits have constitutional problems? And what can Congress actually do to rein in the flood of money?

Judge KAVANAUGH. As a D.C. Circuit judge, I have upheld contribution limits in two important cases—one ruling against the RNC in *RNC v. FEC*, where it was challenging limits on contributions to political parties, and I rejected that challenge; in another, *Bluman v. FEC*, contributions by foreign citizens to U.S. election campaigns, and I upheld that law.

Senator KLOBUCHAR. Let us just talk about that case because your opinion left open the possibility of unlimited spending by foreign nationals in the United States on issue advocacy, the same kind of activity that we saw by the Russians in 2016. And, in fact, a Russian company facing charges brought by Special Counsel Mueller actually cited your opinion in arguing to have these charges thrown out. Does that concern you at all?

Judge KAVANAUGH. Our case dealt with contribution limits, so that is what I was opining on in that case. So I am not sure that there are—the state of the law and the expenditure limits was not before us in that case, and so I do not want to opine on expenditure limits.

What I did do—

Senator KLOBUCHAR. Well, you should know that it was—that opinion was cited by—

Judge KAVANAUGH. Well, I do not know if it was cited—well, I do not want to talk about a pending case.

Senator KLOBUCHAR. All right.

Judge KAVANAUGH. But my case, I upheld—importantly, I upheld limits on contributions in the *RNC* case and in the *Bluman* case, and the Supreme Court has upheld contribution limits generally, but struck them down when they are too low in cases like *Randall v. Sorrell* and *McCutcheon*.

Senator KLOBUCHAR. Okay. In light of the recent indictments, do you stand by your interpretation of the Bipartisan Campaign Reform Act in that case, the *Bluman* case?

Judge KAVANAUGH. I am not sure the question—

Senator KLOBUCHAR. We can go back to it on the second round. I look forward to it.

Judge KAVANAUGH. Okay.

Senator KLOBUCHAR. Okay, antitrust. Senator Lee and I run the Antitrust Subcommittee, and, as you know, in recent years—we talked about this in my office—the Supreme Court has made it harder to enforce our antitrust laws in cases like *Trinko*, *Twombly*,

Leegin, and, most recently, *Ohio v. American Express*. This could not be happening, in my view, at a more troubling time. We are experiencing a wave of industry consolidation. Annual merger filings increased by more than 50 percent between 2010 and 2016. I am concerned that the Court, the Roberts Court, is going down the wrong path, and your major antitrust opinions would have rejected challenges to mergers that the majority has found to be anti-competitive. So I am afraid you are going to move it even further down that path, starting with the 2008 *Whole Foods* case where Whole Foods attempted to buy Wild Oats Markets. It is very complicated, so I am just going to go to the guts of it from my opinion.

The majority of courts and the—what happened: There was a Republican majority; FTC challenges a deal; and then you dissent, and you apply your own pricing test to the merger. My simple question is: Where did you get this pricing test?

Judge KAVANAUGH. Well, I affirmed—I would have affirmed the decision by the district judge in that case which allowed the merger, and the district judge, Judge Friedman, an appointee of President Clinton's to the district court, and I was following his analysis of the merger. That case is, as I think we discussed, very fact-specific, really turns on whether the larger supermarkets sell organic foods or not. And so that was a fact—

Senator KLOBUCHAR. But where did you get the pricing test, is what I want to know, because you used a different test? And I am trying to figure that out, what legal authority actually requires a Government to satisfy your standard to block a merger? I think what I remember in our discussion, you cited these nonbinding horizontal merger guidelines that you used to come up with this test.

Judge KAVANAUGH. Well, you are looking at the effect on competition and what the Supreme Court has told us, at least from the late 1970s, is to look at the effect on consumers and what is the effect on the prices for consumers. And the theory of the district court and Judge Friedman in this case was that the merger would not cause an increase in prices because they were competing in a broader market that included larger supermarkets that also sold organic food. The question was really: Is there an organic food market solely, or is there a broader supermarket market? And that is what the case—

Senator KLOBUCHAR. I was just trying to get to where that new test came from. So in the second case, you also dissented in the *Anthem* case last year, and your opinion would have allowed a merger between two of the four nationwide health insurance providers, which was eventually blocked because it would lead to higher prices for health care in the long term and what was viewed as poorer quality insurance. And here you actually went a step farther than *Whole Foods*. Instead of just trying to raise the bar on what the Government would have to prove to block a merger, you also tried to lower the bar for merging companies trying to justify their deals. And your opinion suggests you would lower the bar for merging companies that are trying to prove their deals will not harm competition.

Does that represent your views when it comes to mergers?

Judge KAVANAUGH. It is a very fact-specific case, and the market in question there where two health insurers that were not selling

health insurance in the downstream market but were acting as purchasing agents for employers in the upstream market where they negotiated prices with hospitals and doctors, and so the theory, at least as I understood it, which I agreed with, was that by having a stronger purchasing agent, they would be able to negotiate lower prices from hospitals and doctors for the employers. And I pointed out in the end of my dissent, Senator, that there might be a problem in the upstream hospital-doctor market, but I did not think there was a problem in the market that was at issue in the case. And I specifically said I would have sent it back to the district court for analysis of whether the merger was a problem in that other—it is a three—it is—

Senator KLOBUCHAR. But you did suggest that the Court should disregard two cases that have been widely relied on for more than 50 years in antitrust, *Brown Shoe* and *Philadelphia National Bank*. Do you think courts now applying these cases are wrong to do so?

Judge KAVANAUGH. I think the Supreme Court in the 1970s moved away from the analysis in those cases because those cases focused on the effect on competition—I mean on competitors, not competition. And in the 1970s, the Supreme Court moved to focus on the effect on competition, which in turn is really consumer—what would be the effect on consumers.

Senator KLOBUCHAR. Okay. Thank you.

Chairman GRASSLEY. Senator Cruz.

Senator KLOBUCHAR. And could I, just one—

Chairman GRASSLEY. Proceed.

Senator KLOBUCHAR. It is just that this antitrust issue is, as you know, very dense.

Judge KAVANAUGH. Yes.

Senator KLOBUCHAR. But, again, I am very concerned about what is going on with these cases nationally. And then when I looked at these two cases, it appears to me that you would go even further. And I think we need less mergers, not more.

Judge KAVANAUGH. Can I add one thing?

Senator KLOBUCHAR. And more competition. Yes.

Judge KAVANAUGH. When I referred to the overlap of *Chevron* and *State Farm*, that is when I was talking about words like “feasible” and “reasonable.” I was not sure I was clear on that.

Senator KLOBUCHAR. Okay. Thank you.

Chairman GRASSLEY. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Welcome back, Judge Kavanaugh.

Judge KAVANAUGH. Thank you, Senator.

Senator CRUZ. Thank you, again, for your service.

Before I get into questions, I just want to take a minute to recognize and thank the outstanding work at this hearing by the Capitol Police in terms of in a calm and professional manner dealing with the unfortunate disruptions we have seen and maintaining an environment where this hearing can focus on the record and substance of this nominee. And so thank you for the tremendous work that the men and women here are doing.

Senator WHITEHOUSE. Mr. Chairman, I think we would like to second—and Senator Cruz—second that sentiment on our side as well.

Chairman GRASSLEY. Thanks both of you very much. I have expressed it to many of the policemen individually as I see them. Proceed. Start his 30 minutes over.

Senator CRUZ. Judge Kavanaugh, let us start with just a general question. What makes a good judge?

Judge KAVANAUGH. Senator, a good judge is independent, first of all, under our constitutional system, someone who is impartial, who is an umpire, who is not wearing the uniform of one litigant or another, of one policy or another, someone who reads the law as written, informed by history and tradition and precedent in constitutional cases, the law as written, informed by canons of construction that are settled in statutory cases, that treats litigants with respect, that writes opinions that are understandable and that resolve the issues. I think civility and collegiality help make a good judge. A good judge understands that real people are affected in the real world, the litigants in front of them, but also the other people affected by the decisions the judge decides or the court decides in a particular case. A good judge pays attention to precedent, which is in constitutional cases, of course, rooted in Article III and critically important to the stability and predictability and reliance interests that are protected by the law.

So there are a number of things that go into making a good judge: a work ethic. It is hard work to dig in and find the right answer in a particular case, and I think that is critically important as well. Judicial temperament. There are a lot of factors that go into it, and those are some of them. I am sure there are more.

Senator CRUZ. One of the things I was looking at, it is striking both the overheated rhetoric we have heard from some of our Democratic colleagues and also from some of the protesters over the last 2 days. I took a look at your record compared to that of Judge Merrick Garland. Judge Garland, of course, was appointed to the D.C. Circuit by Bill Clinton, and he was President Obama's nominee to the U.S. Supreme Court. What I found that was striking is that in the 12 years you have been on the D.C. Circuit, of all the matters that you and Chief Judge Garland have voted on together, you voted together 93 percent of the time. Not only that, of the 28 published opinions that you have authored, where Chief Judge Garland was on the panel, Chief Judge Garland joined 27 out of the 28 opinions you issued when you were on a panel together. In other words, he joined 96 percent of the panel opinions that you have written when he was on a panel with you. And the same is true in the reverse. Of the 30 published opinions that Chief Judge Garland has written on a panel, you have joined 28 out of 30 of them, over 93 percent of those opinions.

What is your reaction to those data and the level of agreement?

Judge KAVANAUGH. Well, I think we are trying hard to find common ground and to—as I have said before, he is a great judge, a great Chief Judge. And he is very careful and very hardworking, and we work well together and try to read the statute as written, read the precedent as written. And he is a judge who does not, like I try to be as well, a judge who is not trying to impose any personal preferences onto the decision, but take the law as written, and that is what I have tried to do in those cases, and that probably explains some of that. I think it also goes back to—I do not think—

I think judges are distinct from policymakers, and I think that shows up when you dig into the actual details of how courts operate and go about their business. You, of course, know well, Senator, from all your arguments and seeing judges decide cases in real time. And I think those statistics reflect the reality of how judges go about their business.

I have said several times I think of the Supreme Court as a Team of Nine, and when you try to be a team player on a Team of Nine, of course, there are going to be disagreements at times, so I do not want to overstate, but if you have that mind-set of where a court, without sitting on different sides of an aisle, without being in separate caucus rooms, trying to find what the right answer is, and I think there is a right answer in many cases, and maybe, you know, a range of reasonable answers in some others, and I think that is what those statistics reflect to me.

Senator CRUZ. So you talked about the difference between your own policy preferences and what the law describes or mandates. How would you describe a judicial activist?

Judge KAVANAUGH. I would describe a judicial activist as someone who lets his or her personal or policy preferences override the best interpretation of the law, and that can go in either direction. So a judge who strikes down a law as unconstitutional when the text and precedent do not support that result or a judge in the other direction who upholds a law as constitutional when the text and precedent would suggest that the law is, in fact, unconstitutional. So, too, in statutory cases, it is the same principle. When a judge does not stick with the compromises that you have reached and written into the text of the statute passed by Congress and signed by the President, but thinks the judge can improve on it in some way or maybe picks a snippet out of a Committee report and says, "Well, I agree with that view in the Committee report, and I am going to superimpose that onto the text of the statute passed by Congress," that is to me the textbook definition of a judicial activist, adding to or subtracting from the text as informed by the precedent.

Senator CRUZ. In your time on the D.C. Circuit, you have written a number of opinions addressing separation of powers. Why does separation of powers matter? Why should an American at home watching this on C-SPAN care about the separation of powers?

Judge KAVANAUGH. People should care about separation of powers because it protects individual liberty, and it is really the foundational protection of individual liberty. We think of the First Amendment, freedom of religion and freedom of speech, as foundational protections of individual liberty. But as Justice Scalia used to say, the old Soviet constitution had a bill of rights, but it was meaningless in operation because they did not have an independent judiciary, they did not have a separation of powers system to help protect those individual liberties. So it works in two ways, I think, or more than two ways: first, the independent judiciary that helps enforce those rights; second, the whole structure, as I have explained, tilts toward liberty in the sense that you start with a system, it is hard to pass a law to effect what you do or cannot do, hard to get a law through Congress. And that is by design. The bicameralism principle, a House and a Senate, as well as adding

the President, was designed to prevent the passions of the moment from overwhelming and enacting a law based on the passions as opposed to a more difficult process. That all helps protect individual liberty.

Then even after you pass a law, the President has, as I was discussing with Senator Klobuchar, some—or the executive branch has prosecutorial discretion, when and how to enforce particular laws. Who is protected by prosecutorial discretion? Ultimately, it protects individual liberty. And then, even when the Congress has passed a law and the Executive has enforced a law, that does not mean you go straight to prison. If you are charged with a crime, you go before an independent judiciary.

And just to add further protections for liberty, you have the jury protections that are in the original text of the Constitution and also reflected in the Bill of Rights. So in check after check after check, the Constitution tilts toward individual liberty.

The separation of powers also ensures that there are checks on the branches. So what do we do—for example, Members of Congress do not serve for life. You have to run for reelection, and that is a check, again, to help protect individual liberty, to help ensure accountability as well. So, too, with Presidents.

So the document is just chock full with protections of individual liberty, and that is ultimately why the separation of powers matters as much as the individual protections that are in the Bill of Rights and also in Article I, Section 9, and Article I, Section 10, of the original Constitution.

Senator CRUZ. How about the doctrine of federalism? That has been an issue you have not encountered as much serving on the D.C. Circuit, but can you share with this Committee why federalism matters and, again, why Americans watching this hearing at home should care about the principles of federalism?

Judge KAVANAUGH. Federalism matters for several reasons, Senator. Again, it helps further individual liberty in the sense of additional protection, so let me give you an example. If the U.S. Constitution only protects—the Fourth Amendment only protects you against unreasonable searches and seizures up to a certain line, it is possible that your State Constitution will protect you even further under that, or your State legislature might protect you further, so further protections of individual liberty. federalism also operates in a different way, a laboratory of democracy in the sense of experimentation around the country. It is not always the same views in Texas that there might be in California, for example, on particular issues, and so you have different laws—

Senator CRUZ. Thankfully.

Judge KAVANAUGH. Yes. And different laws in those States. And also I think that federalism serves the more general idea of the Government that is closest to you for most of your day-to-day activities. My wife is, of course, in local government now as the town manager, but federalism—for the things that affect you on a daily basis, the paving of the roads, the leaf collection, the trash collection, the local schools, which is probably the most direct impact that many people have with the government, the local court system—my mom, of course, was a State trial judge. The whole system of State government is most people's interaction with govern-

ment, and federalism in that sense makes—ensures accountability because you know better usually your local and State elected officials than you do—and you can, therefore, make your views known on whatever governmental issue is of concern to you. For example, the schools is a classic one.

Senator CRUZ. So what is the importance and the relevance of the Tenth Amendment?

Judge KAVANAUGH. The Tenth Amendment protects federalism in the sense of ensuring that the States have independent sovereign—they make clear, which is also clear from the structure, but reinforces the idea that the States are sovereign entities that have independent authority under the Constitution, and that they have the status as separate sovereigns under the Constitution. And so you were Solicitor General of Texas, of course, and I know you represented the State of Texas in many cases where the sovereignty of the State of Texas to pass its laws and to enforce its laws was critical. And the sovereignty of the individual States is important for the people, again, both for the accountability, the local government, and also for the protection of individual liberty. And I think the Tenth Amendment underscores that. It also makes—it helps underscore something else, which is that States cannot be commandeered by the Federal Government. Commandeered is commandeering doctrine of the Supreme Court which recognizes that—and this is from the structure as a whole and underscored, but the Federal Government cannot order States to do certain things that the States themselves have not chosen to do, and so that is an important part of the federalism principles recognized by the Supreme Court and that comes out of the Constitution as well.

Senator CRUZ. What do you make of the Ninth Amendment? Robert Bork famously described it as an “ink blot.” Do you share that assessment?

Judge KAVANAUGH. So, I think the Ninth Amendment, and the Privileges and Immunities Clause, and the Supreme Court’s doctrine of substantive due process, are three roads that someone might take that all really lead to the same destination under the precedent of the Supreme Court now, which is, that the Supreme Court precedent protects certain unenumerated rights so long as the rights are, as the Supreme Court said in the *Glucksberg* case, rooted in history and tradition. And Justice Kagan explained this well in her confirmation hearing, that the *Glucksberg* test is quite important for allowing that protection of unenumerated rights that are rooted in history and tradition, which the precedent definitely establishes, but at the same time making clear that when doing that, judges are not just enacting their own policy preferences into the Constitution.

An example of that is the old *Pierce* case where Oregon passed a law that said everyone in the State of—this is in the 1920s—everyone in the State of Oregon had to attend—every student had to attend a public school. And a challenge was brought to that by parents who wanted to send their children to a parochial school, a religious school. And the Supreme Court ultimately upheld the rights of the parents to send their children to a religious parochial school and struck down that Oregon law, and that is one of the founda-

tions of the unenumerated rights doctrine that is folded into the *Glucksberg* test and rooted in history and tradition.

So how you get there, as you know well, Senator, there are stacks of law reviews written to the ceiling on all of that, whether it is privileges and immunities, substantive due process, or Ninth Amendment. But I think all roads lead to the *Glucksberg* test, as the test that the Supreme Court has settled on as the proper test.

Senator CRUZ. Let us talk a little bit about the First Amendment. Free speech, why is that an important protection for the American people?

Judge KAVANAUGH. It is one of the bedrocks of American liberty, the ability to say what you think, to speak politically, first of all, about policy issues, and to speak about, for example, who you want to support for elected office is a critical part of the free speech principle. But it is broader than that. It is the idea that there is no one truth necessarily, that one person can dictate from on high in terms of policy issues or social issues or economic issues, and that the truth or at least the best answer emerges after debate and over time, and that freedom of speech is important to help advance that cause of the debate. And it is important just as an individual matter, I think, to have that protection written into the Constitution because you may have an unpopular view at a particular point in time, and if that view were suppressed, that view would never take hold even though that view would be the better view. And so it is particularly important in Supreme Court precedent, I think, to protect unpopular views or views that seem out of fashion or out of fashion at a particular moment in time because of both the inherent dignity that that provides to individual people, but also for the broader purpose of that advances societal progress or economic progress or social progress. Most good ideas were unpopular at one point or another and take time to take hold, and I think the Framers understood that. Look at where they came from and how they had to fight against suppression of speech and suppression also of religious liberty, of course, in how they came about.

So free speech is critically important. I think, again, Justice Kennedy and Justice Scalia in *Texas v. Johnson*, what could be more unpopular than burning the American flag? And yet they upheld the right to do that, not because they liked it, and that is the whole point of Justice Kennedy's concurrence, but because they thought the First Amendment had to protect the most unpopular of ideas in order to accord with the precedent and principle of free speech.

Senator CRUZ. So you mentioned religious liberty. Religious liberty is one of our fundamental liberties, cherished by Americans across the Nation, the right to live according to our faith, according to our conscience. Can you share your views on the importance of religious liberty and how the Constitution protects it?

Judge KAVANAUGH. Yes, Senator. To begin with, it is important in the original Constitution, even before the Bill of Rights, that the Framers made clear in Article VI no religious test shall ever be required as a qualification to any office or public trust under the United States. So that was very important in the original Constitution, that the Framers thought it very important that there not be a test to become a legislator, to become an executive branch official,

to become a judge under religion, recognizing the religious freedom at least to serve in public office.

And then, of course, in the First Amendment to the Constitution, ratified in 1791, the principle of religious liberty is written right into the First Amendment to the Constitution. And the Framers understood the importance of protecting conscience. It is akin to the free speech protection in many ways. And no matter what God you worship or if you worship no God at all, you are protected as equally American, as I wrote in my *Newdow* opinion, and if you have religious beliefs, religious people, religious speech, you have just as much right to be in the public square and to participate in the public programs as others do. You cannot be denied just because you have a religious status, and the Supreme Court has articulated that principle in a variety of different ways in particular cases.

If you look at, for example—

[Disturbance in the hearing room.]

Judge KAVANAUGH. In other countries around the world, you know, in China, for example, you—

[Disturbance in the hearing room.]

Judge KAVANAUGH. So if you look at other countries around the world, you are not as—you are not free to take your religion into the public square. You know, crosses are being knocked off churches, for example, or you can only practice in your own home, you cannot bring your religious belief into the public square.

[Disturbance in the hearing room.]

Judge KAVANAUGH. And being able to participate in the public square is a part of the American tradition, I think, as a religious person, religious speech, religious ideas, religious thoughts. That is important.

So, too, in the Establishment Clause, some of those—

[Disturbance in the hearing room.]

Judge KAVANAUGH. Some of those case are, as you know, particularly complicated in the Supreme Court precedent, but the Supreme Court precedent, for example, in the *Town of Greece* case and others has recognized that some religious traditions in governmental practices are rooted sufficiently in history and tradition to be upheld, and so in that case, the *Town of Greece* case, the Supreme Court upheld the practice of a prayer before a local legislative meeting, as *Marsh v. Chambers*, of course, also—a local town meeting, I should say, *Marsh v. Chambers*, it upheld that in a legislative meeting as well.

So the religious tradition reflected in the First Amendment is a foundational part of American liberty, and it is important for us as judges to recognize that and not—and recognize, too, that as with speech, unpopular religions are protected. Our job—we can, under the Religious Freedom Restoration Act, question the sincerity of a religious belief, meaning is someone lying or not about it, but we cannot question the reasonableness of it, and so the Supreme Court has cases with all sorts of religious beliefs protected, Justice Brennan really the architect of that.

So religious liberty is critical to the First Amendment and the American Constitution.

Senator CRUZ. How would you describe the interaction between the Free Exercise Clause and the Establishment Clause? And are they at cross purposes and in tension? Or are they complementary of each other?

Judge KAVANAUGH. I think in general it is good to think of them as both supporting the concept of freedom of religion and—in the *Newdow* case I wrote, tried to explain some of those principles, but I think it is important to think that, to begin with, you are equally American no matter what religion you are, if you are no religion at all; that it is also important, the Supreme Court has said, that religious people be allowed to speak and to participate in the public square without having to sacrifice their religion in speaking in the public square, for example, or practicing their religion in the public square.

At the same time, I think both clauses protect the idea or protect against coercing people into practicing a religion when they might be of a different religion or might be of no religion at all. So the coercion idea I think comes really out of both clauses as well.

The cases that are Establishment Clause cases that do not involve coercion but are some of the—the religious symbols cases, as you well know, Senator, that is a complicated body of law, but probably each area of that has to be analyzed in its own silo. But as a general matter, I think it is good to think of the two clauses working together for the concept of freedom of religion in the United States, which I think is foundational to the Constitution.

Senator CRUZ. When you were in private practice, you represented the Adat Shalom synagogue pro bono. You did that for free. Can you describe for this Committee that representation and why you undertook it?

Judge KAVANAUGH. I undertook that representation to help a group of people who wanted to build a synagogue, but were being denied the ability to do that based on a zoning ordinance that seemed to be—the application, at least, of a zoning ordinance in a way that seemed to be discriminating against them because of their religion, and that may have allowed other buildings to be built there, but they were being blocked or at least challenged from building a synagogue there. So it seemed to me potentially a case of religious discrimination that was being used to try to prevent them from building. So I wanted to—I agreed to represent them because I wanted to do pro bono work and I always like to help the community. In that case in particular, I thought these people who want to build their synagogue had the right to do so, as I saw it under the law. And I thought I could help them do so, and we did prevail in the district court in Maryland, and that synagogue now stands, and they were very grateful.

And so that was the kind of litigation—that was the couple years I was actually at a law firm but did some pro bono work, and that was very rewarding pro bono work to have a real effect on real people in their practice of their religion in the State of Maryland. So that is something that means a lot to me. They gave me something to hang on the wall: “Justice, justice shalt thou pursue,” which has hung on my wall in my chambers the whole 12 years I have been there as just a reminder of a representation I had in the past and

the importance of equal treatment in religious liberty and a successful pro bono representation that meant a lot to me.

Senator CRUZ. Well, and I will note, some of the Democratic Senators on this Committee—

[Disturbance in the hearing room.]

Senator CRUZ. Some of the Democratic Senators on this Committee have suggested that you would somehow side with rich and powerful entities at the expense of the little guy, but at least in that instance, representing the synagogue against the power of government that was trying to prevent it being built is very much an instance that you chose to give your time and your energy and your labor for free to a litigant that I think most would view as the little guy in that battle.

Judge KAVANAUGH. That is correct, Senator, and I have tried as a judge always to rule for the party who has the best argument on the merits, and that has included workers in some cases, businesses in others, coal miners in some cases, environmentalists in others, unions in some cases, the employer in others, criminal defendants in some cases, the prosecution in others. And I have a long line of cases in each of those categories, and little guy/big guy is not the relevant determination. If you are the little guy, so to speak, and you have the right answer under the law, then you will win in front of me.

Senator CRUZ. Earlier in the questions from Senator Graham, he asked you a question, “Are you a Republican?” And he asked it in the present tense. And your answer, you acknowledged that you had been a registered Republican. Indeed, you had served in a Republican administration previously. But, of course, you have been a Federal judge for 12 years. Do you consider yourself a Republican judge?

Judge KAVANAUGH. I am not sure what the current registration is, but shortly after I became a judge, I assume the registration—I have not changed it, but I do not know if it is still listed. But shortly after I became a judge and had voted I think in one election, I decided—I had read about the second Justice Harlan having decided that he did not want to continue voting while being a Federal judge, and I thought about that practice, and I would be the first to say I am not the second Justice Harlan, not trying to compare myself in any way to him, but I thought that was a good model for a Federal judge, just to underscore the independence, because we are not supposed to participate in political activities, go to rallies, give money and that kind of thing. And it seemed to me that voting is a very personal expression of your policy beliefs in many ways and your personal beliefs. And I am not trying to—

Senator CRUZ. Let me ask one final question. My time is expiring, and I want to end on a lighter note.

Judge KAVANAUGH. Yes.

Senator CRUZ. You and I have both had the joys of coaching our daughters in basketball. Could you tell this Committee what have you learned coaching your daughters playing basketball?

Judge KAVANAUGH. Well, it has been a tremendous experience to be able to coach them for the last 7 years, and all the girls on the team, and I have learned about something I saw in my own life about the importance of coaches to the development of America’s

youth, teachers too, but coaches can have such an impact, I think, on building confidence, and when you see—I have coached girls. When you see a girl develop confidence over time or you see their competitive spirit, team work, the toughness that is developed over time, the drive, you know, win with class, lose with dignity, winning and—the ability to lose but still put forth your best effort, and so I have learned just how important—I think I understood that from my own experience, as I said, but learned how important it is for people, for coaches, and the effect that you can have on people's lives. And I have heard from a lot of the parents over the last 8 weeks while I have been in this process about, you know, the effect I had on some of the girls' lives, which was very nice to hear in terms of my coaching.

So like I said yesterday, coaches have such an impact on people, and I have learned that. That is why Senator Kennedy said in our individual meeting, "I hope you keep coaching," and I am going to—either way this comes out, I am going to try to keep coaching.

Thank you, Senator.

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Chairman Grassley. Thank you, Judge Kavanaugh.

As we discussed in my office, and in a letter I have sent to you to follow up, I hope to question you today about your views on rule of law, separation of powers, Presidential power.

And Chairman, I would like to start by entering into the record a series of articles that I think lay some of the foundation for my concerns. First—

Chairman GRASSLEY. Without objection, so ordered. Well, go ahead, if you want.

Senator COONS. Thank you.

First, "Who Is Brett Kavanaugh?" by Chicago Professor Eric Posner and Emily Bazelon.

Second, "The Kavanaugh Nomination Must Be Paused, and He Must Recuse Himself" by former Third Circuit Judge Timothy Lewis, former White House Ethics Counsel Norm Eisen, and Harvard Law Professor Tribe.

Third, "Brett Kavanaugh's Radical View of Executive Power" by Professor Brettschneider.

"Brett Kavanaugh Is Devoted to the Presidency" by Law Professor Garrett Epps.

And "Brett Kavanaugh's Legal Opinions Show He Would Give Donald Trump Unprecedented New Powers" by Fordham Professor Shugerman.

Chairman GRASSLEY. As I previously said, without order—

[The information appears as submissions for the record.]

Judge KAVANAUGH. Would you repeat who the third one was? Sorry, I want to make sure I know the names.

Senator COONS. I think it was, "Brett Kavanaugh's Radical View of Executive Power" by Brown University Professor Corey Brettschneider, if I am not mistaken.

Judge KAVANAUGH. Okay. That is not a law professor, though, right?

Senator COONS. Correct.

Judge KAVANAUGH. Okay.

Senator COONS. It is a range of opinions from a range of folks from a range of backgrounds.

Judge, the rule of law requires that those who are governed and those who govern both be bound by the law. And a key way to ensure, as you said in your opening, that no one is or should be above the law is to ensure that the President is not above the law by preventing him from firing someone appointed to investigate him.

Sitting on a panel at Georgetown in 1998, you took a different view. You said at that time, and I quote, “The prosecutor should be removable at will by the President.” Given what is in your record, a long record of writing and speaking on this topic, I think there is legitimate cause for concern about your views on Presidential power and whether it is possible President Trump chose you so you would protect him.

Please answer directly. Do you still believe a President can fire at will a prosecutor who is criminally investigating him?

Judge KAVANAUGH. That is a question of precedent, and it is a question of that could come before me either as a sitting judge on the D.C. Circuit or, if I am confirmed, as a Supreme Court Justice. So I think that question is governed by precedent that you would have to consider.

United States v. Nixon, of course, the special prosecutor regulation in that case was at issue in the *United States v. Richard Nixon* in the subpoena—

Senator COONS. Judge, if I could, I am just asking whether you stand by your record, something that you chose to write in 1998. You expressed a view at the time that a President can fire at will a prosecutor criminally investigating him. Is that still your view?

Judge KAVANAUGH. Well, that would depend—

Senator COONS. I am not asking for a recitation of precedent. We will get into some precedent later.

Judge KAVANAUGH. Okay.

Senator COONS. I am just trying to make sure I understand if you stand by that publicly expressed view back in 1998.

Judge KAVANAUGH. I think all I can say, Senator, is that was my view in 1998.

Senator COONS. Okay. Well, then let us move to a more recent statement that I think is equally important. In the wake of the Watergate Presidential scandal, a scandal precipitated by a President who had committed some crimes and then was investigated, Congress passed the independent counsel statute, a statute which restricted in part when the President can fire an independent counsel.

And during a recent speech, a 2016 speech, you described this law as, and I quote, “a goo-goo post-Watergate reform,” and “a constitutional travesty.” Do you stand by your criticism of the independent counsel statute as a constitutional travesty?

Judge KAVANAUGH. Well, that was understated compared to what Members of this Committee and others said in 1999, when the decision was made—

Senator COONS. But, Judge, I am interested in your views—

Judge KAVANAUGH. Right.

Senator COONS [continuing]. Not the views of Members of this Committee. And when you chose in a public speech as a sitting

judge to say that that statute was a constitutional travesty, you had something in mind. What are your views on this statute, and why do you view it as a constitutional travesty?

Judge KAVANAUGH. So let me make a few things clear. This is the old independent counsel statute.

Senator COONS. Yes.

Judge KAVANAUGH. That is distinct from the special counsel system that I have specifically said is consistent with our traditions. I said that in the Georgetown article, as you know. I said that, actually, in the *PHH* case most recently.

The statute you are talking about, the independent counsel statute was a distinct regime that Congress itself decided not to reauthorize in 1999. I think Senator Durbin said it was unrestrained, unaccountable, unconstitutional statute. That statute—

Senator COONS. But I am interested, if I might, Judge, in your views. You chose to describe the independent counsel as a constitutional travesty. What did you mean?

Judge KAVANAUGH. Well, I meant I think what Justice Kagan said, when she said at Stanford a few years ago, that Justice Scalia's dissent in *Morrison v. Olson*—and this is a quote—"was one of the greatest dissents ever written, has gotten better every year." By identifying Justice Scalia's dissent as one of the greatest dissents ever written, Justice Kagan seemed to be saying, at least I think this is the only reading of it, that the *Morrison v. Olson* decision was—was wrong.

Senator COONS. I will actually strongly disagree. You offered that quote, that cite of Justice Kagan when we met. I was struck—perhaps I should call Justice Kagan and tell her she is one of your judicial heroes. I think that citation is actually literally true, but misleading in context.

Justice Kagan wrote in a famous Harvard Law Review article in 2001 strongly rejecting the unitary executive theory, which is at the root of the Scalia dissent in *Morrison v. Olson*. I believe Justice Kagan was complimenting the forcefulness and the clarity of Scalia's writing in the dissent, not agreeing with the legal theory.

I am trying to get to the point of—

Judge KAVANAUGH. I think I disagree with that, Senator.

Senator COONS. Well, I look forward to exchanging some papers on this, and perhaps in our next round tomorrow, we can have more fun on it. But it is an important point.

Judge KAVANAUGH. It is. But I think in that article, and I have read that article. It is a great article, "Presidential Administration" by Justice Kagan, then-Professor Kagan. I think she was referring to the concept of independent agencies generally, so the *Humphrey's Executor* line of cases.

[Disturbance in the hearing room.]

So I think she is referring there, at least I read her as referring there, to independent agencies are traditional and permissible. The independent counsel statute was something quite different from the traditional independent agencies that existed with the Federal Trade Commission, the Securities and Exchange Commission. So I did not read her old article to, in any way—

Senator COONS. Let us put it this way. Justice Kagan may have complimented Scalia's dissent in its writing or its holding. You

have criticized the independent counsel statute as a constitutional travesty, and I am simply trying to get to the bottom of why you held that view and why you chose to say that in a speech just 2 years ago.

Judge KAVANAUGH. Well, it was *Morrison v. Olson* was a one-off case about a one-off statute that has not existed for 20 years. The statute is gone. The case, as Justice Kagan—I think I took my lead from her comment. I know I read that. I have cited it many times in speeches I have given. But that statute, it is just real important to be clear here, and I know you know this, Senator, but so everyone understands. That statute has not existed since 1999. Special counsel systems—

Senator COONS. But *Morrison v. Olson* is still good law, is it not? But the holding by the Supreme Court in *Morrison v. Olson*, even though the independent counsel statute has passed into history, *Morrison v. Olson*, as a decision of the Supreme Court, is still good law. In fact, your own Circuit said so forcefully this year.

Judge KAVANAUGH. I think *Humphrey's Executor* is good law.

Senator COONS. I think that is a “yes” or “no” question. The D.C. Circuit held this year in *PHH*, where you wrote a dissent, that *Morrison v. Olson* is still good law. Correct?

Judge KAVANAUGH. I think they were applying *Humphrey's Executor*. They might have cited *Morrison*. But the principle being—

Senator COONS. They literally said, and I quote, “*Morrison* remains valid and binding precedent,” and—

Judge KAVANAUGH. In how it applied *Humphrey's*.

Senator COONS [continuing]. Criticized your minority as, “flying in the face of *Morrison*”.

Judge KAVANAUGH. And again, we are talking about independent agencies. So the traditional independent agencies on the one hand, and the old independent counsel regime that is long gone, on the other. And the independent counsel regime, this Committee and the Congress as a whole decided was a serious mistake. Just Senator Durbin’s words—unrestrained, unaccountable, unconstitutional. And I think the case—

Senator COONS. So what I am concerned about, Judge—what I am concerned about, Judge, is not so much whether there are Members of this Committee or other Justices who view the independent counsel statute as a serious mistake, but whether you view *Morrison v. Olson* and the majority holding there as a serious mistake. So let us move to that point, if I could.

In *Morrison v. Olson*, as you well know, the Court upheld a restriction on the President’s power to fire the independent counsel, in fact, by a vote of 7–to–1. It is an opinion written by your first judicial hero, Chief Justice Rehnquist. It was only Justice Scalia who dissented in arguably a well-crafted dissent.

But for those seven Justices, they wrote an important decision, which I believe you have challenged and criticized because it restrained the President’s power to fire the independent counsel. Just 2 years ago, you were asked at a public event to name a case that deserved to be overturned—any case. And after a pregnant pause, you said, “Well, I can think of one.” There was some chuckling. And then you said, “Well, sure, *Morrison v. Olson*.”

And I am struck by that, having watched that speech. Not *Korematsu*, not *Buck v. Bell*, cases that, you know, are taught to all first-year law students as terrible examples of shameful decisions. No, you chose *Morrison v. Olson* to say, “it has already been effectively overturned”—which I disagree with—and, “I would put the final nail in the coffin.”

So, here is a recent public statement by a sitting D.C. Circuit judge who is now before me as a nominee to serve on the Supreme Court. So, I have got a question: Would you vote to overturn *Morrison*?

Judge KAVANAUGH. Senator, first of all, I—*Korematsu* has been now overturned, and *Buck v. Bell* is a disgrace. So I am—

Senator COONS. Right. So it is striking you did not choose either of them. You reach out and say, oh, this old, 30-year-old decision about a statute long gone, that is the one I am going to hold up to get rid of.

Judge KAVANAUGH. And I really did have Justice Kagan’s comment foremost in mind. I thought she had already talked about *Morrison v. Olson* and—

Senator COONS. Nothing to do with a view of Presidential power?

Judge KAVANAUGH. Well, I have written about the special counsel system, and I have said in the 1999 Georgetown article that the special counsel system is the traditional approach that is used. When there is a conflict of interest in the executive branch, there is a need for an outside counsel. And I have said that is traditional, and it was when I said that again in the *PHH* case that you just cited.

Senator COONS. And is that special counsel fireable at will or only for cause in your conception of what is the most appropriate structure?

Judge KAVANAUGH. So that is the hypothetical that you are asking me, and I think what that depends on is, is there some kind of restriction on for-cause protection either regulatorily or statutorily that is permissible that is different from the old independent counsel, for example? And that is the kind of open question, gray area question that you would want to hear the briefs, get the oral arguments, keep an open mind on. What is the specific statute you have at issue?

Remember, the old independent counsel had a lot of moving parts to it that were—all of which were novel and together produced Justice Scalia’s dissent. I do not think any one aspect—

Senator COONS. So given your enthusiasm for Justice Scalia’s dissent, given your choice to say, forgive me, I would put the final nail in, let me go back to that question. Would you vote to overturn *Morrison*?

Judge KAVANAUGH. Senator, I am not going to say more than what I said before.

Senator COONS. Well, I think what you said before is clear. I think your enthusiasm for overturning *Morrison* is unmistakable. [Disturbance in the hearing room.]

Judge KAVANAUGH. I want to repeat two things, Senator, because they are important. One is, *Humphrey’s Executor* is the precedent that stands—and I have called it an entrenched precedent in an opinion—on independent agencies generally. And two is, the special

counsel system, both in the *PHH* decision recently and in the old Georgetown Law Journal article, I have specifically said that that is the traditional way that criminal investigations proceed when there is a conflict of interest and the usual Justice Department process is not appropriate.

Senator COONS. *Humphrey's Executor* has been settled law now for 83 years, right? And early on, you said that you would be willing to offer views on long-settled cases. Can you just tell me if *Humphrey's Executor* was correctly decided?

It is long-settled precedent, yes. You have said that about a number of cases. But a key difference here is whether you will say that something was rightly decided. I am struck about this—frankly, a little concerned about it—because in your own opinion, in your dissent in *PHH*, you went into a long criticism of *Humphrey's Executor* that at least that is how I read it.

You laid out a very strong articulation of this unitary executive theory, this theory that the President is imbued with all the power of the executive branch, which is the core of Scalia's dissent in *Morrison*, which is a radical theory that has been rejected by the Supreme Court, I would argue.

And you go on to then say that *Humphrey's Executor*, yes, it is long-settled. But you know, if we were to overturn it, it would not mean the elimination of independent agencies. Why did you need to go there? Why have that conversation if this long-settled case is actually well reasoned?

Judge KAVANAUGH. What I said in the *PHH* case is that *Humphrey's Executor* is the precedent that governs independent agencies. I have applied it dozens of times, *Humphrey's Executor*, and referred to it that way.

What concerns me constitutionally as a judge in the *PHH* case was that the CFPB did not follow the traditional model of independent agencies and, therefore, departed from this traditional exception, one might say, to the idea that a single President controls the executive branch. And I explained all that, that the—having one head of an independent agency both diminished Presidential authority more than *Humphrey's Executor* and posed a serious threat to individual liberty and was a departure from historical practice, which under the Supreme Court's precedent made—makes a big difference, as you know, of course.

And so I referred—so that is why I concluded in the *CFPB* case that the statute was—the bureau was unconstitutionally structured. But the remedy was not to get rid of the whole agency. The remedy was simply to make the person removable at will.

Senator COONS. So *Humphrey's Executor* was essentially about whether or not the head of the FTC could be removable at will or have a good cause removal protection?

Judge KAVANAUGH. Right. President Roosevelt wanted to fire Humphrey, who was a Republican holdover.

Senator COONS. Will you simply just state that it is well-reasoned, well-decided, long-settled law?

Judge KAVANAUGH. I will say it is an important precedent of the Supreme Court that I have applied many times. It has been reaffirmed—

Senator COONS. It is troubling to me that you cannot say that *Humphrey's Executor* was well-decided.

Judge KAVANAUGH. But again, I will follow what the eight nominees—

Senator COONS. Was *Marbury v. Madison* well-decided?

Judge KAVANAUGH. Of course. Of course. The—of course it is. The concept of judicial review was not even invented in *Marbury v. Madison*. It is right here in the Constitution, as I read it, and also referred to in Federalist 78. We mistakenly say *Marbury* created the concept of judicial review. It actually exists right there. So it is a correct application.

But the reason I am hesitating—

Senator COONS. So let me bring this back to the current context and why all of this is of concern to me and relevant—

Judge KAVANAUGH. But I did not finish my answer.

Senator COONS. We have a series of public statements by you that are recent about your enthusiasm for overturning *Morrison*. And you are not going to comment on that here. You will not answer that question here. You have got a recent decision as a D.C. Circuit judge where you forcefully articulate this unitary executive theory that would give the President significantly more power. And if *Humphrey's Executor* is at any risk, we might then see a whole series of agencies moved or a whole series of long-established protections from at-will removal at some risk.

Let me just make sure I get this right. In your view, can Congress restrict the removal of any official within the executive branch?

Judge KAVANAUGH. Under the Supreme Court precedent, which I have applied many times, *Humphrey's*—and referred to it as an entrenched precedent—Congress historically has restricted the removal of independent agency heads. And that is—that is law that has been in place for a long time.

Senator COONS. For decades.

Judge KAVANAUGH. On *Morrison*, you may disagree with what I am about to say. But the reason I think Justice Kagan probably felt free to talk about *Morrison*, and I did as well, is, it seemed a one-off case about a statute that does not exist anymore and that *Humphrey's* is the precedent on independent agencies.

Now you may disagree with me on that, but I think that is the premise on which she spoke. I do not want to put words in her mouth, but that is certainly the premise on which I spoke. But I was not intending to do either of two things. I was not intending to say anything about *Humphrey's*, and I was not intending to say anything about traditional special counsels, which I have explicitly distinguished multiple times over the years.

Senator COONS. So I am just—I am concerned that I am having difficulty getting what I think is a clear and decisive answer from you on a number of things. Would you overturn *Morrison*? What is your view of executive theory? Is it appropriate for a President to fire a special counsel investigating him?

I am just going to come back to a decision that you rendered this year, this *PHH* decision, and I urge folks who are having any interest in this or trouble following it to just read your decision in this case. Because you lay out—you embrace this theory of the Execu-

tive, that the Executive has all the power of the executive branch, which I think is directly relevant to the question whether a special prosecutor should be fireable at will by the President or could be protected from being fired by the whims of the President.

This is a theory that was rejected not just by the Supreme Court in *Morrison v. Olson*, not just by the D.C. Circuit, but by a number of Members of this Committee in a recent vote, a bipartisan vote advancing a bill that is predicated on the idea that Congress can impose some restrictions on the Executive power to fire at will executive branch senior officers.

Judge KAVANAUGH. But just with respect, Senator, I think you are significantly overreading what I wrote in that case. I did not in any way say that the traditional independent agencies are in any way constitutionally problematic. In fact, I took that as the baseline on which I said that this new agency departed from that traditional model and was problematic.

So I did not—I did not cast doubt on *Humphrey's* in that case as I—at least as I read it. I guess you do not agree with the opinion, but I explained in great detail why I thought this deviation from *Humphrey's* mattered as a matter of historical practice.

Senator COONS. Let us get then, if we could, Judge, in the few minutes I have got left, to the question of investigations because this is also something you have written about, you have spoken about. And it is related, I think, to this issue.

Now back in Georgetown on a panel in 1998, you said, and I quote, “It makes no sense at all to have an independent counsel investigate the conduct of the President. If the President were the sole subject of a criminal investigation, I would say no one should be investigating that.”

Is that still your view that if there is credible evidence that a President committed crimes, no one should investigate it?

Judge KAVANAUGH. That is not what I said, Senator. So two things on that. One, the independent counsel you are referring to there, it is just important because people forget this, is distinct from the special counsel system. So it is very important. I specifically in that Georgetown Law Journal approved of the traditional special counsel system.

That is—

Senator COONS. And the traditional special counsel system has a special counsel that can be fired at will by the President. Correct?

Judge KAVANAUGH. Well, in the Watergate situation, there was a regulation that protected the special counsel from—from that.

Senator COONS. And what happened to the special counsel in Watergate?

Judge KAVANAUGH. Well, there was a new regulation then put in place, as you know, and then in the *United States v. Richard Nixon*, that new regulation was parsed pretty carefully. And then, more generally—

Senator COONS. This is exactly why your quote that the independent counsel statute was “a goo-goo post-Watergate reform” gave me some agita.

Judge KAVANAUGH. But that was not the—but that was a statute put in well after Watergate, of course, 1978. In Watergate itself, what the system that was in place was the traditional special coun-

sel system with a new regulation put in after the episode you are referring to. And then when the independent counsel system came up in 1999 for reauthorization, there was everyone here, everyone—

Senator COONS. Well—

Judge KAVANAUGH. Agreed it was—I mean, I think I am not—

Senator COONS [continuing]. You are not alone. You are not alone.

Judge KAVANAUGH. I am not exaggerating to say that the quote you put up before that one was understating what everyone here said about the independent counsel system.

Senator COONS. Well, in a 1999 article in that exact period, I think this is the American Spectator article, you called it, “constitutionally dubious” for a criminal prosecutor to have the responsibility to investigate the President.

Help me understand that. Is that still your view, Judge? Is it still your view that it is constitutionally dubious for a criminal prosecutor to investigate the President?

Judge KAVANAUGH. I have never taken a position on the constitutionality. All I have done is point out that, as I did in the Minnesota Law Review article, that Congress might want to consider the balance of—and that is when President Obama was in office—

Senator COONS. So this is just a policy argument, not a constitutional argument?

Judge KAVANAUGH. Correct. If I have a constitutional case come before me as a judge on the D.C. Circuit or, if confirmed, on that Court, I will have an open mind. I will listen to the arguments. I will dig into the history.

I have seen all sides of this. I will—I will have a completely open mind on the constitutional issue. And again, briefs and arguments, I think I have also shown a capacity to, if I am presented with a better argument than something I have had before, to adopt the better argument.

I have certainly done that. A good example of that in the national security context in the first *Bahlul* case, I pointed out how I had reconsidered something I had written before in a national security context. I am not a—but the larger point is that I have not taken a position on constitutionality before.

Senator COONS. Well, and I will just come back to a point we have now talked about several times. In several different contexts, in several different ways, you have chosen to make a constitutional point, either expressing enthusiasm for overturning a 30-year-old long-settled precedent in *Morrison v. Olson*, or arguing for the unitary executive theory that Scalia advanced in his dissent there.

Or I will give you another quote. In a different 2016 speech, you said there Justice Scalia never wrote a better opinion than his dissent in *Morrison v. Olson*, and you may have been commenting on the quality of his writing. But you go on to say you believe his views will 1 day be the law of the land.

I assume here you are talking about the constitutional analysis in Scalia’s dissent, and you are expressing a hope, an expectation that it will some day be the law of the land. You sit before me as

the nominee to be in a seat where that will be eminently within your reach.

Judge KAVANAUGH. But again, Senator, I just want to avoid melding a lot of different things into one because they are very important to keep distinct here, very important. The first is the independent counsel statute, and I view *Morrison* as only about the independent counsel statute. And I realize you may have a different view on that.

But if it is only about the independent counsel statute, as I see it, and the independent counsel statute does not exist anymore, that is why Justice Kagan probably felt free to comment about *Morrison* as well.

Senator COONS. Well—

Judge KAVANAUGH. And then on special counsels, I have said what I have repeated many times here. On investigation and indictment of a sitting President, number one, I have never taken a position on it, and number two, it is important to underscore the Justice Department for 45 years—now this is the Justice Department, not me. The Justice Department for 45 years has taken the position and written opinions that a sitting President may not be indicted while in office, but it has to be deferred. Not immunity, but a deferral.

And Randy Moss, who was head of President Clinton's Office of Legal Counsel, wrote a very long opinion on that. He is now a President Obama-appointed district judge in DC and an excellent district judge. I am not saying I agree with that or disagree with that. I am saying that is the consistent Justice Department view for 45 years.

So before a case like this would come before the courts, whether I am on the D.C. Circuit or otherwise, the Justice Department presumably would have to change its position. That is one. Two, a prosecutor at some point in the future would have to decide to seek an indictment of a sitting President at some point, and three, it would have to be challenged in court. Then all the briefs and arguments, and then it would come up on appeal to me in the D.C. Circuit.

So there is a lot of things that would have to happen before this hypothetical that you are presenting even comes to pass. And if it does come to pass, you can be assured that I have not taken a position on the constitutional issue that you are raising on that specific question, at least as I understand the question. And that is totally distinct from the *Morrison* issue as I understand it.

Senator COONS. Well, and I will tell you again the reason this has been gravely concerning to me, why I raised it in our meeting and sent you a letter about it and why I have dedicated so much time to this question is I really do not view the issue in the independent counsel statute and the *Morrison v. Olson* decision as dealing with some now long-past statute and some really sort of obscure and now not particularly relevant issue.

I think the reason you reached out and volunteered that you would love to overturn *Morrison v. Olson* is not because Scalia wrote a powerful and moving dissent. It is because of a view of the executive branch having all the power of the executive branch in

the President's hands that you have articulated across speeches, interviews, writings, and an opinion, an opinion this year.

I think that is really your view of the executive branch. And it rings as real concern for me.

Judge KAVANAUGH. But I have not said—I have never said that. I have never said that, number one. So there are two issues here, and I want to be very, very clear on them so people understand that, too.

One is—

Senator COONS. This is how I read your dissent in *PHH* this year, is arguing—advancing a unitary executive theory.

Judge KAVANAUGH. And I refer to a single President, but same concept. But—

Senator COONS. Single President means the President is the chief law enforcement officer of the United States and should have all the power of the executive branch, including the ability to fire at will, which is really what is at issue in all of these articles and cases, the ability to fire at will a special prosecutor. Correct?

Judge KAVANAUGH. So the—I have taken as a given in all these cases—

Senator COONS. That is a “yes” or “no,” is that what you mean?

Judge KAVANAUGH. I just want to be real clear, and I am going to be repeating myself for about the tenth time. But I have repeatedly said that *Humphrey's Executor* is the precedent that allows independent agencies and that I have applied time after time. That is point one.

Point two is, I have specifically said what I have said about special counsel systems being the traditional mechanism. Point three is, I have never taken a position on the constitutionality of indicting or investigating a sitting President. And point four is, that the question of who controls the executive—

Senator COONS. I have got just a minute or two left, if I might? On that point that you have never taken a position on the constitutionality of investigating a President, it was this American Spectator article where you said, and I am quoting, “If there is an allegation of Presidential wrongdoing, a congressional inquiry should take precedence over the criminal investigation, including an investigation of any Presidential associates.”

This American Spectator article was striking to me, this one in which you said it was constitutionally dubious for a criminal prosecutor to investigate a President. Because you suggested not just that the President should not be criminally investigated as during his term, but that even his associates should not be held accountable through the criminal justice system.

You mentioned you might make an exception for violent crime, and I—

Judge KAVANAUGH. Now that is—

Senator COONS [continuing]. Have a last question for you, if I might. Whether—what if a Presidential aide commits an assault, an act of domestic violence?

Judge KAVANAUGH. I never said anything like that, Senator, in terms of—

Chairman GRASSLEY. I will—I will let you—I will let you answer that, and then we will go on to the next Senator.

Senator COONS. And I would like to conclude, if I might?

Judge KAVANAUGH. Yes, I have not said anything approaching what your broad description was. There has always been a question based on the Justice Department's own position for the last 45 years. The Justice Department's own position assumes that the proper thing to do is to wait for indictment, is that that occurs after a President leaves office, whether that is because the term ends or because of the impeachment process.

And that is how the Justice Department—again, for 45 years, that has been the law. But it is not my—that is not my law. That is the Justice Department's law, again, with Randy Moss writing the most important thinking on that.

Senator COONS. I recognize I am out of time. I would like to conclude, if I might, Mr. Chairman, briefly?

I look forward to continuing this line of discussion with you in our next round, Judge. I do think that there is good reason for Members of this Committee, myself, principally, to be concerned about a whole range of things that you have said, that you have written, and that you have decided as a judge about whether or not a President can be held accountable.

I think the ability of a special counsel to conduct an independent investigation of the President is foundational to the rule of law.

Judge KAVANAUGH. I have said the same thing. I have said that.

Senator COONS. And I look forward to the next round where we can investigate that more thoroughly.

Judge KAVANAUGH. I have said the exact same thing.

Senator COONS. But frankly, Judge, your views about Executive power, as I think you have detailed, your statements about what you would like to overturn and what limits you think there should be, really leave me concerned. And it is because of our current context. It is because of the environment we are operating in.

And I look forward to another round and to more questions.

Judge KAVANAUGH. I look forward, too. But just to reiterate what you said about special counsels, is exactly what my article said in 1999 and exactly what *PHH* said.

Senator COONS. Thank you, Mr. Chairman.

Chairman GRASSLEY. Before I call on Senator Sasse, a couple things. One, in regard to independent counsel statute at issue in *Morrison*, that statute was never renewed and does not have any effect today. And we in Congress chose not to renew it because it was nearly universally condemned.

I often quote Senator Durbin about independent counsels' "unchecked, unbridled, unrestrained, and unaccountable authority." According to him, unchecked power is tyranny. We had Eric Holder, President Obama's Attorney General, said the law was too flawed to be renewed.

Also I want to insert in the record 30 op-eds from all across the country that support the confirmation of Judge Brett Kavanaugh. The editorial boards of the Los Angeles Times, the Chicago Tribune, the Wall Street Journal, among those 30 supporting confirmation.

Without objection, I will enter in the record all 30 of these op-eds.

[The information appears as submissions for the record.]

Senator COONS. Mr. Chairman? Mr. Chairman?

Chairman GRASSLEY. Senator Sasse.

Senator COONS. While we are on that exact point, there are four committee confidential documents that I would—I wanted to be able to question our witness about today, the nominee, the Judge. I would like to submit those for the record. They reveal his thinking on a unitary executive theory.

Chairman GRASSLEY. Give that, and I can advocate that you get them. And we will put into it, just like we said to Senator Leahy, give us the citations, and we will try to get them. So far, we have been very fortunate.

Senator Sasse.

Senator SASSE. Thank you, Mr. Chairman.

Judge, by my count, you are about half done. Congratulations.

[Laughter.]

Senator SASSE. You are going to be here past midnight, I think.

I also want to talk about limited government in general and about limits on Executive power in particular. I think today has been—Senator Cruz did a nice job complimenting the Capitol Police. I think today has been a tough environment to manage, and I think we all are glad that people get a right to express their First Amendment views and have the right to protest.

I do not want to draw too much more attention to it, though, because I think it disrupts the events. But four things that have been said that I think are relevant to this question, protesters that have been carried out or led out in the last couple of hours.

Just a few minutes ago, a woman shouting, “Please vote ‘no’ on Kavanaugh. Presidents should not have the power to do whatever they want.” “Vote ‘no’ on Kavanaugh” is one of the loudest shouts of today. “He will be a Trump puppet.”

A separate one, “He will support Presidential criminality,” and “Executive immunity has no place in a democracy.”

I think that I want to empathize with concerns that people have about those kinds of statements. And frankly, if I thought that you would be a puppet for this or any President, if you would support Presidential criminality, if you believe that Executive immunity is something that is fitting for our system, or if you believe that Presidents should have the power to do whatever they wanted, I could not vote for you either.

So I am headed toward voting for you because I do not believe any of those things are true. But I think the American people need to understand why not. So already today you cited the Federalist Papers and said the President is not a monarchy. I think it would be useful—the Presidency is not a monarchy.

I think it would be useful to just have you back us up and let us go again. I think Senator Coons asked lots of fair questions, but as a non-lawyer, many times we got lost in weeds. Not critical of his questioning, but I would like to have it at a high school sophomore level for a little while.

If you were going to explain to the American people what the limits on Executive power are, what are they? Where do you start?

Judge KAVANAUGH. I would start with the fact that the President is elected by the people through the electoral process specified in the Constitution. So not a hereditary monarchy was something that

was specified in Federalist 69. Second, the President serves a term in office, not an unlimited term in office. Again, specified in Federalist 69.

The President is subject to the law. No one is above the law in the United States, including the President of the United States. And that is something that is made clear in Federalist 69. The President does not—a President does not have absolute power to make the laws because Congress has the power to make the laws. The President does not have the power to adjudicate disputes because an independent judiciary has the power to adjudicate disputes and cases and controversies, along with a jury.

As Justice Jackson's framework in *Youngstown* famously made clear, it is important to understand that, though, even in the national security context where the Constitution gives the Commander-in-Chief power to the President, the President remains subject to the law, both the Constitution and the laws passed by Congress.

So, for example, as I have said in writings and my review of Judge David Barron's book on war, for example, and some of my cases, Congress has substantial power—and this is often forgotten—a substantial power in the war powers arena. Of course, to declare war, authorize war, but also to regulate the war effort. And Congress has done so historically and currently, including post September 11th on issues such as interrogation, detention, military commissions, surveillance. Congress has been actively involved in those areas historically and through post September 11th.

And I have made clear in my writings that the President has very limited power in *Youngstown* Category 3 to disregard such a law and/or practice. The historical example that is accepted by the Supreme Court is command of troops in battle, for example, that Congress could not get in the middle of that. But outside examples like that and narrow examples like that, Congress regulates the—can regulate the war effort.

Now Congress often chooses to give the executive branch broad discretion on national security policy, but sometimes not because the Congress does not like what the Executive has done. Usually we are very reactive, and that is understandable. Something happens that seems bad. Congress will come in and say we do not want that to happen again in wartime or otherwise in the national security context.

And Justice Jackson set forth that framework, which has stood the test of time and been applied by the Supreme Court. And that is a very critical part because where else would we expect the Executive to really exercise unilateral power but in the national security context, but also at the same time, what else is a greater time of threat to liberties than the national security context? *Youngstown Steel* again being the classic example, where the President said, well, we are trying to win the war, so I can seize steel mills.

And that did not work by a 6-to-3 vote of the Supreme Court, given the statutes Congress has passed. So, too, no President is above the law in the sense that a President remains subject to, the Supreme Court said in the *Clinton v. Jones* case, civil process. So that is a precedent of the Supreme Court on civil suits while in office.

So, too, the criminal process, Hamilton specifies this in Federalist 69, a President is not above the law with respect to the criminal process. The only question that the Justice Department, as I was saying to Senator Coons, has opined on for 45 years is the timing of the indictability question. And the Justice Department, through Democratic and Republican administrations for 45 years, has said that should occur when the President leaves office, either because the term has expired or because of the impeachment process.

Senator SASSE. Can I interrupt to unpack there? And then I will come back.

Judge KAVANAUGH. Yes.

Senator SASSE. I want to have you finish because I think you are building a list that has duration in time of the office of the Presidency, authorities that the legislature may or may not have given to the executive branch, powers of the purse to fund things that may have authorities but may not have current dollars available to them.

I think a lot of your debate with Senator Coons—again, I think it is an important debate—is about personnel matters. But for just a second, let us play out this question of criminality versus civil charges against a President. And I admit that I am sort of, as a non-lawyer, I follow in the Midwestern tradition of the Chairman, of being a non-lawyer on the Committee. I know a whole bunch of big legal brains told me if I ask any hypothetical, you will run circles around me telling me why you cannot answer.

But I kind of want to try the start of a hypothetical. Imagine 10 years in the future: There is a President from the Purple Party. So it is none of the current participants in public life, and it is none of these parties even. And this President ran for office with an instinct to demonstrate self-reliance, and he/she decides that they will not be a part of any motorcades. They are going to drive themselves. And they are drunk one night, and there is a motor vehicle homicide committed by the President.

That is both a criminal and a civil matter. Is the President immune from either being sued or being charged with a crime because they are President?

Judge KAVANAUGH. No. No one has ever said, I do not think, that the President is immune from civil or criminal process. So immunity is the wrong term to even think about in this process. The only question that has ever been debated is whether the actual process should occur while still in office. That is the *Jones v. Clinton* case where strong arguments were presented by both sides, and the Supreme Court ultimately decided that the civil process could go forward against President Clinton.

President Clinton was arguing that the civil process should be deferred until after he left office. The Supreme Court rejected that. So, too, the only question with the criminal process is not immunity. That is the wrong term. It is timing, and the—as I have said, the Justice Department for 45 years has taken the position that the timing of the criminal process, a criminal process should be after the President leaves office.

Now that does not prevent investigations, gathering of evidence, questioning of witnesses, I would not think necessarily. I do not

want to opine too much. But that is certainly how it has proceeded under the special counsel system that we have had traditionally that has coexisted with the Justice Department position on the ultimate timing question.

So those are just timing questions from *Jones v. Clinton* and from the Justice Department position. But immunity is not—not the correct word, and I do not think anyone thinks of immunity. And why not? No one is above the law. And that is just such a foundational principle of the Constitution and equal justice under law, and that is what Hamilton was concerned about in Federalist 69, and that is what the Framers were concerned about.

Even with having—if you read the Constitutional Convention debates, even with having a single President, they were concerned, well, that may seem like a monarchy. And that is why Hamilton felt the need to convince the people, “no, this is not a monarchy.”

And how did Hamilton go about convincing the people of that? He wrote all the ways it was distinct in Federalist 69, some of which I have outlined to you. Appropriations is another important one to—I mean, as Senator Byrd reminded me when I met with him in my 2006 process, Senator Byrd pulled out his pocket Constitution. And Senator Byrd, as everyone who remembers Senator Byrd knows, was very focused on the Appropriations Clause of the Constitution, the fact that the—

Senator SASSE. As any drive through West Virginia will show you.

[Laughter.]

Judge KAVANAUGH. Yes, exactly.

Senator SASSE. I want you to finish that list, and then I want to ask some personnel-specific questions. But, so, I think you have duration of the President’s term in office. Specific authorities that the President may or may not have been given. Appropriations. Personnel questions.

Are there any other—I guess vertical and horizontal federalism. So there is not just executive-legislative distinction here. In my hypothetical, the drunk driving accident could have happened in Virginia or Maryland, instead of DC, and so then we would have to have debates about which level of government would be involved.

Are there any other categories of limitation on Executive power?

Judge KAVANAUGH. Well, I think a huge one, really the hugest question, as I have said many times in my writings in the entirety of constitutional law, is the President’s ability unilaterally to take the country into war. That really dwarfs all other questions in many ways, and Hamilton made clear in Federalist 69 the answer to that question was no.

Now it is sometimes thought and opined by commentators or even scholars that, oh, actually, that has changed over time and actually Presidents have—that really has not changed in practice, at least, over time. Obviously, there is no definitive Supreme Court case.

But you look at all the significant wars, and I wrote this in the book review of the Barron book, which I, you know, recommend to you. I think you would enjoy that. All—

Senator SASSE. Thanks for calling me a nerd on national TV.

[Laughter.]

Judge KAVANAUGH. Yes, I know you would enjoy it, really. Is the—all the significant wars in U.S. history have been congressionally authorized, with one major exception, the Korean War. And the Korean War is an anomaly in many respects, and I think some of the fact that it was undeclared and unauthorized really did lead to the *Youngstown* decision.

But you know, Vietnam, the Persian Gulf War, the AUMF against al-Qaeda, the 2003 Iraq War, and then going back, World War II, World War I, the War of 1812, they are all congressionally authorized. You can go back throughout, and I specify that.

And so the war power, the power to take the Nation into war, at least a significant one, and there are some questions about short-term air strikes and things like that. But a significant war, that is the biggest of all, and that is something that Hamilton talked about in 69 and that our historical practice, I think, has actually lived up to.

I do not mean to footnote Korea. That is an enormous exception. But since then, they have all been congressionally authorized. People debate the Gulf of Tonkin resolution, but the words of it are quite broad.

Senator SASSE. This is not the place for this full detour, but I just want to underscore one thing you said about Hamilton and just in the Federalist Papers more broadly, how many times we see our Founders writing about the norms of our civics. And one of the things that goes wrong in these kind of proceedings is we so regularly conflate policy and politics with civics, and I think that our jurisprudence should fit inside our civics, not inside our politics because it is the overarching thing.

Ken Burns often says “E pluribus unum” is a core motto for America, and we have a whole bunch of pluribus and very little unum right now. We should have a lot more unum, a lot more unity about what we think the role of the judge is. And I think Senator Cruz did a really nice job of unpacking how often you and Judge Garland have been on the same side of issues, 93 and 96 percent of the time.

Your comments yesterday about being on the Team of Nine, about there being no center aisle that needs to be crossed over at the Court, about there being no caucus rooms in the Supreme Court, that is another way of saying if we are doing civics right in America, we should be seeing fewer and fewer political disputes trying to be settled at the Court.

And it means that we need to attend more to the norms. When things are going wrong in America, and we should all admit that things are a mess in this country. We have had—in the governance of our country. There is a lot that is great in America right now.

But in the idea that in our public square we agree on very much, I think we know that that is not true. And if you look at survey data of what high school students turn up if they try to take the immigration and naturalization test and huge shares of high school juniors do not know that we have three branches of Government, shame on us. Not shame on them that they do not understand that because we are not doing that basic civics.

Well, Washington thought it was essential that when he was explaining what his job is as President and that it not be confused

with the monarchy, he wanted to be called Mr. Washington, not honorifics. He rebuked people for bowing before him because we might confuse our kids and grandkids that the Presidency is a monarchy.

So one of the fundamental problems about not understanding the limits on Executive power is that we are not doing a very good job of talking together in common about all the ways that all three branches of Government should be limited.

But let us go back to Senator Coons' point about personnel. I sit on the Armed Services Committee as well, and one of the things that we do there, I do not know, every second week maybe, is that we have confirmation votes of dozens, scores, sometimes hundreds of promotions and flag officers. And why do we do that?

It is because there are all sorts of constraints on Executive power at the level of personnel. And when somebody is getting promoted in the Navy or when somebody is getting promoted at the Air Force, the Congress actually has oversight of that. And because that process works so well, because there is so much collegiality between the legislature and the executive branch, it tends to not turn up on TV. It is often a pretty pro forma moment at the start of our hearings, even though any Senator, Republican or Democrat, that wants to delay the promotion of those officers, we can do that because almost all that stuff is moving by consent.

So there are things where there is unity in hiring or in promotion. It is just a lot of that is noncontroversial. So it does not end up salacious. It does not end up on TV.

Jump in, please. I know you are trying to say something.

Judge KAVANAUGH. I think that is an important addition is that the President, and this goes to Senator Coons as well, does not have the unilateral power to—under the Constitution to appoint even members of the Cabinet, which if you are thinking of a monarchy, of course, you would be able to dispense offices and dispense—you cannot create offices, first of all. You cannot unilaterally fill even Secretary of Defense or Secretary of State because the Framers were so concerned about overbroad Executive power that they required Senate confirmation for even those positions who, if confirmed, then become executive officers.

That is another really hugely important check on the executive branch, which is a reality. And of course, the confirmation process for executive officers, as you say, becomes a part and parcel of the oversight in many ways. And I think that is very important. And I think we have spent—I spent a little too little time. I mentioned it on appropriations. But that is the lifeblood of the Government, of course, is the money that causes the Government to—allows the Government to be able to operate in terms of without money, you cannot do things.

And the President does not—a President does not have the unilateral power to appropriate money. And so Congress ultimately, through that appropriations power, and you all know this better than anyone, can restrict activities of the executive branch in multiple ways, and I think that is an important thing that Hamilton also talked about.

So Congress has substantial power, but that is not to say—the President has large powers, of course, under the Constitution. But

we sometimes forget, and I think your civics lesson is a reminder that all these checks and balances work together, including on judges, in a way that has served the test of time but could always be improved in some respects, I suppose.

Senator SASSE. And one of the reasons that the executive branch seems so powerful right now is, again, because of how weak the legislature is. I mean, it is a fundamental part of why we have the term “President.” In the 1780s, this was not a very common term in the English language. “President” was a nounified form of the name “presiding officer,” and we made it up, our Founders made it up so that we would not have a term that sounded a lot like a king.

And so we wanted to be sure that the term “presiding officer” sounded pretty boring and administrative because the legislative, the policymaking powers were supposed to sit in this body, and the Article II branch is supposed to preside over and execute the laws that have been passed.

It is not supposed to be the locus of all policymaking in America. But one of the reasons we have some of these problems with so many of these executive agencies is because Congress regularly does not finish its work, punts those powers to Article II, and then it is not clear who exactly can execute all those authorities. And so we end up with this debate about the unitary executive, and you had a different term for it.

But unpack for us a little bit why you have a different view about both the prudence and the constitutionality of one person-headed independent executive agencies or pseudo-independent agencies versus commission structure-headed independent agencies.

Judge KAVANAUGH. The traditional independent agencies that were upheld by the Supreme Court in *Humphrey's Executor* in 1935 are multi-member independent agencies. And so usually sometimes three, five, occasionally more, but they are multi-member independent agencies. And that has been all the way through. And then—for the significant independent agencies.

The CFPB, and I have no—it is not my role to question the policy or to question the creation of the new agency. In fact, I think it was designed to—for efficiency and centralization of certain overlapping authorities. It is not my role to question that policy. Someone challenged the fact that it was headed for the first time on something like this by a single person.

And a couple things then I wrote about in my dissent in that case. I will just repeat what I wrote in the dissent. I said, first of all, that is a departure from historical practice of independent agencies, and that matters, according to the Supreme Court.

They had a previous case involving the PCAOB, where they had a different innovation there the Supreme Court had struck down in part because of the novelty of it. So departure from historical practice matters because precedent always matters, including Executive precedent.

Then a diminution of Presidential authority beyond the traditional independent agencies in this sense. With a traditional independent agency, when a new President comes in office, almost immediately the President has been given the authority to designate

a new chair of the independent agency. So when a new—when President Obama came in, was able to designate new chairs of the various independent agencies, and the chairs, of course, set the policy direction and control the agency. That has historically been the way. That does not happen with the CFPB.

And finally, having a single person, just going back to liberty, who is in charge, who is not removable at will by anyone, not accountable to Congress, in charge of a huge agency, is something that is different and has an effect on individual liberty.

So a single person can make these enormous decisions—rulemakings, adjudications, and enforcement decisions, all of them. And from my perspective—I am just repeating what I wrote here, I am not intending to go beyond what I wrote in that opinion—that was an issue of concern.

And I did put in a hypothetical because it seems abstract that I think we will realize this issue with that agency or any other when a President comes into office and has to live for 3, 4 years with a CFPB director appointed by the prior President. And then I think everyone is going to realize—of a different party in particular.

Senator SASSE. Right.

Judge KAVANAUGH. And then I think everyone is going to realize, wow, that is an odd structure. Now maybe not, but that is what I wrote in my opinion that that will seem very weird because that is not what happens with all the traditional independent agencies, and so when President—whenever any President leaves and is appointed in the last 2 years, the CFPB director—the new President might campaign on consumer protection.

Let us imagine, okay, Presidential campaign, candidate campaigns on consumer protection and consumer issues and then comes into office and cannot actually appoint a new CFPB director for the whole term of his or her office. That is going to seem, I think, quite odd structurally. At least that is what I said in my opinion, again not intending to go beyond what I said in my opinion.

Senator SASSE. So is it fair to say that if you have a single person-headed agency and the President does not have the authority to hire or fire this person, that that person having policymaking functions, executive functions, and judicial functions, functionally becomes a fourth branch of Government because who are they accountable to? Is that a fair summary of the concern?

Judge KAVANAUGH. Absolutely, that is a fair summary. A branch unto itself.

Senator SASSE. I want to ask unanimous consent to enter into the record, Mr. Chairman, I have got a letter from several dozen legal scholars. They are professors that teach at Harvard, Stanford, Yale, Duke, Northwestern, and other schools, a diverse group of folks, very varied politics and legal scholarship.

But a few of their quotes I want to include here are, that they “all agree that Judge Brett M. Kavanaugh displays outstanding scholarly and academic virtues and that he would bring to the Court an exceptional record of distinction in his judicial service.” As well, “Judge Kavanaugh’s long record of teaching and mentoring students of diverse backgrounds is to be applauded,” and “Judge

Kavanaugh would continue to help build productive bridges between the bench, legal practitioners, and the academy.”

Mr. Chairman, can I ask unanimous consent? Chairman, can I ask unanimous consent to include it?

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator SASSE. Thank you.

I have a series of questions I would like to ask you about both precedent and the First Amendment, but I am going to be out of time too soon. So I am going to do some smaller ball stuff first and save for the next round.

I would like to go back to the Kagan quote on Scalia and the “We are all textualists now” point. What is a fair way to characterize the position that folks would have held before Justice Kagan said we have all become textualists now?

When people were—when there were nontextualists, who were they, and how does it make any sense? What is the fairest construction you can put on it?

Judge KAVANAUGH. I think one way to describe it is that judges would try to figure out what the general policy was reflected in the statute and then feel free to shape the particular textual provision in a way that the text itself would bear to serve that broad policy end.

And so I think that is probably one way to think about it. Another way is that judges would sometimes use a snippet of a Committee report or a floor statement and say that is really what Congress was getting at in terms of the statute. And therefore, we are going to follow that Committee report or floor statement rather than following the text of the statute.

So that is another way I think in which judges would depart from the text of the statute. And that mode of statutory interpretation I do think Justice Scalia had a very profound effect on the Supreme Court itself and the lower courts in particular. And one of the things Justice Kagan said in that speech was he probably did not get 100 percent of what he wanted in terms of moving the statutory interpretation, but he got pretty darned close in terms of moving the ball in his direction and that everyone really does pay attention to the text.

And if you sat in my court for a week and listened to argument after argument, which I do not recommend, Senator. But if you did that, you would hear judge after judge saying, well, what about the text of the statute? What about Clause 2 of the statute?

Every judge is focused on the text of the statute, again because that is what you passed and that is what matters under the Constitution, and because we know the compromises that are inherent in any legislative product and we have to respect that compromise.

Senator SASSE. So I think one of the things that concerns me about the way we have talked about your nomination and a lot of media reports about it is that it has been said that you have been nominated to the so-called “swing seat” on the Court.

I think two ways that we can go wrong. One of them are thinking about judges as Republican versus Democrat, and you are supposedly because you have been—you have worked in a Republican White House. You have worked in the George W. Bush White

House and because you are being nominated by a Republican President today, there are a whole bunch of people who say, heck, yes. We won the election. We get our guy on the Court. Wear your jersey. You are supposed to be a Republican when you are on the Bench.

And then there are other people—I think that is a terrible view. There are other people who say, well, hopefully, he can grow in office. And because he is going to be nominated and confirmed to the swing seat, the Kennedy vote, the Powell vote on the Court, he will be big enough to rise above the all the muck of politics. And when there are really big issues facing the country that get to the Court, at least in a 4-to-4 Court, this could be the guy who rises to the level of giving us Solomonic wisdom and functioning not just as a judge, but maybe as a quasi-kingly figure.

What do you say to people who have a conception of a swing seat on the Court? What does that mean?

Judge KAVANAUGH. I am not entirely sure what it means to individual people who use that term.

Senator SASSE. Are you being considered for the swing seat?

Judge KAVANAUGH. I am being nominated to replace Justice Kennedy, who was his own man, as am I my own judge. And I have talked about his jurisprudence and his devotion to liberty, which he found as the unifying theme of all the constitutional provisions and, as I said, established a legacy of liberty for ourselves and our posterity, as the Framers established this Constitution to secure the blessings of liberty for ourselves and our posterity.

But I have read that he publicly in public statements did not like that term, and I am not sure I always know what people mean by that term. As I said repeatedly, but I really believe it, I think that the Court, at least if I am on it—well, I think of the Court, period, as a Team of Nine. And if I am on it, I am fortunate enough to be confirmed, I think of myself as trying to be a team player.

I do think of things through a sports line sometimes, as I know you do, too, Senator. And I think that is important. I am not naive. I am not naive. There would be cases where people divide. But I do think that mindset and that attitude matters in any collegial body, and the Court is a collegial body.

And so different—different cases—

Senator SASSE. I am only interrupting you because I watched the Chairman pull his little gavel.

Judge KAVANAUGH. Yes, yes.

Senator SASSE. And if I do not get my question in before the bell, I am done. So I can get one more off, if I fire fast.

Chairman GRASSLEY. Make sure it is a short question.

Senator SASSE. Yes, sir. When I was writing my dissertation, I struggled to find my voice at one point, and I had an adviser who was great. He said, put an 8-by-10 picture up, next to your keyboard, and make it be somebody that you are writing to every day and make it be somebody who is smarter than you but knows nothing about your topic.

This was great advice. I took a picture of my aunt, from one of the farms I used to work on when I was a kid, and she is far smarter than I am. She did not know anything about the topic I

was writing about, and it was an incredibly helpful device for me to every day figure out who I was writing to that day.

When you write your opinions, who are you writing for?

Judge KAVANAUGH. Multiple audiences, Senator. I am thinking first and foremost about the litigants before us, and I want the losing party in particular to respect the opinion. They are not going to agree with it by definition, but I want them to respect the opinion. The clarity of the opinion, the thoroughness of the opinion, the fact that I understood the real world consequences, that I have grappled with the law, that I grappled with the best argument.

So I want the losing party to come away saying he got it. As a litigant, I knew how important that was when I lost, at least I felt like I got a fair shake. Why does that matter? Both due process and the individual case, but it builds overall confidence I think in the judiciary to know you are getting a fair shake even when you lose.

I am also writing for the parties affected by the decision. So we decide cases and controversies, but we write opinions that have precedential effect, as we have discussed often. So the opinions need to be clear. They need to be organized.

They can, if there is a screwed up footnote or something, that is going to—I have seen it in my executive branch and private practice experience. That is going to cause all sorts of complications. So to get it just exactly right is so important, which takes draft after draft after draft.

But I am thinking about the affected parties, whether it is agencies or regulated parties or the criminal defense bar or the prosecution, the U.S. Attorney's Office. I am always thinking about that.

I am thinking about someone like you said, I think similar to your model, someone who just picks up the decision and is a lawyer, and I want them to be able to read it and understand it and get it and to be able to follow it. So I always try to have an introductory paragraph or few pages, as you have seen in a few of them. Like the *PHH* case has a long introduction where they could just read the introduction, say "I got it." And then they could read the whole thing if they want. I think that is very important as well.

I am writing, I think about students. So students, where do they learn law? They learn law oftentimes by reading opinions. I have taught for 12 years, and I certainly understand the value of teaching. But teaching through your opinions, that is not the first thing I am thinking about. But I am, that is, okay, could a student learn from this about the criminal—the Fourth Amendment or learn about the First Amendment if they read my opinion?

If I give the—to Senator Coons' conversation, if I give the historical backdrop of the independent agencies, maybe a student will pick that up and think that is good.

And then I am thinking, I think also about professors as well. Not in a sense of trying to convince necessarily if it is not something convincible, but the sense of professors are thinking for years about things I might by definition have a week or two or four to spend. And they are writing treatises and Law Review articles, and I want them to at least be able to understand and help look at my opinions to build the body of law.

Senator SASSE. Thank you. Oh, and thank you, Chairman.

Chairman GRASSLEY. How come you did not ask that question first?

Senator SASSE. You told me to ask last.

Chairman GRASSLEY. We are going to take a 10-minute break, but if you can be back in 5 minutes, it would benefit Senator Blumenthal.

Judge KAVANAUGH. Yes, okay. I will do it.

[Whereupon, at 5:24 p.m., the Committee was recessed.]

[Whereupon, at 5:35 p.m., the Committee reconvened.]

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Good afternoon, Judge.

I want to begin by talking about the elephant in the room, non-theoretical. The President of the United States who has nominated you is an unindicted co-conspirator implicated in some of the most serious wrongdoing that involves the legitimacy of his Presidency. There is a distinct possibility, even a likelihood, that issues concerning his personal criminal or civil liability may come before this Supreme Court as early as the next term. The issues may involve his refusal to comply with a grand jury subpoena or to testify in a criminal trial involving one of the officials in his administration or his friends or even his own actual indictment.

We are in uncharted territory here. It is unprecedented for a Supreme Court nominee to be named by a President who is an unindicted co-conspirator. In the *U.S. v. Nixon* case, two of the Justices had been appointed by Richard Nixon, but not while he was an unindicted co-conspirator. I would like your commitment that you will recuse yourself if there is an issue involving his criminal or civil liability coming before the United States Supreme Court. In other words, will you take yourself out of ruling on any of the issues involving his personal criminal or civil liability?

Judge KAVANAUGH. Senator, one of the core principles I have articulated here is the independence of the judiciary, which I know you care about deeply, too, and I think undergirds some of your comments yesterday. And the independence of the judiciary is critical to the confidence of the American people in the judiciary and to the rule of law in the United States. But one key facet of the independence of the judiciary, as I have studied the history of nominees, is not to make commitments on particular cases—

Senator BLUMENTHAL. I am not asking for a particular commitment, and I am going to take your answer as a “no.” It is really a “yes” or “no” question. You will not commit to recuse yourself. You will not commit to take yourself out of that decision despite the unique circumstances of your nomination.

Judge KAVANAUGH. Senator, I think to be consistent with the principle of independence of the judiciary, I should not and may not make a commitment about how I would handle a particular case, and the decision to participate in a case is itself a decision in a particular case. And, therefore, following the precedent set by all the nominees before me, I need to be careful. And, again, you may disagree with this, but this is part of what I see as the independence of the judiciary.

Senator BLUMENTHAL. Well, I do disagree, and I am troubled and disturbed by your refusal to say that you will take yourself out of that kind of case.

I want to move on to some examples of real-world impacts on real people and taking that as a factor, as you have articulated it, in the decisions that you have made. I want to talk about Jane Doe in *Garza v. Hargan*. As you know, she was a 17-year-old unaccompanied minor who came across this border having escaped serious threatening, horrific physical violence in her family in her homeland. She braved horrific threats of rape and sexual exploitation as she crossed the border. She was 8 weeks pregnant. Under Texas law she received an order that entitled her to an abortion, and she also went through mandatory counseling as required by Texas law. She was eligible for an abortion under that law. The Trump administration blocked her. The Office of Refugee Resettlement forced her to go to a crisis pregnancy center where she was subjected to medically unnecessary procedures. She was punished by her continued requests to terminate her pregnancy by being isolated from the rest of the residents. She was also forced to notify her parents, which Texas law did not require. And the pregnancy, which was 8 weeks, was 4 weeks further when you participate on a panel that upheld the Trump administration in blocking her efforts to terminate her pregnancy.

The decision of that panel was overruled by a full court of the D.C. Circuit Court of Appeals. It reversed that panel, and the decision and opinion in that case commented, "The flat barrier that the Government has interposed to her knowing and informed decision to end the pregnancy defies controlling Supreme Court precedent." And it said further, "The Government's insistence that it must not even stand back and permit abortion to go forward for someone in some form of custody is freakishly erratic."

In addition to being erratic, it also threatened her health because she was unable to terminate her pregnancy for weeks that further increased the risk of the procedure—one study said 38 percent every week. Her health was threatened. She was going through emotional turmoil. And yet in your dissent, you would have further blocked and delayed that termination of the pregnancy.

All of what I have said is correct as to the facts here, correct?

Judge KAVANAUGH. No, Senator. I respectfully disagree in various parts. My ruling, my position in the case would not have blocked—

Senator BLUMENTHAL. It would have delayed it, and it would have put her perilously close to the 20-week limit under Texas law. Correct?

Judge KAVANAUGH. No. We were still several weeks away. I said several things that are important, I think. First—

Senator BLUMENTHAL. Well, I want to go on because I can read your dissent, but I want to go to—

Judge KAVANAUGH. Well, but you read several things—respectfully, first of all, I think the opinion was by one judge that you were reading from. That was not the opinion for the majority.

Second, I was trying to follow precedent of the Supreme Court on parental consent which allows some delays in the abortion procedure so as to fulfill the parental consent requirements. I was rea-

soning by analogy from those. People can disagree, I understand, on whether we were following precedent, you know, how to read that precedent. But I was trying to do so as faithfully as I could and explained that. I also did not join the separate opinion, the separate dissent that said she had no right to attain an abortion at all. I did not say that. And I also made clear that the Government could not use this immigration sponsor provision as a ruse to try to delay her abortion past, to your point, the time when it was safe.

Senator BLUMENTHAL. Let us talk about your dissent in just a moment, but, first, I want to talk about a list. It is the list that Donald Trump circulated in May 2016 of his potential Supreme Court nominees. May 2016. Was your name on that list?

Judge KAVANAUGH. It was not.

Senator BLUMENTHAL. And then he circulated another list in November 2017, another list of Supreme Court nominees. November 2017. Was your name on that list?

Judge KAVANAUGH. 2017, yes. There was another list in the interim between those two, but—

Senator BLUMENTHAL. And his litmus test for that list was that a Justice that he would nominate would have to automatically overturn *Roe v. Wade*, correct?

Judge KAVANAUGH. I am not going to comment on what he had said. Whatever he had said publicly—

Senator BLUMENTHAL. Well, he said it. That is not in dispute. And in between, in—

Judge KAVANAUGH. I am not sure the exact words you just used are consistent with what he said, but whatever he said publicly will stand in the record.

Senator BLUMENTHAL. Exactly.

October 2017, your decision and dissent in *Garza* occurred. Correct?

Judge KAVANAUGH. It did, but that case came to us in an emergency posture. I did not seek that case. That was not a speech. I was driving home on a Wednesday night, as I recall, and the clerk's office called and said, "We have an emergency abortion case," which is very unusual in our court. First time I had had one.

Senator BLUMENTHAL. Okay. What occurred then between May 2016 and November 2017 besides your *Garza* dissent that put you on that list?

Judge KAVANAUGH. Well, Mr. McGahn was White House Counsel, and the President has taken office by then, if I am—sorry, I am looking at the dates. I think I got it—May.

Senator BLUMENTHAL. We can hold it up higher.

Judge KAVANAUGH. No; that is okay. I got it now. The interim list—

Senator BLUMENTHAL. So let me ask you—

Judge KAVANAUGH. But so President Trump had taken office. Mr. McGahn was White House Counsel. Those are just facts. And then what else happened, I—

Senator BLUMENTHAL. It is a mystery.

Judge KAVANAUGH. No, it is not a mystery. I am just debating whether I want to say, but a lot of judges and lawyers who I know—

Senator BLUMENTHAL. Let us talk about your dissent for a moment.

Judge KAVANAUGH. Can I answer the question? Can I answer the question?

Senator BLUMENTHAL. I want to talk about your dissent.

Judge KAVANAUGH. But I had an answer to your question. You said, "What else happened?" And I have an answer.

Senator BLUMENTHAL. Go ahead.

Judge KAVANAUGH. A lot of judges and lawyers I know made clear to, I think, various people that they thought I should at least be considered based on my record for the last 12 years. And colleagues of mine thought I should be considered, and I think that—I appreciate that.

Senator BLUMENTHAL. And maybe more than a few of them cited your dissent in *Garza*.

Judge KAVANAUGH. I think it had happened long before that, actually. They—

Senator BLUMENTHAL. Well, let us talk about the dissent, though. In that dissent, three times you used the term "abortion on demand." "Abortion on demand," as you know, is a code word in the anti-choice community. In fact, it is used by Justices Scalia and Thomas in their dissents from Supreme Court opinions that affirm *Roe v. Wade*. They have used it numerous times in those dissents, and it is a word used in the anti-choice community. And, in addition, in that dissent, you refer to *Roe v. Wade* as "existing Supreme Court precedent." You do not refer to it as *Roe v. Wade* protecting Jane Doe's right to privacy or her right to an abortion. You refer to it as "existing Supreme Court precedent"—not "Supreme Court precedent"—"existing Supreme Court precedent."

Now, I do not recall seeing a judge refer to "existing Supreme Court precedent" in other decisions, certainly not commonly, unless they are opening the possibility of overturning that precedent. It is a little bit like somebody introducing his wife to you as, "my current wife." You might not expect that wife to be around for all that long. "My current wife"—"existing Supreme Court precedent."

And throughout your opinion, you are careful to never say that the Constitution protects the right to choose. You concede that the parties have "assumed for purposes of this case" that the plaintiff has a right to end her pregnancy, but not that she actually has that right. You write, "As a lower court, our job is to follow the law as it is, not as we might wish it to be."

Judge KAVANAUGH. There I have to interrupt, Senator, because I was referring to the parental consent cases as well, which I talked about at some length there. And my disagreement with the other judge was that I thought I was, as best I could, faithfully following the precedent on the parental consent statutes, which allowed reasonable regulation. As *Casey* said, "minors benefit from consultation about abortion." That is an exact quote from *Casey*, and the Supreme Court had upheld those statutes even though they allowed—I mean they occasioned some delay in the abortion procedure. Justices Marshall, Brennan, and Blackmun dissented in those.

And so an "existing Supreme Court precedent," I put it all together, *Roe v. Wade* plus the parental consent statutes, and I said

different people disagree about this from different directions, but we have to follow it as faithfully as possible, and the parental consent were the—was the model—not the model, the precedent.

And can I say, on “abortion on demand,” I do not—I am not familiar with the code word. What I am familiar with is Chief Justice Burger in his concurrence in *Roe v. Wade* itself, so he joined the majority in *Roe v. Wade*, and he wrote a concurrence that specifically said that the Court today does not uphold abortion on demand. That is his phrase. And he joined the majority in *Roe v. Wade*. And what that meant in practice over the years, over the last 45 years, is that reasonable regulations are permissible so long as they do not constitute an undue burden. And that has been the parental consent, the informed consent, the 24-hour waiting period, parental notice laws, and that is what I understood Chief Justice Burger to be contemplating and what I was recognizing when I used that term. I am not familiar—

Senator BLUMENTHAL. Well, it also was a signal. Let us be very blunt here. It was a signal to the Federalist Society and the Heritage Foundation and to the preparers of those lists—the President outsourced that task to those groups—that you were prepared, and you are, to overturn *Roe v. Wade*. “Abortion on demand” has a very specific meaning in the dissents after *Roe*, and the concurrences. “Existing Supreme Court precedent,” and reference to that precedent not as you wished it to be, but as the law, Supreme Court precedent existing now, required.

Is it a fact, Judge, also that while you were in the Bush White House, you took the position that not all legal scholars actually believe that *Roe v. Wade* is the settled law of the land and that the Supreme Court could always overturn it as precedent and, in fact, there were a number of Justices who would do so?

Judge KAVANAUGH. I think that is what legal scholars have—some legal scholars have undoubtedly said things like that over time, but that is different from what I as a judge—my position as a judge is that there are 45 years of precedent and there is *Planned Parenthood v. Casey*, which reaffirmed *Roe*, so that is precedent on precedent, as I have explained, and that is important. And that is an important precedent of the Supreme Court. It is not the only—

Senator BLUMENTHAL. I think—

Judge KAVANAUGH. It is not the only precedent, though, and *Casey*, it is very important to understand, I think, and it goes to your point about existing. *Planned Parenthood v. Casey* reaffirmed *Roe*, but at the same time upheld Pennsylvania’s waiting period, its informed consent provision, and the parental consent provision of the Pennsylvania law, and Justices Blackmun and Stevens dissented from that part of the decision in *Planned Parenthood v. Casey*. That was Justices Kennedy, O’Connor, and Souter who upheld that. So, in many ways, *Casey* reached—in applying the undue burden standard, reached a position that allowed some reasonable regulation, as the Court put it, so long as it does not constitute an undue burden. And so existing Supreme Court precedent is the body of precedent on the regulations, too. It is *Roe*, but then what regulations, and that is the body of existing Supreme Court precedent.

Senator BLUMENTHAL. And that is exactly the point here. You were telling the Trump administration that if they wanted someone who would overturn *Roe v. Wade*, you would make the list. These were your bumper stickers in that campaign: “Abortion on demand,” “Existing precedent,” “Law not as it necessarily was as you wished it now.”

Judge KAVANAUGH. Well, I would just say two other things, Senator. One, I did not join the separate opinion of another dissenter who said that there was no constitutional right at all for the minor in that case. I did not join that opinion. And, second, I—I will say three things. Second, I said in a footnote, joined by Judge Henderson and Judge Griffith, that—my whole dissent was joined by both of them—that the Government could not use this transfer to the sponsor procedure as a ruse to delay the abortion past unsafe time.

Senator BLUMENTHAL. You did not join that dissent, but let me ask you—

Judge KAVANAUGH. And I said, third, that if the 9 days or 7 days expired, that the minor at that point, unless the Government had some other argument that had not unfolded yet that was persuasive, and since they had not unfolded it yet—I am not sure what that would have been—that the minor would have to be allowed to obtain the abortion at that time. So the whole point was simply—and it was not my policy, but my question was to review the policy set forth by the Government, and the question was: Was that policy consistent with precedent? And it was a delay, undoubtedly, but a delay consistent, as I saw it, with the Supreme Court precedent on parental consent provisions.

Senator BLUMENTHAL. Well, let me just ask you then: Can you commit, sitting here today, that you would never overturn *Roe v. Wade*?

Judge KAVANAUGH. So, Senator, each of the eight Justices currently on the Supreme Court, when they were in this seat, declined to answer that question.

Senator BLUMENTHAL. I understand—I understand your answer. You have given it on other issues before. But you can understand also given what we have seen in *Garza* and the pattern here of sending a signal about your willingness to overturn *Roe v. Wade*, that your response leaves in serious question your commitment to this precedent. And, in fact, given the real-world consequences here, a young woman’s health was put in serious jeopardy. She came close to being unable at 20 weeks to even have the opportunity to terminate her pregnancy. She was deprived of options because of that wait, and you would have delayed it further, and perhaps completely. And I think that you needed to send a message to the Trump administration that you should be on that list.

Let me move on to other health care issues. You have taken the position in *Seven-Sky*—and I am going to put up a poster—that the President’s authority—“Under the Constitution, the President may decline to enforce a statute that regulates private individuals when he [the President] deems”—when he deems—“the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

Under the Affordable Care Act, as you know, there are protections for millions of Americans who suffer from pre-existing condi-

tions. That protection has real-world consequences. Pre-existing conditions include Alzheimer's, arthritis, congestive heart failure, Crohn's disease, hepatitis, lupus, mental disorders. That is just a very partial list, including being pregnant. You have answered my colleague, Senator Coons, that you would not say whether or not the President would have the power to strike down that statute unilaterally or decide that he would not enforce it because there is a case pending.

Do you believe that the President can refuse to enforce that statute even if the United States Supreme Court upholds it?

Judge KAVANAUGH. Senator, a couple things. First of all, just to close out the prior discussion, you said delayed completely. That is not what I said. In fact, I said it could not be delayed past the point of a safe time. I just wanted to close the loop on that and make clear the record on that.

On this, I was referring to the concept of prosecutorial discretion, and this is in a broader—which is established by the *United States v. Richard Nixon* case, which says the executive branch has the “exclusive authority and absolute discretion whether to prosecute a case.” That is an exact quote from *U.S. v. Nixon*, if I am remembering correctly, and then in *Heckler v. Chaney*, the Supreme Court says that that principle applies to civil enforcement as well. So that is the precedent of the Supreme Court that I was referring to and explained later in *Aiken*.

But why did I have that in there at all? I was—in the Affordable Care Act case, I wrote a decision saying that the Court should not consider it, at that time, because it was not ripe under the Anti-Injunction Act, and that we should wait to consider it when—

Senator BLUMENTHAL. But here is my question to you—the enforcement of the Affordable Care Act is a matter of prosecutorial discretion, and my question is, even if the United States Supreme Court in that *Texas* case should hold it to be constitutional, could President Trump decline to enforce it and put at risk the health of literally tens of millions of Americans, including 500,000 people in Connecticut who suffer from those diseases, including those homeless people who come to the shelter where you distribute meals?

Judge KAVANAUGH. So a couple things on that, Senator. The concept of prosecutorial discretion, as you know, of course, as a former U.S. Attorney, is well rooted in American law. So if a U.S. Attorney decides we are going to go after bank fraud and not after low-level marijuana, that is classic prosecutorial discretion.

Senator BLUMENTHAL. But we are not talking about that discretion. We are talking about the President saying that law, the Affordable Care Act, or, for that matter, civil rights statutes, which this President unfortunately could decide he is not going to enforce, or consumer protection statutes or even anticorruption statutes, we are talking about statutes that, as you said here, regulate individuals and they protect them, simply because he deems them unconstitutional, refused to enforce them, not in selected cases, across the board.

Judge KAVANAUGH. A couple things, Senator. First of all, for a few of your examples, of course, there are private causes of action as well, so—

Senator BLUMENTHAL. There are private causes of action, but the Government is the chief enforcer.

Judge KAVANAUGH. I agree with that. I am not disputing that. On prosecutorial discretion, what I said in the subsequent *Aiken County* case, I elaborated on that, but then in a subsequent Marquette speech that is published in the Marquette Lawyer that you have, I indicated that the limits of prosecutorial discretion are uncertain and it would be important for academics and others to study that history and figure out what the limits are.

So, for example, in the deferred—in the immigration context—

Senator BLUMENTHAL. Well, my point is there are no limits here.

Judge KAVANAUGH. But the Supreme Court, if you look at the quote in *United States v. Richard Nixon*, which I know you have read, it says the executive branch has the “exclusive authority and absolute discretion whether to prosecute a case.” Now, *Heckler v. Chaney* refers back to that, cites that, and that is in the civil context. There are some limits presumably on prosecutorial discretion, but this came up in the immigration context in President Obama’s administration. That is still something I will not comment on directly, but there are always questions about prosecutorial discretion of—

Senator BLUMENTHAL. Well, let me just point out—and I apologize for interrupting you, but my time is limited.

Judge KAVANAUGH. I understand.

Senator BLUMENTHAL. In *Seven-Sky v. Holder*, in your dissent you said, “Under the Constitution”—this is in your dissent in that case. You cited Justice Scalia in *Freytag v. Commissioner* as your authority.

Judge KAVANAUGH. Yes.

Senator BLUMENTHAL. “The President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.” I am going to leave this topic. I hope we will have an opportunity to return to it tomorrow.

Judge KAVANAUGH. Sure.

Senator BLUMENTHAL. And I want to talk about the Second Amendment and your position on gun violence prevention. As you know, my State has a tragic history—

Judge KAVANAUGH. Yes.

Senator BLUMENTHAL [continuing]. And experience, recently with this issue. But literally every community in the whole country has some experience with gun violence prevention because 90 people every day die from it. And I am deeply troubled by your position on this issue that history and tradition govern here, that any weapon in common use is protected. The reason that some weapons are not in common use is that they are banned, like machine guns. If our standard is going to be whether assault weapons are in common use, we are going to have more and more of them, and they are in common use, they are commonly used to kill people. That is what they were designed to do.

So I want your explanation as to how possibly you can justify requiring that gun violence protection statutes have to be long-standing or traditional and that they cannot in any way protect people from weapons, assault weapons, that are, as you put it, “in

common use,” because they are in common use only because they are not in any way regulated for public safety.

Chairman GRASSLEY. Judge, you answer as thoroughly as you need to answer that question. And then when you are done answering that question, I am going to call on Senator Flake.

Judge KAVANAUGH. A few things, Senator. First, at the end of my *Heller* opinion, I pointed out that I grew up in this area, and this area has been plagued by—in the 1970s and 1980s plagued by gang and gun/drug violence, and was known for a while as the “murder capital of the world.” So I understand and appreciate your initial comment on that.

Second, where did I get the test? I got it right out of the Supreme Court’s opinion in *Heller*, which uses those exact phrases and then elaborates on those in the subsequent *McDonald* case. And I know people passionately disagree with the Supreme Court’s decision in *Heller* and with the Supreme Court’s decision in *McDonald*. But as a lower-court judge, I am following all the precedent. It is not a cafeteria where I can pick which precedents I want to apply. I have to apply all the precedents. I did that. I explained it in painstaking detail why I thought the test I was applying was appropriate in that case and went through the test.

I made clear that the Supreme Court Part 3 of Justice Scalia’s majority opinion in *Heller* allowed—still allowed a lot of gun regulation. Machine guns can be banned. Laws, traditional laws, felon in possession, concealed carry were identified there, laws prohibiting guns—possession by people with mental illness, government buildings, schools, those were all pre-identified. And then it is important to point out, also, the footnote in *Heller* says, “This list is not meant to be exhaustive,” and so I think that is guidance to the lower court when applying that test.

As Chief Justice Roberts said at the oral argument in *Heller*, “You reason by analogy from those historical exceptions in regulations,” and that is something that I think is appropriate, and I said it in my opinion. But, ultimately, I had to apply the test to the Supreme Court, and I understand people may disagree, (a) with the Supreme Court opinion or (b) with how I applied it, but I tried to do it as faithfully as I could.

Chairman GRASSLEY. Senator Flake.

Senator FLAKE. Thank you, Mr. Chairman.

Thank you, Judge. Thank you for your—

Chairman GRASSLEY. Hey, wait a minute, would you, please? Start his time over.

Judge, you have been attacked for this short footnote that you wrote in the Affordable Care Act case about when a President may decline to enforce the laws passed by Congress. But in a different opinion, you actually ordered the executive branch to comply with the law. You wrote, “It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard Federal law.”

Obviously, you do not think the President has a blank check to ignore the law.

Senator Flake.

Senator FLAKE. Thanks. Always happy to defer to the Chair.

I appreciate your endurance here today, Judge, and let me just ask, you mentioned your mother as one of your judicial heroes. Who else would you put on that list? What people do you admire and why?

Judge KAVANAUGH. My mom, as you mentioned, of course, trial judge, real-world consequences, real people in the real world, and saw her operate her courtroom with firmness and civility and was well respected as a prosecutor first, then as a judge, and her civility and work ethic are something—and remembering that cases have real-world consequences.

Justice Kennedy, I have mentioned, a model of independence, fiercely defended judicial independence throughout his career, a model of civility and collegiality. You can look at 30 years of his opinions, and what is the harshest thing ever written? It is not—you cannot find it. Just a model of civility in his judicial opinions. Oral argument, always so courteous to Counsel, in his public speeches, someone who always celebrated the Constitution and its protection of individual liberty, and showed by his example, I think, how to conduct oneself as a judge off the Bench.

When I became a judge, I was sworn in May 30, 2006, in his chambers, and he said, “You are going to go back and you are going to”—“Soon you are going to feel lonely. You have been doing this job at the White House. It is all energetic. And you are going to feel quiet.” And he said, “Get out and teach,” and he has taught since 1975, I believe, when he became a Ninth Circuit judge. And I followed that example, and teaching has been an important part of my life. So he taught—he instructed that. You know, the legacy of liberty he left for the United States is written all through the U.S. reports.

Justice Scalia, someone I knew, and also a fierce adherent to the Constitution and someone who changed statutory interpretation, as we have discussed, in terms of his focus on the text. But it was rooted in his appreciation for the Constitution and the rule of law. And as he often said, but it is true, if you look through his jurisprudence, the decisions where he ruled in ways that people did not expect, protection of the Fourth Amendment, for example, the thermal imaging case, *Kyllo*; the *Jones* case on GPS tracking; First Amendment, *Texas v. Johnson*. He had in *Hamdi*, the dissent. So he was a fierce, also, protector of individual liberty, even in the national security context.

I look back to Chief Justice Rehnquist and Justice Jackson for whom Chief Justice Rehnquist clerked as two people who had experience in the executive branch and then came to the Supreme Court and I think became models of independence. Justice Jackson, of course, with his beautiful prose also in cases like *Morissette*, *Korematsu*, and *Youngstown, Barnett* as well.

Rehnquist, I think such a firm but also affable manner. I wrote about Rehnquist—I gave a speech about him and wrote—I referred to the fact that “Brethren” was this book that came out in the late 1970s very critical of—well, the sources were very critical of the Supreme Court, not saying the authors were, of some of the Justices individually, but Rehnquist is referred to by all these terms throughout that emphasized his collegiality, and I think that is why he was such a hero.

And then I will end it with, you know, anytime you look at the Constitution and you think about people who have had an effect on it and what it means today, you have to identify and you should identify Thurgood Marshall because of what he did as a Justice, but perhaps even more, he had a huge record as a Justice that is very important. And he was a real-world consequences person. I pulled up an old oral argument one time in a First Amendment case that he argued in the early 1970s, and it was about ads on a bus, on the interior of a bus, and I guess it was political ads on the interior of a bus, and the question was whether they were permissible, and the First Amendment right to run these ads on the interior of the bus. And the wording was that they would be identified, it would look like the city was putting its imprimatur on a political candidate. And Thurgood Marshall started the oral argument, "Why? Why?" You know, "Why are you banning them?" And then they said, "Well, people might think that the city is endorsing the political candidate." And he said, "Do you really think people are that stupid?" And it just showed his—he got the real-world consequences in a way that no one else—but, of course, his legacy is towering in terms of what he did as a litigator and helped—not singlehandedly, but he certainly—he had colleagues, but he helped bring the end of *Plessy v. Ferguson* and achieve the greatest moment in Supreme Court history in *Brown v. Board*. So I always think about Thurgood Marshall's legacy as well.

So that is a much more long-winded answer than you expected, Senator, but I appreciate you giving me the time.

Senator FLAKE. That is important insight. I appreciate it. I had the opportunity to sit next to Anthony Kennedy last Saturday for John McCain's funeral, and I think all of us have the same opinion of his collegiality, friendliness, and that certainly is important. We will talk about that a little later.

I noted yesterday some concerns, back to the real world here, about an administration that does not seem to understand or appreciate the separation of powers or the rule of law. I worry that the President, the head of our executive branch, may be using Executive power to advance personal political interests. Now more than ever I think that we have to ensure that our institutions are independence and are firm against encroaching partisan politicking. There is nowhere more important obviously than the judiciary. Alexander Hamilton famously wrote in Federalist No. 78 that you have cited many times that the judiciary is the least dangerous branch of Government based on the understanding that the judicial branch lacks what he said was the power of the executive branch and the political passions of the legislature.

I believe that if you are confirmed to the Supreme Court—I do not believe that you would erode judicial independence or otherwise disrupt the separation of powers between the three branches. You have been discussing your reverence for the separation of powers with us today, particularly the importance of keeping the judiciary the least dangerous branch by making sure that it stays apolitical. And I will discuss that more in a moment, but specifically, I am a little concerned about the executive branch and the powers therein, and I reiterate some of the concerns that Senator Sasse just identified. And in response to Senator Sasse, you walked us

through some of the founding documents, the Constitution Federalist Papers, that endow the President with positive powers. You have also discussed today cases; you mentioned *Youngstown, U.S. v. Nixon*, those that you admire because they involve the judiciary standing up to the President and putting limits on Executive power. These precedents certainly restrain Presidential power.

But I am curious. What limits are there, if any, that would prevent a President from centralizing the Executive power and using it for his own political or personal purposes? What protections are there, statutory, constitutional, judicial, that are built into the system? Can you talk a little about that? You have talked about the positive things that give a President or endow the Executive with power. What constraints are there?

Judge KAVANAUGH. First, Senator, there are the constraints built into the Constitution which—the appropriations power, the Senate confirmation power, which is often used, as you know, of course, as a way to restrain Executive action or at least to prevent the—not only to prevent the appointment of people for principal executive officers who might be—the Senate might not approve, but also sometimes as ways of restraint.

There are also built into the constitutional—there is the ultimate remedies in the Constitution for—there are remedies for how judges can be removed, how Members of Congress can be removed through the expulsion power, and how Presidents can be removed. Those are built in. Those are the ultimate checks that are built into the constitutional system for all of us. There is no one who is guaranteed a permanent time because of the ultimate checks that are in the constitutional system as well.

There are statutes then beyond the Constitution, and I did not mean that to be an exhaustive list, but there are innumerable branch statutes that, of course, regulate Presidential and executive branch conduct in all sorts of ways, whether it be statutes that regulate war powers, surveillance, detention, interrogation, the War Powers Act, statutes that regulate in the domestic arena, statutes that regulate the operations of Government, Freedom of Information Act, Federal Advisory Committee Act, Inspector Generals Act, that all are efforts by Congress, as has historically been understood, to make sure the executive branch does not operate in a way that Congress disapproves of. And there are norms. Norms are important. I think norms, historical practices—Madison talks about that in Federalist No. 37. I think historical practice is relevant to judicial decisionmaking, as we have seen in a lot of judicial decisions. But when I worked in the executive branch, one of the questions I always asked and I ask as a judge is: How has this been done before? And I think that is always—two things I always tell students, two things to always ask yourself, what does the text of the relevant law say, regulation, code, statutes, Constitution? And how has it been done before? Which is really a question of precedent or norm within the executive branch or norms within Congress. Those are important as well.

So I think there is constitutional and statutory structures as well as custom or norm that all constrain Congress and constrain the executive branch and constrain the judiciary as well.

Senator FLAKE. You discussed with Senator Sasse the danger of independence agencies that amass too much power in any individual. Would that not be true with the Executive as well?

Judge KAVANAUGH. That was the debate at the Constitutional Convention, Senator, whether to have a plural Executive—in other words, multi-member Executive—or to have a single President. And, ultimately, the Framers at the Convention decided to go with—and Wilson and Gouverneur Morris, James Wilson and Gouverneur Morris were really the architects of the Presidency at the Constitutional Convention. And they ultimately convinced the others to go with a single President. But at the same time, the fear that you just discussed—or the concern, is a better word to put, you just discussed was certainly raised by people at the time, and that is why Hamilton wrote Federalist No. 69—well, that is why they put all the checks into the Constitution and why Hamilton wrote Federalist No. 69 to point out for the people who were voting on ratification all those differences between the king and a monarchy. And so that fear has existed throughout American history. I think of an Executive that is unchecked, and it is why, for example, the Supreme Court has been willing—*Marbury* is another case. President Jefferson, of course, is trying—is the one who loses in *Marbury v. Madison*. President Truman loses in *Youngstown*. President Nixon loses in *United States v. Richard Nixon. Hamdi*, national security is not a blank check for the President. That was President Bush.

Senator FLAKE. Let me bring it up to today. You have mentioned a couple of times that you live in the real world.

Judge KAVANAUGH. I try, yes. That is important for a judge.

Senator FLAKE. And let me bring it to the real world. This week, there was a Tweet by the President that said—and I mentioned this yesterday—“Two long-running, Obama era, investigations of two very popular Republican Congressmen were brought to a well publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job, Jeff.”

Should a President be able to use his authority to pressure executive or independence agencies to carry out directives for purely political purposes?

Judge KAVANAUGH. Senator, I understand the question, but I think one of the principles of judicial independence that judges, sitting judges—and I am a sitting judge—and nominees sitting here need to be careful about is commenting on current events or political controversies. I do not think we want judges commenting on the latest political controversy because that would ultimately lead the people to doubt whether we are independent or whether we are politicians in robes. And so maintaining that strict independence of the judiciary requires me, I think, to avoid commenting on any current events.

Senator FLAKE. All right. Forget I just said that.

Judge KAVANAUGH. I said I understand, but I—

Senator FLAKE. Just answer this question: Should a President use his or her authority to pressure executive or independent agency officials into carrying out directives for purely political purposes?

Judge KAVANAUGH. Senator, I think that hypothetical that you are asking is directly analogous to the current events, and, therefore, I hesitate to get in. It is also me commenting on something that is not a case or an issue or something I have written about. I just—I have thought about this principle as well and looking at all of the nominee precedent of the Supreme Court nominees in the past, and I think about Chief Justice Roberts and I think an underappreciated aspect of his Chief Justiceship is how he has fervently stood up for the independence of the judiciary and tried to keep the judiciary out of politics through what he does off the Bench as well as on the Bench. And I think that is—he sets the tone for the entire American judiciary, and I think that tone of not getting us involved in politics means I need to stay not just away from the line but three zip codes away from the line of current events or politics. And so I respectfully—I understand, but I respectfully decline.

Senator FLAKE. Well, let me rephrase it a different way. If you have an Executive who is abusing his or her authority by instructing independent agencies of Government to use—or to pursue political ends, are there any remedies other than the one that you mentioned, a political remedy involving Congress, or is there something short of that? And I understand your aversion, as many in this body had—I was not here yet—to the independent counsel statute that we did away with. You expressed—you are a little more sanguine about a special counsel. But what other remedies are there and what other constraints are there on a President?

Judge KAVANAUGH. Well, the constraints on the Executive generally are important ones. The appropriations power is a huge check. That is an enormous check if employed as fully as it might be. The confirmation power of executive branch officials, the ultimate check, of course, that you referred to is always part of the system. And then just to be clear on the special counsel system that I spoke approvingly of in the 1999 law journal article and I have referred to in my *PHH* opinion just last year, the traditional system, that exists. And then I have said what I said about the old independent counsel statute, but that was a statute that had a lot of parts to it, and if a case came before me that had a different statute that you had enacted or that statute, I would have an open mind about considering the arguments in favor of that, and against it, of course. And so those are—you know, that possibility is present to the Congress, of course, in general.

Senator FLAKE. But if the President could fire an independent counsel or a special counsel, is that any restraint at all?

Judge KAVANAUGH. Senator, that hypothetical was tested, I suppose, in September 1973, if I have my month right, and—I might not have my month right, but it might have been a different month, but in 1973. And the system held.

Senator FLAKE. Thank you. We will move on and maybe get back to this tomorrow.

A conversation you and I had about separation of powers leads to a host of other related legal issues, including *Chevron* deference and agency overregulation. In your written opinions, you have suggested that you have concerns with *Chevron* deference. I share those concerns, as we spoke about. You have explained that *Chevron* deference can allow executive agencies to stretch the meaning

of the law beyond what Congress intended. I think we have certainly seen that. You have also encouraged Congress—it can also encourage Congress to abdicate its legislative power by punting its lawmaking responsibilities to the other two branches. We spoke at length about that in a conversation with Senator Sasse and others about our inability here in Congress to actually legislate on important issues. You were discussing with another Senator our failure here to authorize war. I have had that frustration for years now, myself and Senator Tim Kaine, and others trying, unsuccessfully, express Congress' opinion and to provide some kind of template at least, if nothing else, for the executive branch to follow in terms of these long unauthorized wars.

But that aside, your opinion suggests that a *Chevron* analysis has a two-part test: one, determining if there is statutory ambiguity and, if so, determining whether an agency's interpretation of the statute is reasonable. So the real question, when it comes to *Chevron*, is not just whether to defer to an agency but, rather, how a judge approaches statutory ambiguities.

How do you know when a statute is ambiguous?

Judge KAVANAUGH. Well, that is a huge problem, Senator, and I think that is at the heart of the concern I have about how certain canons of statutory interpretation have been applied, including *Chevron*, legislative history, constitutional avoidance, as well. They depend on a threshold finding of ambiguity. And after several years as a judge, I thought about why is it that I disagree with a colleague after a particular case? What is at the root of that disagreement? Because we are both independent judges, and why are we disagreeing?

It occurred to me in some cases that the disagreement is not about what the best meaning of the statute is or what the precedent says. The disagreement is about whether something is ambiguous. And then I would think about going to the judge as umpire vision that I believe in. How can we get neutral principles for determining ambiguity? And this is—and it turns out it is really hard to get neutral principles for how much ambiguity is enough. And there are two problems at the heart of that.

First of all, just to try to reason through this: is 60 percent ambiguity enough, or 80 percent ambiguity, or 95 percent ambiguity? Where is your ambiguity trigger, so to speak? And then, second of all, when applying whatever trigger you come up with, how the heck do you figure out whether a particular word or phrase or statutory provision crosses that ambiguity threshold? And this is something that Justice Kagan and Justice Scalia both have talked about. In the past, Justice Kagan actually said at that same speech where she said we are all textualists now, she also said, you know, some people just find ambiguity more quickly than others do, which I think is a true statement, an observation of human nature, but also leaves the judge as umpire vision in real trouble in those cases because if there is no neutral principles to determine ambiguity, then we are going—and this is not a minor deal.

So if you are in a case about deference to an agency, the fate of huge regulations can—so to give you the example, three judges could be sitting around after oral argument and all three could agree actually the agency's reading of the statute is not the best

reading of the statute given the words, but two judges will say, “I think it is ambiguous,” and the third one says, “I do not think it is ambiguous.” So the two will defer to the agency, no, it is not the best reading of the statute, that can be a \$1 billion decision right there, fate of huge regulations rise or fall just on that. And one judge will say, “Well, I think it is not ambiguous.” “Well, I think it is.” And there is not a great—in my experience sitting in those conference rooms, a great neutral principle, and to my mind that is a concern if you have, as I do, the idea that judges should be umpires and we should have neutral rules of the road. So that is something I focused on. I explained that at some length in that Harvard article. I know you and I talked about that as well.

Senator FLAKE. Let us talk about *stare decisis*, precedent. You talked a little about I think what Senator Lee—about 5-to-4 decisions, they have the same weight, same precedent as those decided unanimously. *Kelo*, in 2005, was a 5-to-4 decision, obviously concerning the Government’s ability to seize property for economic purposes. Those of us in the West are very concerned about issues like this. Arizona, for example, is 85 percent publicly owned when you take State, Federal, and Tribal property. Only about 15 percent of the State is in private hands. So decisions that the Federal Government makes, whether it is the legislative branch, executive agencies, or the judiciary, has an outsized impact on a State like Arizona. Judge Gorsuch, coming from the West, was familiar with many of these issues. You serving on the D.C. Circuit have addressed these issues more than perhaps others.

Do you want to talk a little about that, about some of the Western issues or these issues, and *Kelo* in particular? That is a big concern out West.

Judge KAVANAUGH. So I think *Kelo* was something that was controversial in the East, too, and the Midwest, and the West—in terms of that decision.

Senator FLAKE. Duly noted.

Judge KAVANAUGH. Yes. But I know it is of special concern in the West as well, but it is a precedent of the Supreme Court. But to your point, I have had cases involving regulations. A couple of examples. One where a critical habitat designation based on a fairy shrimp that was found on a property, *Otay Mesa* case, and I wrote in that case that the statutory term was occupied, and the fact that you could not see it to the naked eye, that the fairy shrimp had been present in a tire rut 3 years earlier was not enough to designate a huge swath—

Senator FLAKE. I think you said it was the size of an ant or something.

Judge KAVANAUGH. I did, yes, Senator. So I had that case, and I think there I was just applying the statute as I saw it, but I was trying to do it in a way that understood the concern of landowners.

I had another case, *Carpenters* case, it is called. It was another designation of land in the West, and the issue involved standing of someone who was deprived of their business because of the designation. And I found standing because I think it is important to understand that when something like that happens, there are lots of affected parties. I have talked about this in other cases, like my *Mingo Logan* case. When the Government regulation—the policy is

not my concern, but in assessing standing, for example, or retroactivity, which was another case I had, you need to think about the affected parties, so businesses, workers, the coal miners in the *Mingo Logan* case or the people in the lumber, the timber industry in the *Carpenters* case. But I am also sympathetic to the fact that Westerners do not think people in the East always understand what is going on with those designations. I put right in—

Senator FLAKE. Not even remotely.

Judge KAVANAUGH. Yes, not even remotely. I grant you that. I tried to put out in my opinion something. I said, “For Easterners reading this opinion”—this is the second paragraph of the opinion. “For Easterners reading this opinion, the size of this designation is twice the size of the State of New Jersey.” And I said, “So if you are an Easterner, imagine driving up the New Jersey Turnpike and then all the way back down it, and you will have some sense of what it would take to drive across this designation of land,” which was just my way of saying—

Senator FLAKE. Right.

Judge KAVANAUGH. Trying to appreciate the effect of some of these things in the West.

Senator FLAKE. Getting back to precedent, you know, when you are not on the Supreme Court, if you are in one of the lower courts, then you always look to the Supreme Court, and those precedents are of equal weight, I guess, any decision that is made. But when you are on the Supreme Court, precedent is only precedent until it is not precedent anymore, until there is a decision made.

My question, I guess, is: A decision like *Kelo*, decided in 2005, a 5–4 decision, does it have the same weight as a *Texas v. Johnson* decided in 1989 on the flag-burning issue? How do you—what weight do you give it, once you are on the high court?

Judge KAVANAUGH. Well, I think you start with principles that the Supreme Court itself has articulated about precedent, and those principles that look at, of course, whether the decision is wrong, grievously wrong, whether the decision is inconsistent, deeply inconsistent with other legal principles that have developed around it.

You look at the real-world consequences, to your point, the workability and real-world consequences. You look also at the reliance interests. Those are very important, the Supreme Court has said, in looking at precedent.

But one of the things I will say about *Kelo*—this is kind of an offshoot of your question—is that a lot of States in the wake of *Kelo* have enacted—or their State Supreme Courts have interpreted their own Constitutions in a way that prevents takings of private property for what appears to be not the traditional public uses but going to economic development for private parties. And so, again, I think I have cited this before, but Judge Sutton on the Sixth Circuit, his book, “51 Imperfect Solutions,” is a great book about how State Constitutions and State constitutional law and State statutes can enhance protection of individual liberty even beyond what the Supreme Court has interpreted the Federal Constitution to be.

That is not a direct answer to your question, but it is another way that the people who are affected can—who are upset about that kind of land use designation can find protection.

Senator FLAKE. Thank you, Mr. Chairman.

Senator KENNEDY [presiding]. Senator HIRONO.

Senator HIRONO. Thank you, Mr. Chairman. Mr. Chairman, I have some letters of opposition to Judge Kavanaugh's nomination. These are letters from Lambda Legal and 63 national, State, and local LGBT groups, from Earth Justice, from Muslim advocates, from 63 women lawyers and supporters of *Whole Woman's Health*, from Secular Coalition for America, and from Asian-Pacific American advocates. I ask unanimous consent to enter these letters into the record.

Senator KENNEDY. Without objection.

[The information appears as submissions for the record.]

Senator HIRONO. Thank you. Judge Kavanaugh, Chief Justice John Roberts has recognized that "the judicial branch is not immune" from the widespread problem of sexual harassment and assault, and has taken steps to address this issue. As part of my responsibility as a Member of this Committee to ensure the fitness of nominees for a lifetime appointment to the Federal bench, I ask each nominee two questions. The first question for you. Since you became a legal adult, have you ever made unwanted requests for sexual favors or committed any verbal or physical harassment or assault of a sexual nature?

Judge KAVANAUGH. No.

Senator HIRONO. Have you ever faced discipline or entered into a settlement related to this kind of conduct?

Judge KAVANAUGH. No.

Senator HIRONO. I started asking these questions about sexual harassment because it is so hard to hold lifetime appointees to the Federal bench accountable, and because I did not want the #MeToo movement to be swept under the rug. While Senator Hatch asked you some questions about this, I have some additional questions for you.

Last December, 15 brave women came forward and shared their stories of sexual harassment and assault by former Judge Alex Kozinski. Some of them are detailed on the chart behind me: very explicit allegations of sexual harassment and assault. We know from the reporting that Judge Kozinski's behavior was egregious and pervasive. It went on for more than 30 years. It affected law clerks, professors, law students, lawyers, and in, at least, one case, even another Federal judge. And those are just the women who came forward. Judge Kozinski's behavior became so notorious that professors began to warn female students not to apply for clerkships with him. Judge Kozinski's behavior, in this regard, was an open secret.

A short time after Judge Kozinski's accusers went public, the Judge abruptly resigned, which effectively shut down the Federal investigation into his misconduct. I do not think this was a coincidence. In 2008, in connection with another investigation into Judge Kozinski, the L.A. Times wrote a story about something called, "the Easy Rider Gag List," an email group that the Judge used to send, what the Times reported was, quote, "a steady diet of tasteless humor" end quote. The report describes a list is made up of friends and associates, including his law clerks, colleagues on the Federal bench, prominent attorneys, and journalists.

Senator Hatch asked you if you were on this “Easy Rider Gag List” where Judge Kozinski would send inappropriate materials. Your response was that you do not remember anything like that. Are you telling us that you may have received a steady diet of what people on the list have described as, quote, “a lot of vulgar jokes, very dirty jokes,” but you do not remember it?

Judge KAVANAUGH. No, I do not remember anything like that, and I am not—

Senator HIRONO. So, the answer is “no.” Have you ever—

Judge KAVANAUGH. Well, if I could elaborate.

Senator HIRONO. I think that is a complete answer. Let me go on. Have you otherwise ever received sexually suggestive or explicit emails from Judge Kozinski, even if you do not remember whether you were on this “Gag List” or not?

Judge KAVANAUGH. So, Senator, you start with, “no woman should be subjected to sexual harassment in the workplace,” and—

Senator HIRONO. Judge Kavanaugh, you already went through all of that, and I will get to your perspective about making sure that women in the judiciary do not get sexually harassed. I just want to ask you, during and after your clerkship with Judge Kozinski, did you ever witness or hear of allegations of any inappropriate behavior or conduct that could be described as sexual harassment by Judge Kozinski?

Judge KAVANAUGH. No, Senator. And, you know, there were 10 judges—I worked in Washington, DC. There were 10 judges in the courthouse with him in Pasadena, prominent—prominent Federal judges in the courthouse with him—

Senator HIRONO. So—

Judge KAVANAUGH. Who worked side by side with him day after day while he was Chief Judge in the Ninth Circuit.

Senator HIRONO. To be clear, while this kind of behavior on the part of Judge Kozinski was going on for 30 years, it was an open secret, you saw nothing, you heard nothing, and you obviously said nothing. Judge Kavanaugh, do you believe the women who recently came forward to accuse Judge Kozinski of this kind of behavior?

Judge KAVANAUGH. I have no reason not to believe them, Senator.

Senator HIRONO. So, you know, let me just put this into a context, because you have testified that you basically saw no evidence of this kind of behavior at all, you never heard of it, but you worked closely with him on a number of projects. It was not just during the time you were clerking for him. You kept in touch with him while you were in the White House. He introduced you to the Senate at your 2006 nomination hearing, and he called you his good friend. Yesterday, you called each of the people who introduced you a friend, and I presume you felt that way about Judge Kozinski when he introduced you in 2006. You joined him for panels at the Federalist Society where you patted him on the shoulder and said, “I learned from the master about hiring clerks,” and I believe I have a photo of that—there is Judge Kozinski.

You told us that you have hired many women clerks, how you are a mentor to women, how important you think it is for women to have a safe working environment where they feel that they can

report sexual harassment. I conclude that you consider yourself an advocate for women. If a judge was aware that another judge was engaging in sexual harassment or sexual assault, would the judge have a duty to report it?

Judge KAVANAUGH. If I heard those allegations, Senator, I would have done three things immediately. I would have called Judge Tom Griffith, who is on our court, who is on the Codes of Conduct Committee for the Federal judiciary appointed by Chief Justice Roberts. I would have called Chief Judge Garland, who is chair of the Executive Committee. I would have called Jim Duff, who is head of the Administrative Office of the U.S. Courts. If, for any reason, I was not satisfied with that, I would have called Chief Justice Roberts directly.

Senator HIRONO. So, you believe that all judges who, including yourself, if you ever heard of any allegations about these kinds of behaviors, you would report it. You would go through whatever processes were set up by the courts.

Judge KAVANAUGH. I would do that and—

Senator HIRONO [continuing]. To prevent this kind of behavior and to hold people accountable. And yet, you know, someone that you have been close to that you clerked, and I did go through the various encounters, more than encounters that you had with Judge Kozinski, and yet you heard nothing, saw nothing, and obviously you did not see anything. So, let me just mention that this is why the #MeToo movement is so important because often in these kinds of situations where there are power issues involved, and certainly there are between judges and clerks, that often, you know, it is an environment where people see nothing, hear nothing, say nothing. And that is what we have to change.

Judge KAVANAUGH. I agree with you, Senator.

Senator HIRONO. That is great.

Judge KAVANAUGH. I agree completely. There need to be better reporting mechanisms. Women who are the victims of sexual harassment need to know who they can call, when they can call. They need know first that the way—

Senator HIRONO. Judge Kavanaugh, perhaps if all those situations or those processes had been in place over the 30 years that Judge Kozinski was engaging in this kind of behavior, maybe he would have stopped, but he did not.

I have one more question, Judge Kavanaugh. Were you aware of the serious allegations of domestic violence against Rob Porter before you recommended him for staff secretary to Donald Trump?

Judge KAVANAUGH. There is a premise in there that I am not sure is accurate—

Senator HIRONO. The premise being that he engaged in domestic abuse.

Judge KAVANAUGH. No, no, no, the recommendation premise, but I will—but put that aside. No, I was not aware of those allegations until they became public, when there was the news reports about them.

Senator HIRONO. Let me turn to another set of questions that I have for you. In 1999, you joined Robert Bork in writing an amicus brief in support of Harold “Freddy” Rice, who challenged the voting structure for Hawaii’s Office of Hawaiian Affairs, a State office

charged with working for the betterment of Native Hawaiians. You argued that Hawaii could not limit those who voted for the Office's Trustees, so only made of Hawaiians. You not only made this argument in a legal brief, but you also published an opinion piece in the Wall Street Journal under your own name entitled, "Are Hawaiians Indians?" In the piece you wrote, "The Native Hawaiian community was not indigenous because," as you said, "after all they came from Polynesia." It might interest you to know that Hawaii is part of Polynesia, so it is not that they came from Polynesia. They were part of Polynesia. Hawaii is part of Polynesia. Native Hawaiians did not come from Polynesia. Let me repeat that. They were a part of Polynesia.

You also implied that Native Hawaiians could not qualify as an Indian Tribe, and, therefore, were not entitled to constitutional protections given to indigenous Americans because, and I quote you, "They do not have their own government. They do not have their own elected leaders. They do not live on reservations or in territorial enclaves. They do not even live together in Hawaii." Let me tell you why each of these assertions are wrong, but it is the basis on which you determined that the OHA elections were unconstitutional.

Judge KAVANAUGH. Well, the Supreme Court—the Supreme Court agreed, though. The Supreme Court agreed, 7-to-2.

Senator HIRONO. No, they did not agree based on necessarily your arguments. Let me go on. To say that there is no system of law is an insult to the society that evolved in the Hawaiian Islands over centuries, even before the creation of the United States. To say they do not have their own elected leaders in a historical sense just betrays, in my view, your ignorance of Native Hawaiians. They were a self-sustaining, self-governing society for a thousand years prior to the so-called discovery by Captain Cook. You said, "They do not live on reservations or in territorial enclaves. They do not even live together in Hawaii."

You know, it is hard to know what to say to this assertion. It sounds like you are saying that Native groups in the United States derive their rights from having been herded into reservations and cheated out of their land, or that they surrender their rights when they move outside of these artificial boundaries. It is not only factually wrong, but also very offensive. Judge Kavanaugh, it is hard to believe that you spent any time researching the history of Native Hawaiians. Now, I am going to refer to an email that you sent out.

Judge KAVANAUGH. May I respond to that?

Senator HIRONO. I am going to get to my question.

Judge KAVANAUGH. Okay.

Senator HIRONO. You sent out an email on June 4th, 2002, and I am going to read in part. "Any programs targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution." Now, you sent out this email after the *Rice* decision had already been made by the Supreme Court. When you wrote this email saying that all Native Hawaiian programs should be—undergo strict scrutiny because they are a constitutional—questionable validity under the Constitution, were you looking to *Rice v. Cayetano* as a basis for this view which you expressed in your email?

Judge KAVANAUGH. So, Senator, first of all, I appreciate your perspective. The amicus brief I wrote was—the Supreme Court agreed with by a 7-to-2 decision written by Justice Kennedy in that case, *Rice v. Cayetano*. And that decision—in the case, just so I am clear, it was a State office that denied African Americans the ability to vote in that—for that State office. Latinos and other people were denied the ability to vote for a State office, and the question was whether that was permissible under the Constitution. And the Supreme Court, by 7-to-2—

Senator HIRONO. No, I attended the Supreme Court hearing.

Judge KAVANAUGH. I did, too.

Senator HIRONO. And I believe that one of the reasons they kept asking about—trying to figure out whether Native Hawaiians constitute Tribes is probably because of the amicus that you put in there that raised this issue, so let me go on. You know, you did not answer my question as to whether or not when you said that “any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution.” My question to you was, were you thinking about the *Rice* decision, which you continue to say, yes, the Supreme Court agreed with you. Were you thinking about the *Rice* decision when you made this view known?

Judge KAVANAUGH. That is an email 16 years ago. I do not recall what I was thinking about when I wrote—

Senator HIRONO. It was right after the *Rice* decision. This is a 2002 email. The *Rice* decision was 2000. Well, let me ask you this, then. Do you think *Rice v. Cayetano* raises constitutional questions when Congress—not the State, because *Rice* was a State action case. It had to do with the Fifteenth Amendment—not the Fourteenth Amendment—the Fifteenth Amendment having to do with voting rights. So, my question to you is, do you think *Rice v. Cayetano* raises constitutional questions when Congress passes laws to benefit Native Hawaiians?

Judge KAVANAUGH. I think Congress’ power with respect to an issue like that is substantial. I do not want to pre-commit to any particular program, but I understand that Congress has substantial power with respect to declaring—recognizing Tribes.

Senator HIRONO. But you believe that any of these kinds of programs and laws passed by Congress should undergo strict scrutiny and raises constitutional questions?

Judge KAVANAUGH. Well, as I—as I sit here today as a judge, I would listen to arguments under—16 years ago, and I am working in the administration, in the executive branch, and putting forth the position there. But if I were a judge, I would listen to the arguments. To your question, Congress has substantial power with respect to programs like this. I appreciate what you have said about Native Hawaiians. The specific case was about an election to a State office.

Senator HIRONO. Yes, that is why it is a State action case. I am well aware of the basis on which the Supreme Court made that decision. So, Judge Kavanaugh, *Rice* is often cited for the proposition that laws that benefit Native Hawaiians are unconstitutional because they are race-based. Do you think *Rice* can be cited for that view, knowing, as you have acknowledged, that it is a State action,

Fifteenth Amendment voting rights case? *Rice*—I know this—*Rice* is often cited for the proposition that all Native Hawaiian programs enacted by Congress are—can be challenged as unconstitutional as race-based. I am asking you if that is an appropriate citation of the *Rice* decision.

Judge KAVANAUGH. Senator, I think Congress has substantial power, of course, in this area that you are discussing, and I would want to hear more about how *Rice* applies. I would want to hear the arguments on both sides. I would keep an open mind and appreciate your perspective on this question.

Senator HIRONO. You know, when the Supreme Court keeps an open mind and listens to the litigants and the advocates, one would hope that the advocates will actually proffer facts to the Court, and that is not what you did when you filed your amicus to the Court. And I think you have a problem here. Your view is that Native Hawaiians do not deserve protections as indigenous people under the Constitution, and your argument raises a serious question about how you would rule on the constitutionality of programs benefiting Alaska Natives. And I think that my colleagues from Alaska should be deeply troubled by your views. And I know that in your amicus brief and in your Wall Street article you did not mention one word about Alaska Natives. And it could be because there is no Commerce Clause reference to Alaska Natives, as there is for American Indian Tribes.

I want to go on to another set of questions because I am running out of time. I want to follow up on your discussion with Senator Feinstein about *Roe* and *Casey*, and your conversation with Senator Durbin about *Garza*, and also raised by my colleague, Senator Blumenthal. You talked about the importance of precedence. You said you understand the strong feelings about abortion. You said you recognized the real-world effect of cases, and you do not live in a bubble. But I think when you talk about respect for precedent it is misleading because there are ways to say you are relying on precedent, i.e., *Roe v. Wade* and its progeny, but still severely limit a woman's right to make her own reproductive choices. And that is exactly what you did in *Garza*, because we all recognize that even if *Roe v. Wade* is not overturned, there are going to be many cases that will continue to come before all of the courts, including the Supreme Court, that will probably be laws enacted by States that will limit a woman's right to choose, so including things like parental consent, spousal consent, or notification, limits on where abortions can be performed, i.e., *Whole Woman's*.

So, both Senators Durbin and Blumenthal explained the facts in *Garza*, so I will not go over that. But when the case reached you, you took any opportunity you could to prevent that girl from getting an abortion. You said you were relying on precedent, but you were not. You turned this case into a parental consent case, which it was not. Then you looked at the facts and ruled against, in my view, all common sense that keeping a young woman behind lock and key against her will by ORR—Office of Refugee Relocation—insisting that ORR be allowed to delay beyond the time an abortion would be—would no longer be feasible by finding her sponsors that she did not need. And, that you deemed these factual cir-

cumstances not an undue burden on her constitutional right for an abortion.

Let me read you a portion of your dissent in this case. You say, “The majority points out in States, such as Texas, the minor will have received a judicial bypass. That is true, but it is irrelevant to the current situation.” Why? The current situation was all about parental consent and the need to get—to get a judicial bypass, which this young woman did. So, if there is anything that is irrelevant, it is your argument that this was a parental consent case. Then you went on to analyze this case on the basis of whether or not keeping her under lock and key—you sustained that there would be sponsors found for her which could have ended up being an unfeasible timeframe for her to get an abortion, and you deemed those not to be undue burdens.

The young woman had already received a State judicial bypass, as referenced before. The fact that she did not have, you thought, that parental consent, that was not even an issue—it was irrelevant. So, this is very disturbing. Is it any wonder there are so many people who, even if you are not sitting there, in spite of the fact that President Trump said his nominees to the Supreme Court will overturn *Roe v. Wade*. Even if *Roe* is not overturned, there will be, as I mentioned, all of these cases that will put barriers—that would put barriers before a woman’s right to choose.

So, I find it really a rather unbelievable—and by the way, you also mentioned—you know, you said several times in *Garza* you did not join the dissent, which basically says an alien minor does not have a constitutional right to an abortion. So, does the fact that you did not join this dissent mean that undocumented persons do have a constitutional right to an abortion?

Judge KAVANAUGH. Well, I decided that case based on the precedent of the Supreme Court and the arguments that were present in the case. I made clear that I was following as carefully as I could the precedent. You mentioned parental consent and spousal consent. The Supreme Court has upheld parental consent laws, but has rejected spousal consent.

Senator HIRONO. Usually it requires a judicial waiver, which was the case in the *Texas* case. So you cannot just require parental consent, as in this case, where her parents were beating her up. How can you expect parental consent in a situation like that?

Judge KAVANAUGH. That would be a situation for the bypass.

Senator HIRONO. Yes.

Judge KAVANAUGH. This was an analogy for a woman who is a minor, that is critical, who was in an immigration facility by herself in the United States and had—

Senator HIRONO. She had already gotten a judicial bypass. There was no issue of parental consent, and in this case you would have substituted a foster family for parental consent. That is not even an issue, but I do have a question. Since you mentioned several times that you did not join the dissent, and the crux of the dissent was that there was no constitutional right for an alien minor to have an abortion, I want to ask you, did you join or did you not join that dissent because you disagreed with that, that, in fact, alien minors do have a right to an abortion in our country?

Judge KAVANAUGH. Well, as a general proposition—first of all, the Government did not argue in that case that aliens lack a constitutional right generally to obtain an abortion.

Senator HIRONO. Yes, even they did not argue because probably they figured that is a decided issue, but maybe you do not think so. Do you think that that is an open question as to whether or not alien minors, or, in fact, aliens in our country have a right to—a constitutional right to an abortion? Do you think that is an open case?

Judge KAVANAUGH. The Supreme Court has recognized that persons in the United States have constitutional rights.

Senator HIRONO. Okay. So, I hope that is why you did not join the dissent. Moving on to another set of questions relating to your dissents. I think you can learn a lot about a judge by looking at his or her dissents, and that is why judges go out of their way to voice their disagreement with the majority and show what their views are. And you have the dissent rate among active D.C. Circuit judges, 5.1 dissents per year.

I am going to talk about several studies that analyze your decision. The first study by Professor Elliott Ash and Professor Daniel Chen shows that compared to other circuit court judges elevated to the Supreme Court since the 1980s, you not only have the highest rate of dissents, you also have the highest rate of partisan dissents. So, I think I have a chart on that. Well, maybe not. Suffice to say there is such a study, and I ask unanimous consent to have the study by Professors Ash and Chen be entered into the record.

[The information appears as a submission for the record.]

Senator HIRONO. The second study by people—thank you, I am on a roll here, Mr. Chairman.

[Laughter.]

Senator HIRONO. The second study by People for the American Way shows that you consistently sided against workers or immigrants and only once favored consumers in your dissents. Mr. Chairman, I ask unanimous consent to have the People for the American Way study entered into the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator HIRONO. A third study by Public Citizen shows that in cases where there was disagreement among the judges, you consistently sided against helping people who wanted to protect our clean air and water. Mr. Chairman, I ask unanimous consent to have the Public Citizen study entered into the record as well.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator HIRONO. A fourth study, a detailed study by Professors Cope and Fischman, found that you are, and I quote their study, “no judicial moderate,” and that, “It is hard to find a Federal judge more conservative than Brett Kavanaugh.” Mr. Chairman, I ask unanimous consent to have the study of Professors Cope and Fischman entered into the record as well.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator HIRONO. Judge Kavanaugh, why do you rarely dissent on behalf of consumers, workers, or the powerless? And please, do not

talk to me about all the times that you were with the majority or where you joined other majorities?

Judge KAVANAUGH. Well, Senator, I have ruled for workers many times. I have ruled for environmental interests many times in big cases that involve clean air regulation, particulate matter regulation, affirmative defense for accidental emissions, the California Clean Air law over a dissent by a fellow judge.

Senator HIRONO. So, Judge Kavanaugh, I cited—how many studies did I enter into the record? At least four studies that indicate that there is a pattern to your dissents, and your pattern is that you do not favor basically regular people.

Judge KAVANAUGH. Well, I wrote a—one of my most important dissents, Senator, was in *United States v. Burwell*. That was a criminal case, an en banc case for a convicted drug distributor. The question was whether he had been sentenced to a 30-year mandatory minimum permissibly, and I joined by Judge Tatel, who is an appointee of President Clinton, ruled that the jury instructions were flawed. I was in dissent for him because mens rea requirement had been omitted from the jury instructions, and I wrote a very opinion lengthy about that. That is someone—that is one of my most important dissents, and that was on behalf of a criminal defendant.

Senator HIRONO. Judge Kavanaugh, the thing about patterns that are exceptions to the pattern. So, all of these studies that I cite to, we are not talking about the exceptions to the pattern. We are talking about the existence of a pattern. You know, it kind of—it bothers me—you know, I would expect a judge to follow the law. I fact, I think you started off saying that you are a—how did you describe yourself in terms of following the law? You said several times—

Judge KAVANAUGH. Independent and pro-law.

Senator HIRONO. Pro-law.

Judge KAVANAUGH. Another important decision is a case, I think I wrote the leading opinion or one of the leading opinions, on battered women's syndrome, called *United States v. Nwoye* over a dissent of another judge where I reversed a conviction of a woman on the ground that she had not been able—

Senator HIRONO. Judge Kavanaugh, I hate to continue to interrupt you, but, you know, 30 minutes goes by awfully fast, and there are always exceptions to the pattern. So, yes, you call yourself—you describe yourself as a pro-law judge. And, you say, you consider yourself to be someone who follows precedent and the law, but over and over again your colleagues and the majority criticize you for not following the law or Supreme Court precedent. Where Congress is clear, you miss the plain language. Where the Supreme Court clearly states rules, you ignore them.

Let me cite you to some examples where your colleagues actually took the time to criticize your dissents. So, in a 2008 case, *Agri Processor v. NLRB*, the majority said the dissent—your dissent—“creates his own rule instead of following Supreme Court rules.” They said that your dissent “abandons the text of the applicable laws all together.” Or, in 2011, the majority in a case called, *Heller II*, held that Washington, DC, could ban semi-automatic weapons, and the majority wrote an entire appendix—an entire appendix—

to explain why your dissent was wrong and how you misread the Supreme Court.

Mr. Chairman, I ask unanimous consent to have the 10-page appendix in *Heller II* entered into the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator HIRONO. In 2017, in *U.S. v. Anthem*, the majority sharply criticized your dissent. They said, “Rather than engage with the record, much less adhere to our standard, the dissent offers a series of bald conclusions and mischaracterizes the Court’s opinion.” They said that you, the dissenting colleague, “applies the law as he wishes it were, not as it currently is.” This does not sound like such a pro-law judge to me. Now, why do your colleagues go out of their way so often—

Senator KENNEDY. Senator, if you could begin to wrap up, please, ma’am.

Senator HIRONO. Why do your colleagues go out of their way so often to point out that you are not following the law or relevant Supreme Court cases?

Judge KAVANAUGH. Senator, my—I stand by my record. I have been in the majority the vast majority of the time, 95—90 to 95 percent of the time. I have written opinions joined by colleagues of all stripes. I think there have been studies that have shown the affiliation of the judges who join me in majority opinions when there has been a dissent. I stand by my record. I am proud of my record. I have explained thoroughly my decisions in each case. I appreciate your perspective, and I understand the cases you have raised, but my opinions speaks for themselves, and I am very proud of them.

Senator KENNEDY. Senator Crapo.

Senator HIRONO. And I think all these studies speak for themselves also. Thank you, Mr. Chairman.

Senator KENNEDY. Thank you, Senator.

Senator Crapo.

Senator CRAPO. Thank you very much, Mr. Chairman. And, Judge Kavanaugh, you can relax for just a short moment because I am going to take a few minutes at the beginning and introduce some documents for the record.

First, Mr. Chairman, I would like to introduce—or, ask unanimous consent to enter an op-ed from the San Bernardino Sun editorial board stating that Brett Kavanaugh’s nomination might be the calm before the storm. The editorial board says that “Judge Kavanaugh is impeccably credentialed, conventionally conservative, and less likely than other short-listed judges to overturn landmark culture war case law. In addition to his qualifications and nationwide respect, Judge Kavanaugh brings a reassuring image of normality and judicial cohesion.” I ask unanimous consent to introduce this document into the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator CRAPO. Second, Mr. Chairman, the San Diego Union Tribune, “Why Supreme Court Nominee, Brett Kavanaugh, May Be More Independent Than You Expect.” This op-ed goes forward to say that—the editorial board is strongly inclined to support Judge Kavanaugh’s confirmation, has endorsed nominees from both Re-

publican and Democrats in the past. The board advocates for the deference to the President in picking Justices “so long as the nominee has the requisite credentials,” and it applauds “Judge Kavanaugh as straight out of Supreme Court central casting.” I ask unanimous consent to put this document in the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator CRAPO. Third, a document from the Harvard Black Law Students Association. This is a letter that exhibits Judge Kavanaugh’s commitment to fostering diversity in the legal profession. “Last year, Judge Kavanaugh reached out to the Harvard Law School chapter of the Black Law Students Association to express his interest in organizing a clerkship event for their members. Also on the panel with him was Judge Paul Watford, African-American Judge on the Ninth Circuit Court of Appeals.”

The Black Law Student Association described that event. “Judge Kavanaugh explained that one of his priorities is to encourage more students of color to apply for judicial clerkships. Several recent reports have indicated that minority law students are significantly underrepresented in Federal clerkships. During the event, Judge Kavanaugh provided his insight and advice on how students should navigate the entire process.” They continued, “The judge not only graciously offered his time for that panel, but also has continued to mentor numerous Harvard students whom he has taught or worked in a number of capacities.” Again, I submit this document for the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator CRAPO. Fourth, a Georgetown Prep letter. Judge Kavanaugh’s former Georgetown Prep classmates. These men grew up with Judge Kavanaugh. They have known him for 35 years. They know him as man of high character and intellect before he became a judge, and in high school he was the team captain and a multi-sport athlete. Years later, despite his great achievements, he remains the same grounded and approachable person they knew from class sports and student body activities. Their letter goes on with shining accolades. I would like to put this letter into the record, Mr. Chairman.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator CRAPO. And then finally for documents for the record, Governor Matthew Mead of Wyoming has sent a letter which states that “Judge Kavanaugh embodies the qualities we need in an independent, thoughtful judiciary. He will be an effective and fair member of the United States Supreme Court.” I ask to submit this letter to the record.

Senator KENNEDY. Without objection.

[The information appears as a submission for the record.]

Senator CRAPO. Well, thank you very much, Mr. Chairman, and, Judge Kavanaugh, I would like to now turn to some questions. Before I get into the questions I had intended to ask, though, I wanted to get into the discussion—go back and try to bring some clarity to the discussion that was held earlier in some of the questioning with regard to the independent counsel versus the special counsel

circumstances and laws and statutes that we have had in the United States.

My colleagues have asked you a lot about the old independent counsel statute. I think it is important that we walk through some of the differences between that statute, which is now no longer law, and the new special counsel regulation. And I am going to mention three important differences, and then I am going to just ask you, Judge Kavanaugh, if you would like to give any clarity to this situation and the issues that were raised with you earlier.

First, the process for appointing a special counsel, which is the current situation. The decision to appoint a special counsel and the choice of whom to appoint is solely within the discretion of the Attorney General. The old independent counsel had to be appointed and selected by a panel of three D.C. Circuit judges. Second, the scope of the investigation. The scope of the current special counsel inquiry is determined solely by the Attorney General. The scope of the independent counsel's jurisdiction, when it was the law, was essentially boundless, no limits. Third, is the process for removing a special counsel. The Attorney General can remove the special counsel for good cause. The independent counsel could only have been removed by a three-judge panel. I think those are important differences related to the conversations you had earlier.

And, Judge Kavanaugh, I would just, with that clarification, like to ask you if you would like to give any more comment or clarification to the discussions that were raised with you earlier.

Judge KAVANAUGH. Thank you, Senator. I appreciate the distinctions, which I think are accurate, and it is important to understand, as you underscored, the old independent counsel statute had many parts to it that combined to make it such a departure from the traditional special counsel system, all of which were part of the analysis that, I think, Justice Scalia engaged in in his dissent, and that the Congress looked at when it decided that that statute had been a mistake, and you overwhelmingly decided not to reauthorize it in 1999.

Senator CRAPO. Well, thank you. I just—I felt like you did not get an opportunity to make that clarification and that the record needed to be clear for the American people.

Judge KAVANAUGH. Thank you, Senator.

Senator CRAPO. Before we move on from that topic, I just want to state that Eric Holder has noted that the fundamental—noted the fundamental structural flaws with the old statute. Senator Durbin, as has been said, called that law “unchecked, unbridled, unrestrained, and unaccountable.” And, as we have heard, Justice Kagan has praised Justice Scalia's dissent calling that law into question. So, I just did want the record to be clarified somewhat in that context.

Judge KAVANAUGH. Thank you, Senator.

Senator CRAPO. Now, what I want to do during the rest of my questioning, in a number of different ways, is to get into your judicial record. I will start with this, however, by going back to what this set of hearings began with yesterday, which was an attack on the documentation that has been produced by you and others for your record. I will state again there is no nominee for the Supreme Court who has ever been asked a more robust questionnaire by this

Committee than you, and you provided, I believe, around 17,000 pages of documents in response to that questionnaire, which was more than any other nominee has been asked.

Second, you provided over 440,000 other documents that—or pages, I believe it is, of documents that in and of itself is more than the entire number of documents or pages of documents that were provided by the last previous five nominees to the Supreme Court. You have also got a record—a judicial record, which is acknowledged by Senators constantly as the most important part of the documentation for a nominee to the Supreme Court of over 10,000 pages of your decisions. And unfortunately, we have not seen a lot of focus on that yet in the questioning that you have received in this hearing, so I want to try to get into that.

Before I do, however, I want to note, everyone has heard this many times, but I am not sure that the—that the normal American really understands. You are a judge of the D.C. Circuit. It has been said in this room a number of times that that is often called the second most powerful court in the Nation. It is a circuit court. There are a number of circuit courts. What is different about the D.C. Circuit Court from, say, the Ninth Circuit Court in which I sit in Idaho for the Ninth Circuit? What is different between all of the other circuit courts and the D.C. Circuit Court?

Judge KAVANAUGH. Thank you, Senator. All the courts of appeals are important and have important dockets and important case-loads, and the judges on all those courts do important work. The D.C. Circuit does get more regulatory cases because we are—the D.C. Circuit is in the Nation's capital, the seat of Government, and, therefore, more of the administrative law regulatory cases come. So, EPA cases, for example, or NLRB cases—EPA, Environmental Protection Agency, NLRB, National Labor Relations Board, Securities and Exchange Commission. We will get more of those cases involving agencies of the Government here in DC as a percentage of our docket than you would get in other courts, and that includes some of the separation of powers controversies that traditionally arise of—relating to national security cases. We have all the Guantanamo-related cases in our court.

So, there are cases related to Government operations, Government—separation of powers, administrative law, the agencies that are a bigger percentage of our docket. But I do want to underscore all the courts of appeals of this country do important work, and all the judges have important dockets, and they are different, distinctive characteristics or characters of each of those courts in terms of—for example, the Ninth Circuit has a good deal of immigration law. The Fifth Circuit has a good deal of that. The Eleventh Circuit, of course, has a very—all the Circuits have important dockets. So, I just wanted to not—I want to underscore that D.C. has a lot more separation of powers, but I do not want to—I have a lot of friends on the other courts of appeals, Senator.

[Laughter.]

Judge KAVANAUGH. I do not want to—I do not want to diminish the work that they do because it is very important work, and what they do as well.

Senator CRAPO. Well, I appreciate your answer, and believe me, those of us who live in the Ninth Circuit understand the power of

the Ninth Circuit Court of Appeals. And sometimes we chafe under its rulings, but we are very aware of the incredible power. The point being, though, that the D.C. Circuit is distinctly different, as you indicated, in that it gets a much higher level of caseload dealing with the operation of executive agencies and with operations of Government, the kinds of things that we have been talking about extensively here, these types of issues. And I just think it is important for that to be brought out.

Judge KAVANAUGH. Thank you.

Senator CRAPO. With regard to the—to the D.C. Circuit on which you sit, you have spent how many years as a judge on that Circuit?

Judge KAVANAUGH. Twelve years and 3 months.

Senator CRAPO. And how many decisions? Do you know the number of decisions you have participated in?

Judge KAVANAUGH. I think I have handled well over 2,000 cases, including all the cases counted up together.

Senator CRAPO. And how many of those were you the author of the opinion?

Judge KAVANAUGH. I have written majority opinions, published majority opinions in, I believe, 307 cases is the current number.

Senator CRAPO. And there has been some discussion even with the last questioning that you received about what the norm is, what the pattern with your decisionmaking. I will note before I ask you this question that the current active judges on the D.C. Circuit are made up of seven nominees from Democrat Presidents and four nominees from Republican Presidents.

So, the current makeup of the active judges on the D.C. Circuit is more Democrat than Republican in terms of who nominated them. But in—I guess I am going to lead you a little bit with this question, but in this several thousand cases that you have been involved in deciding with this group of judges, what percentage did you agree with? In other words, in what percentage were you in the majority?

Judge KAVANAUGH. It has to be in the nineties, I would believe.

Senator CRAPO. I heard yesterday from the Chairman it was 97.

Judge KAVANAUGH. Yes, I believe that sounds correct.

Senator CRAPO. So, if there is a pattern here, it is that you are right there with the majority of your colleagues on the court on most cases, and I do not mean just 51 percent. It is, like, 90-plus percent, probably 97 percent if I remember from yesterday correctly.

Judge KAVANAUGH. Yes, that sounds about right, Senator, appreciate it. We are judges. We do not wear a partisan label as judges, and I worked—tried to work well under the law with my—all my colleagues.

Senator CRAPO. So, those who want to try to create the impression that you are an outlier have to use that last 3 percent—in fact, I think it is 2.7 percent in which you are actually in the dissent or not—maybe you are a member of a partial majority. But they have to go to that very small number of cases and then try to figure out a way in there to make it look like you have disagreement with norms in the judiciary. I just think it is important for us to note when people start talking about let us look for patterns, the pattern is that you are working with your colleagues on that court

in a united way, and that there seems to be a pretty high level—a pattern of—a high level of consensus in the rulings in which you participate.

In terms of the decisions that you have written, the 307 decisions that you have written, how many of those do you recall—have you analyzed it—how many of those were majority—decisions for a majority?

Judge KAVANAUGH. The vast majority of those are majority opinions.

Senator CRAPO. So, it was a small number that would have been dissenting opinions.

Judge KAVANAUGH. Dissents and also some concurrences.

Senator CRAPO. And some concurrences.

Judge KAVANAUGH. Yes.

Senator CRAPO. Again, I do not know that you would have these statistics, but I assume some number of those cases were appealed to the Supreme Court. Did the Supreme Court—when your cases were brought to the Supreme Court, the ones that you wrote, were they overturned regularly or were they sustained mostly? Do you know the numbers on that?

Judge KAVANAUGH. I believe there are 13 cases where the Supreme Court has agreed with the analysis that I had—or the decision I had made either in a dissent or in a majority opinion for the D.C. Circuit.

Senator CRAPO. And how about reversals where one case where there was a reversal? Excuse me. So, 13-to-1. Again, if you are looking at a pattern, it appears to me that you are, again, in the mainstream of the American judiciary. With regard to the—to the question of how the Supreme Court has treated your cases, I seem to recall that they actually adopted your line of reasoning in a number of cases. Is that correct?

Judge KAVANAUGH. That is correct, Senator. I do not know if you have a—I will let you—

Senator CRAPO. I do not have the number on that.

Judge KAVANAUGH. Yes. No, of the 13, that is correct where they either cited or quoted or otherwise agreed with the reasoning or decision I made in a concurrence or dissent. And I am happy to talk about those, but—

Senator CRAPO. Well, let me—let me get—ask you this question, and you can use it there—

Judge KAVANAUGH. Of course, I am happy to talk about them.

Senator CRAPO. What I was going to ask you next is before I go into some of the cases that I am aware of that you participated in that I think are notable, are there any—of the cases that you have participated in as a judge, particularly those where you have written the opinion, but any cases you would like to note. Like I said, we have not really gotten into your judicial record much here. I would like you to have an opportunity to talk about your judicial record. Are there some that you would like to discuss with us before I go on to some that I have on my papers?

Judge KAVANAUGH. Well, I will let you ask a few, and if there are any others I want to go to—

Senator CRAPO. Well, I will probably run out of time before I am done with mine, but—

Judge KAVANAUGH. I will try to be succinct.

Senator CRAPO. Well, the first one is, back to an issue that you have been criticized for is, equal treatment of women. One of the cases I am aware you participated in is the *United States v. Nwoye*—

Judge KAVANAUGH. Yes.

Senator CRAPO [continuing]. Where you defended the rights of vulnerable women and reversed the district court on grounds that a female criminal defendant was prejudiced by her lawyer's failure to introduce evidence of her suffering from battered women's syndrome. Would you discuss that case a little bit?

Judge KAVANAUGH. Yes. There had been a criminal conviction of a woman for extortion, and she claimed duress defense. She claimed that she was a battered woman, that she had been repeatedly beaten by her boyfriend. The district court had ruled against the woman on the claim that she—her Counsel was ineffective by not presenting the battered woman's defense. It came up to our court, and I wrote a lengthy opinion explaining why it was ineffective assistance of Counsel not to present the battered woman's defense over a dissent from another judge, I should add.

And I explained the point there that the jurors needed to hear the evidence from the expert about the battered woman's defense because otherwise the jury might not believe the claim she was making because they might think, well, why did she not walk away, or why did she not do something else. And the expert testimony would explain the—what happens when you are beaten repeatedly, and would explain that the jurors would not—would benefit from having that expert understanding, that sometimes you cannot walk away. That is the whole point when you are in a relationship where you are beaten repeatedly.

Senator CRAPO. Well, I appreciate that.

Judge KAVANAUGH. And, I therefore, reversed the conviction in that case that *Nwoye* had received.

Senator CRAPO. And the ACLU said your opinion in *Nwoye* "demonstrated a sympathetic and nuanced understanding of intimate partner violence and its effects." I am going to skip over to another case, *Adams v. Rice*, because we are running low on time. What about *Artis v. Bernanke*, in which you voted to reverse the dismissal of a Title VII complaint by an African-American female group of secretaries alleging race discrimination by the Federal Reserve Board? Can you tell me about that case?

Judge KAVANAUGH. That is a—that is a discrimination case where the, as we analyzed it, the evidence presented was sufficient to raise a claim of race discrimination based on the treatment that the African-American secretaries had received in that case. And that was our ruling in that case.

Senator CRAPO. Well, thank you, and I have got pages more of cases on this issue, but only 10 minutes left in our time. So, I am going to shift to another issue, again, looking at cases that you have decided. Race and diversity. Let us talk about *Ayissi-Etoh v. Fannie Mae*. In that case, an African-American employee was fired from his job at Fannie Mae. He brought an employment discrimination claim alleging his supervisor had used a despicable racial slur and created a hostile work environment. Not only did you join

Judge Merrick Garland and Judge Thomas Griffith in the court's per curiam opinion, but you also wrote a separate concurrence. And in your concurrence, you wrote that the severity of this racial slur—"Even a single use of the 'N' word by a supervisor is sufficient by itself to create a hostile work environment." And I could go on, but I would rather give you a chance to just describe that case a little bit.

Judge KAVANAUGH. Well, that case was a powerful case. The plaintiff argued it pro se in front of our court, which is unusual. The situation was that he had been called the "N" word by a supervisor. The question was whether the single utterance of the "N" word was—constituted a racially hostile work environment under the Supreme Court's precedent, which says "severe or pervasive." So, the question really was, is a single utterance of that word severe under the—under the precedent. I wrote a separate opinion to make clear that it was, that that word—that no other word in the English language so instantly or powerfully calls to mind this country's long and brutal struggle against racism, which I have emphasized in many cases as a—and the long march for racial equality in the United States is not over.

When you look back to the—I cited some of the history of the country, and the original sin of the Constitution was its tolerance of slavery, Fugitive Slave Clause, the Importation Clause, which allowed the slave trade from 1788 to 1888—I mean, to 1808, which during that 20-year period, 200,000 additional slaves were imported into the United States. The history that corrected in part on paper in the Thirteenth, Fourteenth, and Fifteenth Amendments, but then, of course, a century of backtracking from the promise of the Fourteenth Amendment, Jim Crow and racial discrimination, leading up to *Brown v. Board of Education*. Of course, again, in the Civil Rights Act and the Voting Rights Act of 1965, among the most important pieces of legislation ever enacted by Congress in terms of changing America.

But still, there is still work to be done after centuries of discrimination, racial—slavery, racial oppression, racial discrimination. And this case, to my mind, was one case with one person arguing one claim of one incident, but to me the whole history of the country was presented on race relations, and racial discrimination was represented in that one case. And I tried to capture that as best I could in the opinion I wrote in that case.

Senator CRAPO. Thank you, Judge. Let us move on to *Ortiz-Diaz v. the Department of Housing and Urban Development*. In that case you joined an opinion holding that "denying a lateral job transfer with the same pay and benefits may be an adverse employment action when the employee alleges he sought to transfer away from a biased supervisor." And in that case, you wrote a concurrence in which you said that "The court sitting en banc should establish a clear principle that all discriminatory transfers and discriminatory denials of requested transfers are actionable under Title VII." And you went on to make it clear that "denying an employee's requested transfer because of the employee's race plainly constitutes discrimination." And I will let you go further on that if you would.

Judge KAVANAUGH. Well, the question was if you are transferred laterally and you get the same pay and benefits, is that really a

change. In oral argument in that case—if anyone is interested, I encourage them to listen to the oral argument in that case where I said something I explained later in the opinion. Look, in the real world, a transfer, even if you get the same pay and benefits, may hugely affect your later job opportunities, your career track, and to think that discriminatory transfers were somehow exempt from the civil rights law merely because you have the same pay and benefits was blinking reality. And so, that is what I said in the opinion.

Our case law at that point basically said some transfers can be actionable, others not, and what I wrote was I do not see all discriminatory transfers are not unlawful under the Civil Rights Act.

Senator CRAPO. Well, I think it is important for America to know that your attitude is that strong on this. And we already went over the *Artis v. Bernanke* case when we were talking about women's rights issues. But this, again, is a group of African-American secretaries who were alleging discrimination, and you ruled in their favor.

Again, I have a number of more cases on this, but I got a different question, again, still on race and diversity. I recall the Black Law Students Association letter from Harvard that we talked—that I introduced the letter on previously. But I also note here that your commitment to promoting civil rights extends back to your personal law school days when you wrote one of your first pieces of legal scholarship, your Law School Note, which was titled “Defense Presence and Participation of Procedural Minimum for *Batson v. Kentucky* Hearings.” Now, what that means you can explain.

Judge KAVANAUGH. Yes.

Senator CRAPO. But essentially, it was an article about this topic that you chose when you were in law school. And I guess my question is, explain the topic, but why did you choose this topic in law school?

Judge KAVANAUGH. Well, because I was interested in trial procedure at that time, but I was also a product of a city where, as I described yesterday and described what my mom did in terms of teaching at McKinley Tech where race relations and race discrimination were an issue that was of concern to me. And so, I wrote after the 1986 *Batson* opinion, which prohibited race discrimination and preemptory challenge in jury selection. I worried or wrote, well, what is to prevent backtracking from that decision by prosecutors who will be able to assert seemingly race neutral reasons, but still have the effect of excluding African Americans from juries.

And so, I wrote a Law Review article, published, explaining that we needed good procedures to detect even subtle discrimination in the jury selection process to ensure that the *Batson v. Kentucky* decision was not evaded, and so that, you know, the legacy of all-White juries convicting African-American defendants is, of course, a painful part of our criminal justice legacy. And one of the things I wanted to make sure when the *Batson* decision came out was that that was not circumvented procedurally.

Senator CRAPO. Well, thank you, Judge Kavanaugh. I just want to commend on this. And as I said at the outset, it seems to me that an awful lot of the time in this hearing has been sent—been spent trying to create criticisms of you in areas like women's rights

or race relations and what have you, when in reality your record is strong and deep in terms of protecting women's rights and protecting those who are in unfavored positions, and protecting against racial discrimination. And I hope that we can get a strong focus on your true record, because whether it is these issues, whether it is the independent counsel versus special counsel issues, or whether it is just the balance of your decisionmaking and whether you are somehow out of the judicial norms in terms of your approach to decisions that you have entered into as a circuit judge. The record, your record, reveals the truth, and the attacks that have been made on you today are absolutely unfounded. And I just hope that we can get a much deeper look at your true, honest record as we move forward.

Now, I have only got a minute and 12 seconds left. The most important issue to me in your nomination is whether you will be an activist Justice or whether you will follow the law as it is written. I know what your answer is, but I would like to hear you, in the last minute that I have, tell me again what kind of a judge—what kind of a Justice will you be on the Supreme Court if you are confirmed?

Judge KAVANAUGH. Senator, I appreciate that and I appreciate your comments. Be an independent judge who follows the law, Constitution as written informed by history and tradition and precedent, follow the statutes that you pass, that Congress passes as written informed by the Canons of Construction. I will remember Hamilton's admonition in Federalist 78 that the judiciary exercises not will, but judgment, and Hamilton's admonition in Federalist 83 that the rules of legal interpretation are rules of common sense. And I will give it my all, as I have tried to do for the last 12 years as a judge on the D.C. Circuit.

Senator CRAPO. Thank you very much. I commend you for that answer and your approach to it.

Judge KAVANAUGH. Thank you, Senator.

Senator KENNEDY. Thank you, Senator. Judge, we are scheduled to take a 30-minute break. If you need all of it, just say so. If you do, I am not suggesting you should not take it.

Judge KAVANAUGH. Twenty-five?

[Laughter.]

Senator KENNEDY. Twenty-five. We will be back at—I have got 20 of 8. We will be back at five after. If you need a few additional minutes take them. When we come back, Senator Booker will begin.

Judge KAVANAUGH. Thank you, Senator.

[Whereupon, at 7:40 p.m., the Committee was recessed.]

[Whereupon, at 8:07 p.m., the Committee reconvened.]

Senator KENNEDY. Judge, are you ready?

Judge KAVANAUGH. I am ready.

Senator KENNEDY. Good. Got a little rest?

Judge KAVANAUGH. Not much.

Senator KENNEDY. Not much, huh?

Senator Booker.

Senator BOOKER. Thank you. Thank you, Mr. Chairman.

Judge, in a 1999 interview with the Christian Science Monitor about the *Rice* case, you discussed with Senator Hirono a little bit,

but you said, and I quote, “This case is one more step along the way in which I see as an inevitable conclusion within the next 10 to 20 years when the Court says we are all one race in the eyes of Government.”

It has been about 20 years now. We are about 6 months away. Do you think that you were wrong at that point, that racial discrimination in America would be over by 2019?

Judge KAVANAUGH. I think that was, Senator, an aspirational comment and one that, to your point, of course, I have said in my decisions, as you and I have discussed, that the march for racial equality is not finished, and we still have a lot of work to do as a country and as a people on that. So—

Senator BOOKER. I appreciate that. I really do. But I want to know what you were thinking in 1999 that would make you make such a bold aspirational comment that, hey, in 10 years, the Court could view this—us all as one race. What was going on in the 1990s that led you to have that belief?

Judge KAVANAUGH. Hope.

Senator BOOKER. Okay. Because you and I know—you and I are both aware of where the trends were going in the 1990s. This was a period where the drug war was in full blare, where the prison population exploded. Since 1980, we have been up 800 percent in the Federal prison population.

The massive increases in racial disparities of incarcerations. Blacks constitute roughly 13 percent of drug users but were 46 percent of those that were being jailed for drug offenses. Even our schools in the 1990s were becoming more segregated.

And so your brief in the *Rice* case invoked Justice Scalia’s argument that we should be “one race”. And this, let me go on with the Scalia quote because he said that Government can never have—never have a compelling interest in implementing race-conscious programs that seek to address this Nation’s wretched history of racial discrimination. He said, “never.”

He said that race-conscious programs, I am going to quote him now, are “racial entitlement.” Now do you think that someone who wants to remedy the fact that they could not get a loan from the Fair Housing Administration because of the color of their skin is racial entitlement, or are they seeking racial justice? Do you think someone, a person who tried—tries to remedy the fact that they were denied the chance to go to college under the GI bill because of the color of their skin is seeking racial entitlement, or are they seeking racial justice?

So to be specific with Scalia, do you agree with Justice Scalia, who you reference in your brief, that it is never permissible for the Government to use race to try to remediate past discrimination to try to achieve justice?

Judge KAVANAUGH. Senator, that was a brief for a client, first of all. So I am not—I was not saying something in my own voice particularly there. So I am writing a brief for a client.

Senator BOOKER. But if I can correct you, sir? You said this is a brief for a client, but you seem to invoke Scalia’s one race theory quite often. You invoked Justice Scalia’s one race theory to a reporter. You again mentioned it in the Wall Street Journal op-ed

you wrote around the same time, and you cited his opinion, yes, in this brief.

Are you saying that you do not share Justice Scalia's beliefs about this idea that people who are seeking to address past—past discrimination, past harms, that they are seeking racial entitlement?

Judge KAVANAUGH. I think, first of all, the Supreme Court precedent allows race-conscious programs in certain circumstance. So the precedent on the Supreme Court, as you know, Senator, is different. I was writing a brief, trying to cite all the principles from the different cases that would support the brief.

But to your point, when you are trying to remedy past discrimination, as a general proposition, you are seeking racial equality and seeking to remedy both past discrimination and the lingering effects.

Senator BOOKER. So you disagree with Scalia that it is—that he says it is never permissible for the Government to use race to try to remediate past discrimination to try to achieve justice? You disagree with Scalia?

Judge KAVANAUGH. The Supreme Court law—

Senator BOOKER. I know what the precedent is. I know what the law is. I am asking what you believe. Do you agree with Scalia that, again, that it is never permissible for Government to use race to try to remediate past discrimination to try to achieve justice, that that is racial entitlement?

Judge KAVANAUGH. That position has never been adopted by the Supreme Court.

Senator BOOKER. I am asking what you believe, sir, not the Supreme Court.

Judge KAVANAUGH. Okay. The term I used was that what you are seeking is equality. Equal, and what—

Senator BOOKER. And right. So if you are seeking equality, I appreciate it, grant that. Is it never permissible for Government to use race to try to remediate past discrimination?

Judge KAVANAUGH. There are a couple of things that the Supreme Court has pointed out in its case law.

Senator BOOKER. And again, I know the Supreme Court case law. Maybe I can approach this in a different way.

Judge KAVANAUGH. Okay.

Senator BOOKER. The aftermath of Katrina. In a case brought by plaintiffs in New Orleans who challenged the way Government provided grants to homeowners as having a discriminatory impact on African Americans, you joined the minority in denying them relief.

If the findings had shown that the grant program systematically disfavored African Americans, would a Government effort that uses race to remedy that disparity be unconstitutional? In other words, do you believe that all such efforts that use—the Government using those efforts amount to what Scalia called, “a racial entitlement”? I am trying to figure out if you agree with that point that Scalia is making.

Judge KAVANAUGH. Senator, first of all, I approach questions like you are asking with a recognition of two things. One, the history of our country and, two, the real world today.

Senator BOOKER. Yes.

Judge KAVANAUGH. And I try, as best I can, to understand both the history of our country on that issue and the real world today. So I am coming at it from that perspective.

You are asking a question, I think, about specific remedies for discrimination, and there is a lot—I am a judge, as you know, and so I have to follow precedent. And the precedent allows remedies in certain circumstances—

Senator BOOKER. And again, sir, I have heard you use that with a lot of colleagues, and I know what precedents are, especially dealing with a lot of very important Supreme Court issues. I am asking about your opinions because your opinions matter, what you have stated matters.

Let me give you an example. In April in 2003, you wrote regarding a program designed to benefit Native-American small businesses by saying the desire to remedy societal discrimination is not a compelling interest.

Judge KAVANAUGH. That is what the Supreme Court has said and—

Senator BOOKER. Hold on—the Supreme Court said that the desire to remedy societal discrimination is not a compelling interest?

Judge KAVANAUGH. The Supreme Court has in—let us go to *Bakke*, for example.

Senator BOOKER. I am going to get to *Bakke*.

[Laughter.]

Judge KAVANAUGH. Okay.

Senator BOOKER. Just answer this question. Do you still believe, this is what you said, that race can never be used to remediate clearly proven discrimination? If it is clearly proven discrimination, I am just using an absolute, do you still believe that it can never be used?

Judge KAVANAUGH. Well, the Supreme Court has said it can be to remedy—

Senator BOOKER. I know what the Supreme Court, but what do you believe, sir?

Judge KAVANAUGH. Well, I—

Senator BOOKER. I know the history. You have recited it numerous times.

Judge KAVANAUGH. I would say, look, I have trouble departing from the Supreme Court precedent and saying—

Senator BOOKER. But you do not. You opined about it in emails. You have opined about it in Wall Street Journal articles. I have heard you opine about these things in “race.” You just cannot say right now what you believe?

Judge KAVANAUGH. Well, a couple of things, Senator, just to back up. Lawyer for client in the email you are reading. As well, lawyer for—

Senator BOOKER. Christian Science Monitor article, Wall Street Journal, your comments to a reporter. Let me approach it this way, because you are not answering the question, but let me see if I can approach it in a different way now, getting to some of the things you were talking about.

The Supreme Court has said for decades—this gets us to *Bakke*. The Supreme Court said for decades that institutions of higher education have a compelling interest in student body diversity and

that race can be used as a factor—not the only factor, but a factor—in admissions if it is done so in a way that is narrowly tailored to serve that interest.

You said the Court said this in *Bakke*, and I know these cases. Said it in *Grutter* in 2003. *Fisher*, most recently in 2006. The simple question here is do you believe these cases were rightly decided?

Judge KAVANAUGH. Senator, they are important precedents of the Supreme Court, and as Justice—

Senator BOOKER. I did not ask you if they were precedents. I have heard you go through this before. Do you, sir—if you cannot answer it, just say, “Cory, I cannot answer this.” Do you believe that those cases—you say *Marbury v. Madison* was rightly decided. You said that. You said *Brown v. Board of Education* rightly decided.

And by the way, desegregation cases could come before the Supreme Court. Do you believe that these cases, “yes” or “no,” do you personally believe they were rightly decided?

Judge KAVANAUGH. Senator, I am following the precedent of the—set by the eight Justices currently sitting on the Supreme Court. To put it in the terms of Justice Kagan, who was asked a lot of these same questions, it would be inappropriate to give a thumbs up or thumbs down on—

Senator BOOKER. Yes, but, sir, there is a distinction between you and Kagan, you and Ginsburg on these issues because—

Judge KAVANAUGH. Or Roberts, Alito, Gorsuch, Kagan, Breyer—

Senator BOOKER. And I am going to tell you the distinction between that excuse you are using with many of my colleagues and the distinction here is, none of those nominees had voiced personal opinions that Government should refuse to defend these kinds of programs.

And let me give you an example. Let me give you an example. You wrote in an email about *Adarand v. Mineta*, a case that involved benefits to minority-owned businesses. You wrote that the Government should file a brief saying that the program is unconstitutional.

And let there be no confusion, sir. You went on to say, you went on to write that, “In fact, this is my personal opinion.” And so you said that then. My question is, do you still think a diverse student body is a compelling interest?

You opined on it then. You wrote it then. What do you believe now?

Judge KAVANAUGH. A couple of things there, Senator. First of all, the *Adarand* case is in the context of contracting. The *Bakke* case is—

Senator BOOKER. So you think that those cases, using race to remedy past discrimination, is unconstitutional? That is what you wrote then.

Judge KAVANAUGH. In light of the precedent of the Supreme Court representing a client in that case, and I go through—I think the email you are referring to, I go through—actually, we should not—the SG should make a recommendation first that this should not be a White House-dictated answer. And the Solicitor General

is ordinarily—I think if you are referring to the email that I am thinking of.

But in any event, I think, as you know, and I just want to reiterate, there is precedent in the higher education context, in the contracting context, that are somewhat distinct. And those precedents have been applied by judges. And in my record on race discrimination cases, I am happy to talk about my cases, the *Ayissi-Etoh*, the—

Senator BOOKER. But you are not happy to talk to me about the opinions you have expressed in the past. Do you still hold those opinions now?

Judge KAVANAUGH. Well, that is what I wrote then as a lawyer for a client.

Senator BOOKER. But you said that, again, “That is, in fact, my personal opinion.”

Judge KAVANAUGH. That is before the case is decided. In subsequent—

Senator BOOKER. So you expressed a personal opinion on this issue then. Do you still hold that same opinion now that it is unconstitutional?

Judge KAVANAUGH. I think you are—you are taking, I believe, respectfully, “personal opinion,” out of context there. Personal opinion about what the Government position, so personal recommendation. Because I said, the distinction there is, I said the Solicitor General should first make a recommendation, and then the White House should respond, or the President.

As to “personal opinion,” it was not my personal opinion, “Kavanaugh,” it was what the Government’s position—recommendation would be, based on President Bush’s stated policy—

Senator BOOKER. Okay, sir. It seems that you were pretty clear there what your personal opinion was.

Judge KAVANAUGH. Well, I—

Senator BOOKER. Let me approach it again—

Judge KAVANAUGH. I do not want to—I do not want to—

Senator BOOKER. Sir, we do not have to go back and forth. I want to ask you a simple, direct question. Do you think having a diverse student body is a compelling Government interest? Do you believe that? Do you think having a diverse—it is not a complicated question.

Do you believe having a diverse student body is a compelling Government interest?

Judge KAVANAUGH. The Supreme Court has said so, and my efforts to promote diversity, I am very proud of.

Senator BOOKER. But I know what the law is now—

Judge KAVANAUGH. No—

Senator BOOKER [continuing]. I am worried about what the law is going to be, sir, when you get on the Court and have the ability to change those precedents. But let me—I will go back to your words. I just want to ask you about your words and maybe give you a chance to explain something else because you have not answered my question, and I understand that you are going to stick to that.

You have also written that, “an effort designed to benefit minority-owned businesses, an effort to try to give them a fair shake be-

cause they had been historically excluded,” and these are your words now, “use a lot of legalisms and disguises to mask what is, in reality, a naked racial set-aside.” That is what you said. That is how you referred to it.

Judge KAVANAUGH. What are you reading from, Senator?

Senator BOOKER. Sir, I am reading from an email dated August 8th. These are your words. But I do not need to know—

Judge KAVANAUGH. Can I get a copy of it?

Senator BOOKER. You certainly can, but let us ask you what you believe now. I will leave aside then. Okay? You said it—you wrote it, but my question is, what are your views right now?

Do you believe that Government efforts to promote racial diversity are “a naked racial set-aside”? Those are loaded words. Do you believe that now, sir?

Judge KAVANAUGH. The Government efforts to promote diversity in the higher education context are constitutional, and I have made clear my own personal efforts to promote—

Senator BOOKER. But you refer to it in the past, sir, you refer to minority-owned businesses trying to get a fair shake after historically being excluded, you call that—which is very powerful.

Judge KAVANAUGH. I cannot—I do not have the email, Senator. So I am a little—

Senator BOOKER. Have you ever used the term, “naked racial set-asides”? You remember ever using that term?

Judge KAVANAUGH. That would—if you are saying there is an email, but I would like to see an email if I am getting questioned about an email.

Senator BOOKER. Okay. I am going to ask my staff to provide you the email while I move on.

Judge KAVANAUGH. I have promoted diversity in law clerk hiring and made a big difference in that.

Senator BOOKER. Sir, you told me about the diversity in promoting law clerk hiring, and I am so grateful for it. You told me a lot of things about the diversity that you personally have practiced—practice in your own life. I really, really appreciate that.

I am not asking you about the five Black clerks that you have. That is good. I am seeking—you are seeking a position on the highest court in the land that is going to affect millions of people. You have expressed opinions about these subjects to the media, to the press, in speeches, in past emails. But you are not willing to say if you still hold those positions that you held before.

And I want to just move on to specifically something that you have expressed opinions in some of your cases as well, sir, and that is the issue of racial profiling. You once discussed the use of racial profiling after 9/11 with your colleagues in the Bush White House.

Judge KAVANAUGH. Can I see the email?

Senator BOOKER. What is that, sir?

Judge KAVANAUGH. Can I see the email?

Senator BOOKER. Yes. I will get you the email, but there was—

Judge KAVANAUGH. But I cannot answer if I do not—

Senator BOOKER. I am going to ask you about your views now, sir, and I will provide the email. But I am more interested in your views right now before you may be confirmed as a Supreme Court Justice.

There was a debate going back and forth, and one of your colleagues said that there was a school of thought in the administration that if the use of race renders security measures effective, if using race renders security measures effective, then perhaps we should be using it in the interest of safety, now and in the long term. And that such actions, your colleague said, may be legal under such cases as *Korematsu*.

Judge KAVANAUGH. It sounds like you are quoting someone else, not me.

Senator BOOKER. I am quoting somebody else.

Judge KAVANAUGH. Well, it sounds like—

Senator BOOKER. Sir, sir. I am not going to stick you with that. I know you have already said *Korematsu*—

Judge KAVANAUGH. But do not attribute—

Senator BOOKER. I am not attributing it to you. Sir, please do not accuse me of that. I am not. I said that was your colleague. I clearly said that was your colleague.

You did not respond. You did not respond in the email by denouncing racial profiling or expressing outrage at the idea of relying on a case as odious as *Korematsu*.

Senator TILLIS. Mr. Chair, point of order.

Senator BOOKER. Can I ask for my time to be paused, Mr. Chair, while you hear this point?

Senator KENNEDY. Please do. Pause Senator Booker's—

Senator TILLIS. Mr. Chair, just as a courtesy to the witness, we just saw an example there where I even believed that the words that were being repeated were words in an email authored by Judge Kavanaugh. I think it would be helpful if we could suspend for long enough to have the documents available to the Judge so that it can be answered in proper context.

Is that an appropriate request?

Senator KENNEDY. Do you have any objections?

Senator BOOKER. I do have an objection. If my colleague has an issue with that agenda, I think he should bring it up after my time. I would like to get back to my questioning.

Senator KENNEDY. Okay. Let us proceed. Do not take time away from Senator Booker.

Senator BOOKER. Thank you very much.

Sir, your response to that colleague's email was that you generally favored race neutral security measures, but you thought that there was, and I am quoting you now, "interim question of whether the Government should use racial profiling before a supposedly race neutral system could be developed sometime in the future."

So it seems that you are okay with using race to single out some Americans for extra security measures because they look different, but you are not okay with using race to help promote diversity and equal opportunity and correct for past racial, documented racial inequality?

Judge KAVANAUGH. Sounds like I rejected the racial profiling idea. What is the date of the email, Senator?

Senator BOOKER. The date of the email is January 17, 2002. And so, have you ever suggested or expressed an openness to, even in a temporary circumstance, like this email seems to indicate, in an

interim question of using racial profiling? Have you ever suggested that, sir?

Judge KAVANAUGH. I would like to see the email.

Senator BOOKER. I will provide the email, sir, to you.

Judge KAVANAUGH. But that sounds, from what you read, like I rejected the concept, but I will look at the email.

Senator BOOKER. It seemed to me that you were open to the concept, sir, clearly. This is critically important because right now in our Nation, there are law enforcement practices, and I think you are aware, that overwhelmingly target African Americans and other people of color. Yet I have read opinions, such as yours in the *United States v. Washington*, upheld a search, and I quote, “in the neighborhoods in Southeast Washington, DC,” that you called crime plagued. In *Wesby v. District of Columbia*, where you would have protected police from liability when they made warrantless arrests at a house that was “in east of the Anacostia River.” You and I both know that those are predominantly Black areas.

Judge KAVANAUGH. Yes.

Senator BOOKER. Predominantly African-American communities.

Judge KAVANAUGH. Yes.

Senator BOOKER. I understand there is case law that says police can justify some actions by saying that they were in areas that were high crime. But you know how some of these opinions using this type of racially coded language can further the disparate treatment of people of color with the police.

And so the way I see it, and I will give you a chance to respond, is that you are willing to consider using racial profiling to accept police practices, like heavy policing of African-American neighborhoods, but you are hostile to the use of race when it is used to promote diversity or remediate past proven discrimination.

Judge KAVANAUGH. Can I get 60 seconds?

Senator BOOKER. Sir, go ahead.

Judge KAVANAUGH. Okay. On the *Wesby* case, there was a house—there was a call to the police. It was not the police patrolling the neighborhood. On the *Wesby* case, the Supreme Court reversed the majority decision that had been written by other people that I dissented from. They reversed it 9–to–0 this past term. So what I wrote in *Wesby*, I was cited, and the Supreme Court agreed with the approach that I had suggested, 9–to–0.

On the general concept, you and I have discussed this in our meeting. I am very aware of the reality and perception of targeted policing or police activity in minority neighborhoods and—or I try, as best I can, to be aware and understand that. And you and I talked about that. And the *Wesby* case, in my view, had nothing to do with that issue.

Senator BOOKER. So, sir? Sir, I tried to give you some time there, but this is what I am hearing right now, sir. And you know, and I appreciate your rhetoric on these matters. But again, you are going to be a judge on the Supreme Court, if you are confirmed, and have a power to make massive differences in our country. And these are real issues.

And so I asked you, was the *Fisher* case, I just asked if it was rightly decided. You refused to answer. I asked you again whether

you believe diversity is a compelling interest. You did not answer that, sir.

That is not good enough for a nominee to the highest court, particularly one who has expressed, and I will provide you with the emails as well as other quotes for the record as well, opposition to affirmative action and efforts to address systemic provable discrimination, such as—and yet you also have an openness to racial profiling. And again, I will provide that email.

The cases I raise are about addressing documented systemic structural inequality in our country. This is about the fact that children in this country still encounter a different experience of America based upon the color of their skin and not the content of their character.

They are more likely to drink dirty water and breathe dirty air and less likely to have access to equal educational opportunities. They are more likely to be stopped by the police. They are more likely to be shot by the police and become unfairly entrapped in our broken criminal justice system.

I, like you, you said you are an optimist. I am a prisoner of hope. But I think even I have a troubling understanding in your eyes how America could be just months away or a few years away from becoming one race in the eyes of the law, as Scalia you have quoted numerous times.

We are a good country with great people. And we are great people because people of all races in America have worked together. Black folks, White folks, all folks have worked together to make progress. But you said it yourself. We have so much work still to do.

The Supreme Court, see, plays a vital role in that work, just as it did generations past with cases like *Brown*. And so, Judge, our communities—you have answered my question. I want to move really quick in the remaining time I have to voting rights, which is the crown jewel of the civil rights movement.

It is designed to prevent States from putting up barriers for the rights of African Americans to vote. It is in the 21st century voter ID laws, which we are seeing more and more, many people consider them the modern-day equivalent of poll taxes. These laws are being enacted despite the fact that in-person voter fraud is incredibly rare. You are more likely to be struck by lightning in America than to find a person committing in-person voter fraud.

You wrote an opinion in the South Carolina voter ID law that you said you were proud of that decision in my office, and I heard you say it here. I am taking you at your word that you are proud of this decision.

But you were aware at trial that the author of the South Carolina voter ID law admitted that he received an email from a supporter of the bill that said African Americans—he said—that said if African Americans were offered \$100 reward for obtaining a photo ID to vote, it would be, and I quote, “like a swarm of bees going after watermelon.”

In response to that racist email, the author of the voter ID wrote, and I quote him directly, “Amen, Ed. Thank you for your support.”

You were also aware that, based on the evidence in that case, that minority voters in South Carolina were 20 percent more likely

than White registered voters to have a valid photo ID. So how could you have concluded that the voter ID law would not have a disparate impact on minority voters and poor voters in general?

If a registered voter did not have a voter ID, is it not true that their only option was to write out a sworn statement that could expose them to criminal penalties? And is it not true that even then, they could only vote on a provisional ballot? Is that true?

Judge KAVANAUGH. So the decision was unanimous, joined by Judge Kollar-Kotelly, who is an appointee of President Clinton's, and Judge Bates, a President Bush appointee. But it was a unanimous decision where we blocked—we blocked implementation of the South Carolina voter ID law for the 2012—

Senator BOOKER. But you are telling me things I know. Can you just get to your feelings on this? Could you not see—

Judge KAVANAUGH. Yes.

Senator BOOKER [continuing]. That this was going to provide an impediment and disparate impact on African Americans? Could you not see the problems that this would create?

Judge KAVANAUGH. That is why we said that the reasonable impediment provision could not just be the form that they had prepared, but there had—we essentially said what would have to occur.

Senator BOOKER. And you said you were proud of the reasonable impediment provision. That is where we got—that is the point we had to stop, when we talked in my office. Could I just ask you, because this is how I see the reasonable impediment provision.

South Carolina tried to enact this law that would not disenfranchise minority voters. When the people who enacted this law realized that they had to make changes to it, remember this?

Judge KAVANAUGH. Yes.

Senator BOOKER. They enacted, sort of created a second class of voters, those without an ID. They had to go to a separate line, fill out a form under the threat of criminal prosecution. Wait for an attorney or a poll worker to witness that. And then, after all that, they had to cast a provisional ballot that may not have counted at all.

Now this is a lot of a process. And you said to me, and I appreciate you saying this. You said what looks good on paper may fall apart in practice. And you told me, hey, Cory, I was keeping an eye on this to see what was going on.

Judge KAVANAUGH. I think I said “Senator,” but yes, otherwise—

Senator BOOKER. I am sorry, Judge. I am sorry. I feel comfortable with you.

[Laughter.]

Senator BOOKER. Can I just show you what was up, in South Carolina polling places?

[Showing sign.]

Senator BOOKER. You can see this sign. Here is a picture. This is the sign that was in the polling places in South Carolina after the passage of their voter ID law. I mean, look at this sign, sir. This is what people without a photo ID would have seen.

This is confusing and intimidating. It does not show the—what you call the reasonable impediment option that they had. It just

shows this very thing. Do you see how this poster board, you know, might not be really much—I do not even know if you can see any reasonable provision aspect on this.

Does it not matter that the average voter seeing this poster could be intimidated by this process?

Judge KAVANAUGH. That is why I said in the last paragraph of the opinion what looks good on paper may fall apart in practice. And what we did in the decision was we said—to your concern, I was concerned about the same thing you are asking about here when I was questioning the lawyers at oral argument. And we said the proposed reasonable impediment form was not good enough and that there had to be a catch-all box where you could put in any reason.

And then we have listed all the reasons—

Senator BOOKER. Well, sir, I appreciate you saying all that, but this is the result. And let me—but let me go with something different from a person—you and I are nearly the same generation. I want to talk to you about somebody from a different generation that we all think is the greatest generation.

They did try to get a photo ID under the law that you were part of establishing. That was hell. And this was a 92-year-old South Carolinian named Larry Butler, a military veteran and a pastor of the Lord. He voted in the 2010 election, but in his attempt to get a photo ID, he had to chase down paperwork from his high school records, then go to get his birth certificate, then go to get court records.

He went to the DMV, to the Official Vital Records Office, and the court. And after all that, actually, he still was having trouble. He still could not get a valid photo ID.

According to a study by the Harvard Law School, the cost of his filing efforts were 36 bucks. That is how much all this process cost him. Now I am not accounting for his time. If he was working, it would have been a lot more.

And so I just want to ask you, because many people call this the modern-day poll tax, that we are going back. Do you know what the infamous poll tax was in South Carolina in 1895? Do you know how much it was?

Judge KAVANAUGH. The exact amount?

Senator BOOKER. Yes.

Judge KAVANAUGH. I do not.

Senator BOOKER. I did not think so. I will tell you, sir. It was one dollar. That was the poll tax that you and I think is despicable and disgusting. It was one dollar then, which is roughly \$30 today. Less than what it cost the veteran, Pastor Larry Butler, that is less than what he incurred trying to get to vote after the 2011 law. And if it was not for him holding a press conference with the Governor intervening and others giving him a special dispensation.

And so here is this great generation, where Black folks and White folks in this country joined together, they fought and they bled, they died. Goodman, Chaney, and Schwerner, dying for voting rights. They grew up at a time when the States like South Carolina routinely placed these burdens on the right to vote and made it impossible and even dangerous to try to cast these votes.

I do not know if you see that this is not that much different in terms of the cost to this person of trying to ultimately pay what is in effect a poll tax.

Now my time is about to run out, and I want to say you can answer up to this because I have only got a minute and 30 seconds. So let me just conclude, and then I know they will ask you this. But this, this is not complicated to me, sir.

Costs like this create structural barriers that systematically disenfranchise African Americans, people of color, and actually poor people of all colors. I am concerned that a person who believes that we are all one race, like Scalia says, in the eyes of Government, that could happen months from now, a couple of years from now. A person who believes that efforts to promote racial justice are, your words, naked racial set-asides, they will be blind to the reality of someone like Mr. Butler and the experiences of poor folks all around this country.

You refused to answer a lot of my questions about your views of the race and the law, talking about what Supreme Court precedent is. We are at a time when States are enacting these laws all over our country, designed to disenfranchise voters. As one Federal court said about a North Carolina law, targeting them with almost surgical precision to disenfranchise them.

And now we do not even have the benefit of the Voting Rights Act provision designed to curtail discriminatory laws before they go into effect. Your answers do not provide me comfort—as a Justice of our Nation’s highest court—that you will fairly take into account the barriers that continue to disenfranchise minority voters like Mr. Butler today.

Sir, I am optimist. I am prisoner of hope like you. But we have a long way to go. We have work to do, Black folks and White folks honoring the history of a united America, fighting to make us more just. The Supreme Court has a vital role in that, and nothing you have said here today gives me comfort—gives me comfort that should you get on the Supreme Court that you will drive forward and see that we have that work to do and make the kind of decisions that will make a difference for people like Mr. Butler, people living east of the Anacostia River, north of the river, south of the river, all over this Nation.

Thank you, sir.

Judge KAVANAUGH. Can I take a minute to respond?

Senator KENNEDY. Sure. And then I am going to recognize Senator Lee.

Judge KAVANAUGH. Senator, a couple of things, on that. I pointed out in the South Carolina opinion, I wrote the majority opinion on it, that we see, on an all too common basis, that racism still exists in the United States of America. The long march for racial equality is not over.

I cited, I think you have seen, after an African-American hockey player scored the winning goal, a burst of racial commentary about him. I think that was just one of many examples I could have cited in that case.

Senator BOOKER. Racial commentary? Can you be more specific?

Judge KAVANAUGH. Racist. Racist.

Senator BOOKER. Racist commentary.

Judge KAVANAUGH. I actually said racist. So racist comments is what I should have said online. And that was just one example I pointed to say the reality, just one example.

I made clear that the reasonable impediment provision had to be rewritten. I was all over the real world effects during the trial that you are raising here, I was all over that—so were the other judges—of how is this really going to work in practice? We drilled down and drilled down and drilled down and caused the rewriting of the reasonable impediment provision to make sure.

I talked about the fact, for example, that African Americans in South Carolina at that time did not have as many cars on the same percentage. And so to get—to your point about getting the photo IDs, I made clear that I understood that.

We blocked implementation for 2012 because we were worried, to your point about the form, that it would not be enough time to get all this in place and to educate people.

It was a unanimous decision. Again, neither side, the Obama Justice Department did not appeal our decision to the Supreme Court. I believe, I assume that is because they thought our decision appropriately accommodated the interests of the parties in that case to ensure that African Americans in South Carolina were able to vote on the same basis as before.

In talking about my life and record, you were talking about that, going back to growing up, but the law journal note that I wrote on race discrimination talked about something that I know you have been talking about a lot, which was bias in the criminal justice system. And I said at the end of that law journal note that both racial equality and the appearance of racial equality were critical to the fairness of the racial justice system.

I provided specific mechanisms for rooting out race discrimination in the jury selection process and talked about what you have talked about, implicit bias or subconscious racism. I specifically talked about that in that decision.

I have been a, I think, a leader. So there is 2010 testimony before the Congress about the lack of minority law clerk hiring at the Supreme Court, and Justice Thomas and Justice Breyer were testifying before the Appropriations Committee, and they were asked about minority law clerks and the lack of them at the Supreme Court. And they said, in essence, well, we are hiring from the lower courts. And I remember reading that and thinking, well, I need to do something about that. I am the lower court. I am one of them.

And so after that, I thought what can I do? And I did not just sit there. I went and thought what can I do? And I started on my own going to the Yale Black Law Students Association every year, starting in 2012. I think I am the only judge who has done something like that, or certainly one of the few. And I just cold-called them, cold-emailed them and said I would like to come speak about minority law clerk hiring because I am told there is a problem there.

And I showed up the first time wondering how it would go, and I explained and I got a good crowd from the Black Law Students Association. I said we need more law clerks. There is a problem. And let me tell you how to do it, and here is why you should clerk,

and here is how you clerk, and here is how you—here are the classes you should take, and here are the things you need.

And at the end of that meeting, I gave them my phone number and email and said call me anytime, email me anytime if you want help. And then it was a big success. I got a lot of emails after that. I helped students get clerkships with other judges. One of them recently finished the Supreme Court, emailed me, thanking me for starting him on that road.

And then it was a success, and I have gone back almost every year there. And as you know, we are graduates of the same law school—that is, a lot of people clerk from there, so it is a good place to go. And I have continued to encourage African-American law clerks. But it is not just encouragement. I have given them help and advice and been a source of counsel, I have tried to be.

And why is that? Because I saw a problem to the extent of the kind you are talking about. And it is one small thing, I suppose. But those are the future people who are going to be sitting around here and sitting here, I think. Those are the pool.

And I have tried to be very proactive on that, including my own clerk hiring where the old networks that prevented women and African Americans and minorities from getting law clerkships. I have been very aggressive about trying to break down those barriers and be very proactive on that, recognizing that part of this is professors who have research assistants.

And so I have done, you know, my cases like the *Ayissi-Etoh* case and the *Ortiz-Diaz* case, and I think the South Carolina case I understand your concern about, but I am proud of what we did in that case. So I think if you look at my—your broader question about my life and my record, I understand what you are asking about a few comments in those Hawaii—the Hawaii case. But if you look at the sweep of it, I hope it gives you confidence that I have at least done my best to try to understand the real world and tried through my actual decisions to understand the real world and apply the law fairly.

And through my other role as a judge and hiring law clerks to be very proactive in trying to advance equality for African Americans.

Senator KENNEDY. Senator Lee.

Senator BOOKER. Sir?

Senator KENNEDY. Senator Lee.

Senator LEE. Mr. Chairman, thank you.

I think it is important. The rules of fairness and the Rules of the Committee require us to treat our witnesses with respect, with certain minimum standards of respect such that you cannot cross-examine somebody about a document that they cannot see.

Now in this circumstance, the document that was referred to by my distinguished friend and colleague from New Jersey, Senator Booker, was designated as “committee confidential.” Now there are ways we can deal with this. We can deal with this either in a closed session so that he can see the document to which you are referring, or we can also go about different procedures to make it public.

We have already done this in this very set of hearings with Senator Leahy and with Senator Klobuchar, who identified some documents that were identified as “committee confidential.”

The one thing we cannot do is refer to a document, cross-examine him about that document, but not even let him see it because he cannot see it. We would not do that in a courtroom, and we cannot do that in our Committee. Our rules do not allow it. So I would just suggest that we go through the proper procedure to either deal with this in a closed session or ideally go through the process that Senator Leahy and Senator Klobuchar went through in order to allow us to address this in open Committee.

Senator BOOKER. Mr. Chairman, may I respond?

Senator KENNEDY. The objection is duly noted.

Senator BOOKER. Mr. Chairman?

Senator KENNEDY. Thirty seconds, Senator.

Senator BOOKER. I really respect my colleague from Utah, and I appreciate that. I am not the first colleague that has referenced committee confidential emails, not the ones you said is the exception, they were referenced before. And that is why this system is rigged is because we have been asking, I have letters here, sir, that we have asked for.

Now the one email specifically entitled, “Racial profiling” that somehow—I mean, literally, the email was entitled, “Racial profiling”—that somehow was designated as something that the public could not see. This was not personal information. This was not personal information.

There is no national security issue whatsoever. The fact that we are not allowing these emails out, as we have asked, as I have asked, joined the letter with my colleagues asking. And that is why I am saying the system is rigged.

More than that, Senator, you have this system where there are whole areas—whole areas that was cleared where—

Senator KENNEDY. Senator, if you could begin to wrap up?

Senator BOOKER. I will wrap up. Thank you, sir, for the generosity. Where there is whole areas where we are not allowed to let these out. And so I see you are outlining a process, but I am saying that process is unfair. It is unnecessary. It is unjust, and it is unprecedented on this Committee.

Senator KENNEDY. Gentlemen, I am trying to be fair to everybody. I know Senator Lee wants to respond. With respect, if he would do that briefly, I would like to continue on.

Senator LEE. Senator Booker, I will go with you hand in hand literally to work with Committee leadership staff to get that going. I agree with you. There is no reason why it should not be something that we can discuss in public.

I do not know why it was marked “committee confidential.” I was not in charge of that. Regardless, we do have to follow procedure so that he can have access to it so that he knows how to respond. I will work with you on that.

Senator KENNEDY. Thank you, gentlemen.

Senator WHITEHOUSE. Now that the hearing is half over.

Senator KENNEDY. I am next. So, and I do not have any emails. [Laughter.]

Senator KENNEDY. I want to start, I have watched you for the last couple of days, Judge, and I want to compliment you on your demeanor. And I mean that. I know you are on your best behavior, but—but I appreciate your humility.

We both know some Federal judges who can pretty much strut sitting down, and I appreciate your attitude and your demeanor, and I mean that.

Judge KAVANAUGH. Thank you very much, Senator.

Senator KENNEDY. I just want to ask you a few questions about—about the law. I am not going to ask you to violate the canon of judicial ethics. I am not asking you to go thumbs up or thumbs down. I am truly not.

I may have to interrupt you a few times just to move us along. I am not trying to be rude. I want you to understand that.

Judge KAVANAUGH. Yes, sir.

Senator KENNEDY. You know, you have been nominated for the most powerful unelected position in the most powerful country in all of human history. Congratulations, but you understand also where we are coming from. There is no margin for error.

Judge KAVANAUGH. Yes, sir.

Senator KENNEDY. We have got to get this right. Yesterday—gentlemen, take it outside, would you?

Yesterday, I talked a little bit about the fact that judges have limits on their power, and I do not know if I said it this way, but I said I think it is inappropriate for a Federal judge to try to rewrite the Constitution every other Thursday to advance an agenda that either he or his/her supporters cannot get by the voters.

Do you agree with that?

Judge KAVANAUGH. Yes, of course, Senator. The judges interpret the law. They do not make the law, and that is obviously something that is repeated a lot. I know it is cliché, but it actually matters. If you keep that in mind, it matters.

Senator KENNEDY. Judges also have another duty, though. I did not get to talk about it yesterday. Federal judges and State court judges have an obligation to protect inalienable rights, even if the majority wants to take them away. That is why they call them “inalienable.”

And I said this when Judge Gorsuch was here, if you think about in many cases, the Bill of Rights is really not there for the high school quarterback or the prom queen. The Bill of Rights is there for the person who kind of sees the world differently but has the right to do that.

And I think that is important for a judge. Can we agree on that?

Judge KAVANAUGH. Absolutely, Senator. I think the Bill of Rights is—protects all of us, but that includes and it is most relevant for free speech of the unpopular—

Senator KENNEDY. Right.

Judge KAVANAUGH. Or the unpopular criminal defendant.

Senator KENNEDY. Even if the majority says—

Judge KAVANAUGH. Yes.

Senator KENNEDY [continuing]. We are the majority. Because we both know that sometimes the majority just means that most of the fools are on the same side.

[Laughter.]

Senator KENNEDY. I mean, just because you are in the majority does not mean you are right. Correct?

Judge KAVANAUGH. Just because you are in the majority does not mean you are right is absolutely a correct proposition.

Senator KENNEDY. Right. That is why we have a Bill of Rights.

Judge KAVANAUGH. Yes.

Senator KENNEDY. All right. I want to talk about—now that is the easy part. I want to talk about how we go about making these decisions, and there is a tension there, and that has to do with the language. If I talked about—and you have talked about it a little bit. But if I talked about the *Holy Trinity* doctrine, you would know what I am talking about, I am sure?

Judge KAVANAUGH. Yes.

Senator KENNEDY. Yes. Now the Supreme Court has rejected the *Holy Trinity* doctrine. Okay?

Judge KAVANAUGH. Right. Yes.

Senator KENNEDY. You talked about we are now textualists and are originalists, and you called originalism constitutional textualism, I think.

Judge KAVANAUGH. Yes, original public meaning, originalism, constitutional textualism. I think those describe the same thing.

Senator KENNEDY. Okay. You start with the language, let us take a statute, with the language in the statute.

Judge KAVANAUGH. Yes, sir.

Senator KENNEDY. And the first question you ask as a textualist, is it ambiguous or unambiguous? Correct?

Judge KAVANAUGH. If there is a canon of construction that is there that depends on a finding of ambiguity, that would be the question. Otherwise, other than that, you would just say what is the best meaning?

Senator KENNEDY. Yes, you read the statute.

Judge KAVANAUGH. Yes, read the statute.

Senator KENNEDY. You say does it make sense? It either makes sense or it does not. How do you determine that? How ambiguous—you alluded to this. But how ambiguous does it have to be? Does it have to be 100 percent ambiguous? Does it have to be 51 percent ambiguous?

Is there really any principled way to compare clarity to ambiguity, or do some judges use it as an excuse to get to those canons of interpretation about which they have already read in the brief to do what they want to do, did you know?

Judge KAVANAUGH. Yes. I have said many times in my cases and talks to students that judges should not be snatching ambiguity from clarity. So that is one thing. I think that goes right to your question. But to your broader question is that is one of my concerns about a few canons of construction that depend on an initial finding of ambiguity, which sounds great in theory, which is, oh, if it is ambiguous, go to that canon or this canon or this canon.

But in practice over 12 years, what I have found—and I have written about this—is that there is not a good way to find neutral principles on which two or, in my case, three judges can agree on how ambiguous is ambiguity. And that is hard to even talk about. I find it ambiguous. I do not think it is ambiguous.

That has, in my view, frustrated the goal that I have of a judge as umpire, the even-handed application of neutral principles in the rule of law, and ultimately that has concerned me because some of these cases where that has come up are big deal cases. Yet it is dependent on this initial determination that when you unpack it and you actually sit in the judicial conference room like I do, it turns out to be very hard to apply in an even-handed way.

So that has been the concern I have identified.

Senator KENNEDY. Original of the article. You advocate the best reading of the statute.

Judge KAVANAUGH. Yes.

Senator KENNEDY. Okay. Let us talk about that, and I want to talk about it, not in terms of the statute, but the Second Amendment and talk about the *Heller* case. You defined originalism as constitutional textualism, and you—the way to interpret the Constitution is to ask yourself—tell me if I get this wrong now. What would—how would a reasonable person at that time have understood the Constitution? The public knowledge.

Judge KAVANAUGH. The original public meaning. I always want to add—

Senator KENNEDY. Public meaning.

Judge KAVANAUGH. Of course, precedent is a huge part of what we do in constitutional law.

Senator KENNEDY. Sure.

Judge KAVANAUGH. But if you are looking at the words, the original public meaning, you look at what the words mean, sometimes the meanings change. Oftentimes, it has not. But to your point, I agree.

Senator KENNEDY. And there is almost an objective test.

Judge KAVANAUGH. You are trying to make it as objective as possible, absolutely. It is—it is an objective test. I mean, sometimes there is different evidence about what the meaning of the word was, I think.

Senator KENNEDY. Sure. But you are not looking at intent.

Judge KAVANAUGH. Correct. You are not looking at the subjective intent other than to the extent that helps show the—

Senator KENNEDY. Right. We have thrown that out?

Judge KAVANAUGH. Yes.

Senator KENNEDY. Okay. If you look at the *Heller* case—and I am talking about the *DC v. Heller* by the U.S. Supreme Court—it was not a balancing case. You made that point clear at the court of appeals level. It was a text history and tradition case. And Justice Scalia wrote the majority opinion. Justice Stevens dissented, and they both took an originalist approach.

And I went back and looked. Scalia, this is what he relied on. He relied on founding era dictionaries, founding era treatises. He looked at English laws, American colonial laws, British and American historical documents, colonial era State constitutions. He looked at post-enactment commentary on the Second Amendment.

And Justice Stevens, also using an originalist approach, looked at the same documents, and then he added he relied on linguistic professors, an 18th century treatise on synonymous words, and a different edition of the colonial era dictionary that Justice Scalia used. Pretty impressive.

Here is my question. Does the originalist approach not just require a judge to be an historian, and an untrained historian at that?

Judge KAVANAUGH. I do not think—

Senator KENNEDY. I mean, would we not be better off hiring a trained historian to go back and look at all of this, this commentary?

Judge KAVANAUGH. Well, the *Heller* case was one of the rare cases where the Supreme Court was deciding the meaning of a constitutional provision without the benefit of much, if any, relevant precedent. On most of the constitutional provisions, there has been a body of cases over time interpreting the provision, and you do not have to do the kind of excavation that Justice Scalia and Justice Stevens did in that case because it has been done before.

The reason I think why the Second Amendment posed a challenge in that case in terms of figuring it out is, the prefatory clause in the Second Amendment, which the question was did that define the scope of the right indicated afterwards, the right of the people to keep and bear arms shall not be infringed. Or did the prefatory clause merely state a purpose via for which the right was ratified, and therefore, you read the right as written. The right to keep and bear arms shall not be infringed.

And to figure out what the prefatory clause meant, you had to figure out as a general proposition how legal documents at the time used prefatory clauses and what the purposes of those were, and that required a lot of historical excavation by the two Justices who had the competing positions.

Senator KENNEDY. Okay. Fair enough. Somebody commented yesterday, maybe it was you, Judge, they talked about how our judiciary was one of the crowning jewels of our Government and the fact that it separates us from other countries.

I think one of the reasons so many of our neighbors in the world want to come here is because of our independent judiciary. They know their person and their property will be protected. I think that singles us out. You know, you never read about somebody trying to sneak into China. They want to come to America.

But there have also been studies, I think Senator Booker talked about this. Maybe it was Senator Whitehouse. People have—in America, many of them think the United States Supreme Court is a little Congress that is political, and that is unfortunate because that means we lose confidence in an independent judiciary. I am not saying it is true, but perception is important in government.

Do you think having cameras in the courtroom would help?

Judge KAVANAUGH. Senator, that is an issue that I have thought about, and let me just give you a little perspective on our court. We have gone to same-time audio in our court. We started with release of tapes much later, then release of tapes later in the week, then release of tapes later in the day, and now we are same-time audio in our court. And I think that has been a—that has worked at the court of appeals level for us.

I know nominees who sat in this chair in the past have expressed the desire for cameras in the courtroom only to get to the Supreme Court and really change their positions fairly rapidly. So that gives me some humility about making confident assertions about that,

and, of course, joining a Team of Nine means thinking about that, if I were fortunate enough to do so, and hearing the perspectives of why did they change their position? What is their view?

Senator KENNEDY. Yes.

Judge KAVANAUGH. I will say one thing about that that I do think is important. Oral arguments are a time for the judges to ask testing questions of both sides, and there is a perception sometimes, and you see it in the media that the oral argument, Judge X is leaning this way at oral argument.

I really cannot stand that kind of commentary about oral argument because I, at least, have always approached oral argument as the time to ask tough questions of both sides. And I do sometimes wonder whether people would get the wrong impression of oral argument.

Now I have always thought, too, though, the announcement of the Supreme Court decisions, when they issue the opinions, that is a different point in time. When if there—

Senator KENNEDY. What did you say Justice Marshall said? People are not fools. You have to trust in people sometimes, Judge.

Judge KAVANAUGH. And as to the decisions, right, that is when the Court is announcing its decision, and that is the decision of the Court. Oral argument, lawyers—people are asking tough questions of both sides, and sometimes you would think, oh, Judge X thinks this because of the oral argument question.

Senator KENNEDY. I understand.

Judge KAVANAUGH. But the decisions, I think that is—let us put it this way. If I were starting—I think I will stop there.

[Laughter.]

Senator KENNEDY. Well, I get your point, and there are good arguments on both sides. But I do think that the American people have lost confidence in the institution of the Supreme Court and Congress and the Presidency, and it is ironic, given my generation, that the only institution that the American people I think have a lot of confidence in right now is the military, which was not true in my era.

Judge KAVANAUGH. Yes. Well, that shows—

Senator KENNEDY. But you know, you have got to trust the people, and too many up here on the beltway do not.

Judge KAVANAUGH. I agree with your general point.

Senator KENNEDY. You know, they do not—the people do not read Aristotle every day, but they get it. They will figure it out.

All right. Let me ask you a couple more. You are an originalist?

Judge KAVANAUGH. Yes. I pay attention to the text, the original public meaning. But informed, I always want to make sure I say precedent. If you are in a constitutional case, precedent is critically important, and that is part of the text of the Constitution, too.

Senator KENNEDY. Right. But you may—and the focus of primarily of an originalist is an understanding of the Constitution by the people, an objective test, at the time it was written and ratified?

Judge KAVANAUGH. The meaning, as opposed to the intent, and then informed—

Senator KENNEDY. Right.

Judge KAVANAUGH. I always have to add precedent.

Senator KENNEDY. I get it. I am not trying to trick you.

Judge KAVANAUGH. No, I understand. I just—

Senator KENNEDY. I could not trick you.

Judge KAVANAUGH. I just want to be clear in case someone takes something out of context.

Senator KENNEDY. All right. Are you willing to overturn precedent that you think conflicts with the original public understanding of the document?

Judge KAVANAUGH. The Supreme Court's rules on precedent, the precedent on precedent, sets forth a series of conditions that you look for before you consider what you would overrule—

Senator KENNEDY. I know that, but I am just asking if you come upon a case and you say, you know, I am on the Supreme Court now, and I have looked at this. And that is not—under originalism, that is not what the public understanding was.

Judge KAVANAUGH. So the first inquiry is, is the prior decision wrong, actually grievously wrong? And if you thought it was grievously wrong, that would be you would go on to the—because of that or for some other reason, you would go on to the next steps of the stare decisis inquiry. But that is how that would work, if I understand the question correctly.

Senator KENNEDY. Okay. All right. Can we agree that there were State constitutions that preceded the Federal Constitution?

Judge KAVANAUGH. They did, and the Framers at Philadelphia drew on a lot of the experience of State constitutions.

Senator KENNEDY. Yes, they drew from State constitutions.

Judge KAVANAUGH. They sure did.

Senator KENNEDY. And can we agree that every State now has a State constitution?

Judge KAVANAUGH. Yes, yes. And they protect a lot—a lot of rights.

Senator KENNEDY. Yes. In fact, they before the Federal Constitution was extended to the States in the Fourteenth Amendment, the only protection you had from the State government was the State constitution?

Judge KAVANAUGH. That is correct, other than the rights articulated in Article I, Section 10 of the original Constitution.

Senator KENNEDY. Right.

Judge KAVANAUGH. Yes. Ex post facto and—

Senator KENNEDY. Can we agree that your right under the U.S. Constitution, let us take the Bill of Rights, but you know what I mean. I mean the whole document.

Judge KAVANAUGH. Yes.

Senator KENNEDY. Let us take the First Amendment. Can we agree that the First Amendment in the United States Constitution sets the floor that the State counterpart, the State First Amendment counterpart can actually give you a greater First Amendment right?

Judge KAVANAUGH. Correct. And I think that is—I have mentioned a couple of times Judge Sutton's book, and Justice Brennan wrote an article in the 1970s about State constitutional law doing exactly what you said and encouraging State litigants and State courts and State court judges to think about exactly what you are saying.

Senator KENNEDY. And in fact, some States have.

Judge KAVANAUGH. Yes.

Senator KENNEDY. Like California, for example. Their first amendment, they do not have a State action requirement. Am I correct in that?

Judge KAVANAUGH. I will admit I have not looked at the California constitution recently, but I will take your understanding of it, Senator.

Senator KENNEDY. Well, they do not. In a private shopping center, so long as it is a common area, somebody can go in there and protest, and you have a First Amendment right under the State constitution.

Judge KAVANAUGH. And the only question in that case would be if it conflicts with another provision of the Federal Constitution.

Senator KENNEDY. And that is my question.

Judge KAVANAUGH. Okay.

Senator KENNEDY. That is my question. What happens when a State interprets its own first amendment, which it can insulate from review by you guys or by you soon-to-be guys on the Supreme Court under the adequate and independent State ground document, but it conflicts with your Fifth Amendment property right?

Judge KAVANAUGH. Well, Article VI of the Constitution makes clear that the Federal Constitution is the supreme law of the land, and that trumps not only State legislation, but also State constitutional decisions. So in that instance, the property right protected, if it were determined that what you are talking about violated the property right in the U.S. Constitution, that would control.

Senator KENNEDY. Except that is not what the United States Supreme Court said in the *Pruneyard* case.

Judge KAVANAUGH. Well, there was a—

Senator KENNEDY. Is it?

Judge KAVANAUGH. It was a balance—I think because they interpreted the property right not to be protected.

Senator KENNEDY. Protected.

Judge KAVANAUGH. But it—

Senator KENNEDY. But California won.

Judge KAVANAUGH. Yes, but the point being—and I think I have the premise, I hope I did in what I said to you. If you concluded that it violated the property protection in the U.S. Constitution, then the U.S. Constitution would control. In that case, the Supreme Court concluded that it did not violate the property protection of the U.S. Constitution.

Senator KENNEDY. Right. That is—I am not going to outsmart you. You are right.

All right. You have got this—you have got this First Amendment speech right, free speech right on steroids in California, and there is no State action requirement. In *Golden Gateway*, *Pruneyard*, you know—

Judge KAVANAUGH. Yes.

Senator KENNEDY [continuing]. They all said it applies to a private entity like a shopping center. I know that Justice Kennedy—I do not have the language here—but he has talked about how the internet is the new public arena. Okay?

If you have—and other States have adopted this approach, same as California, this enhanced First Amendment right with no State action requirement. I think New Jersey has, and there are some other cases. How then can Twitter in California censor any messages if you are living in California, and you have a First Amendment right, and it is not limited by the State action doctrine?

Judge KAVANAUGH. Senator, that sounds like a hypothetical I am not prepared to give you a full answer on, other than I will give you a broader conception of—

Senator KENNEDY. Well, it is coming.

Judge KAVANAUGH. Right. So I think one of the things with these proceedings for judges and Supreme Court Justice nominee hearings are backward looking in terms of our cases, the cases I have done and the cases the Supreme Court has decided. But one of the interesting things that I think about is, what is the future? What are the big issues coming down the pike?

Senator KENNEDY. Well, that is one of them.

Judge KAVANAUGH. And so speech, how technology affects our conception of speech, how technology affects Fourth Amendment rights and our conception of search and seizure and privacy. I think on the war powers front, which I was discussing with Senator Sasse and Senator Flake earlier, cyber war, and how does the war powers framework fit in with cyberattacks?

And I think those are three things, all technology rooted, that someone sitting in this seat 10 years from now are going to be, I think, critical issues, and I think we also think, again backward looking, but what are the future crisis moments? Because there will be crisis moments for the Supreme Court, and usually those are unpredictable.

When Justices Ginsburg and Breyer went through, you would not have predicted September 11th, for example, or even thought to ask them questions about—

Senator KENNEDY. I am going to stop you, Judge. I am going to run out of time.

Judge KAVANAUGH. Thank you, sir.

Senator KENNEDY. I want to talk about *Chevron* deference just for a second. Here is my understanding of *Chevron*, the deference. First of all, the statute has got to be ambiguous. And if it is ambiguous, according to our Supreme Court, we have got to adopt the agency interpretation, even if it is not the most reasonable interpretation.

Judge KAVANAUGH. That is right.

Senator KENNEDY. It has just got to be half-way reasonable.

Judge KAVANAUGH. They say reasonable, but even your point was it is not the most reasonable.

Senator KENNEDY. It is not the most reasonable, okay? Here is what I do not understand. You look at the APA. This is what the APA says, I am going to quote, “The reviewing court”—not the agency—“The reviewing court shall decide all relevant questions of the law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”

There it is, big as Dallas. Now that is just the Court. How come we have to defer to a Federal agency under 5 U.S.C. Section 706?

Judge KAVANAUGH. Senator, in my article that I wrote in the Harvard Law Review on this, I pointed out that statutory provision and did say that *Chevron* was intentioned—I think I used something stronger—with that statutory provision. But *Chevron* concluded what it concluded, and it has been applied over time.

Now I have pointed out some problems with it in terms of its practical application, the ambiguity trigger. And you are pointing out a problem at the core, which is where did it come from to begin with, given what the APA—

Senator KENNEDY. Well, not only that, Judge, but I mean, I know you know this. But it encourages misbehavior. And let us suppose Senator Whitehouse or Senator Lee, they run for President. You know, they are not going to go out and run on their good looks, though they are good-looking guys and all that. But they are going to run on policy.

And then they get elected, and they need us in Congress. And a lot of times they cannot get their bills passed.

Judge KAVANAUGH. That is right.

Senator KENNEDY. So you know what they do.

Judge KAVANAUGH. Yes.

Senator KENNEDY. They go to one of their agencies, and they say I am going to take my policy, square peg, and put it in a round hole of a statute. And all we have got to do is find a judge to say that the statute is ambiguous, and then we can do anything we want to do. And that is not right, is it?

Judge KAVANAUGH. Senator, that is a problem I have identified in the real world application of certain broad conceptions of deference and that it is a judicially orchestrated shift of power from the legislative branch to the executive branch. And the phenomenon that you have described I think is exactly right.

Presidents run for office. I have seen this with the President I work for, President—

Senator KENNEDY. They all do it.

Judge KAVANAUGH. And you get—and if you cannot get legislation through, then you try to see existing statutory authorities where you can achieve to the extent possible your policy ends, and then you push the envelope on the theory of, well, there is ambiguity in the old statute. And then sometimes courts will uphold it, and that is—

Senator KENNEDY. Yes, but your hands are tied when it comes in front of you if a President does that. And all Presidents have done it. I am not blaming them. I mean, they all do it.

But your hands are tied if the statute is ambiguous, and even if the agency interpretation is not the most reasonable, it can be the tenth most reasonable, and you have got to go with it.

Judge KAVANAUGH. So two things on that. One is, if the statute is ambiguous, as we have discussed, turns out to be a much more difficult inquiry. And Footnote 9 of *Chevron* does say use all the tools of statutory interpretation before you get to that.

Senator KENNEDY. Right.

Judge KAVANAUGH. And that is something I have cited that, you know, dozens and dozens of times, that footnote, to make sure that you are not jumping too quick to deferring to the agency's interpretation.

The other thing is the major questions, major rules—

Senator KENNEDY. Could you tell me quickly? I have got 2 minutes.

Judge KAVANAUGH. Yes. That means if it is of major economic or social significance, you should not defer to the agency because that is a big deal for Congress and—

Senator KENNEDY. I want to ask your opinion about universal injunctions. I do not know how many Federal judges, district judges we have. Seven hundred? Anybody know? Seven hundred.

As I understand a nationwide injunction, sometimes they call it universal, it means that a Federal—a single Federal district judge can enjoin or freeze a law or a regulation. Let us suppose we have 700 Federal district court judges. One of them can enjoin a law or a regulation—

[Disturbance in the hearing room.]

Senator KENNEDY. Thank you, ma'am. I just got an extra 20 seconds under the rules.

[Laughter.]

Senator KENNEDY. Anybody else want to go? I will get up to 40. I am giving myself an extra 20 seconds. Where was I? Oh, yes, the nationwide injunctions.

One Federal judge can enjoin a law or a regulation for the entire country, even if every other judge in the country says I do not agree. Now what is the legal basis for that? It has got to either be a statute or the Constitution.

Judge KAVANAUGH. Senator, that is an issue that is being contested currently in courts around the country, I think, and is an issue of debate. And therefore, I think I better say nothing about it. I apologize for that, but it is an issue of current debate.

Senator KENNEDY. All right.

Judge KAVANAUGH. I apologize.

Senator KENNEDY. That is okay. I have got 9 seconds. No, I have got 29 seconds.

All right. This is not meant to be a trick question. This question is not about Title IX, and it is not about sexual assault, because I know you cannot answer that. But it is really a—well, I am not going to ask that. I am going to strike it.

State action. Is a private security guard a State actor?

Judge KAVANAUGH. Well, as stated, your question stated that way, the answer would be “no.” But I think sometimes the cases, when you are—if you are—

Senator KENNEDY. Okay, I am going to take the “no.”

Judge KAVANAUGH. There are questions of contracting, and if you are a State contractor and this and that. There are lots of factors.

Senator KENNEDY. Well, here is my question because I do not want to abuse this. I have always wondered this. If a city privatizes its entire police force, they are private police officers. Do they have to comply with the Constitution?

Judge KAVANAUGH. That is why I pointed out the contracting issue that I mentioned. Some of the Supreme Court case law would say you look at the contracting issue, and I think that is an interesting question that is hard to answer in the abstract without looking at the particular arrangement of a particular city or locality and figuring out how much the State is involved.

Senator KENNEDY. Okay. Thanks, Judge.

Judge KAVANAUGH. Thank you.

Senator KENNEDY. Senator Harris.

Senator HARRIS. Thank you.

Judge, have you ever discussed Special Counsel Mueller or his investigation with anyone?

Judge KAVANAUGH. Well, it is in the news every day. I—

Senator HARRIS. Have you discussed it with anyone?

Judge KAVANAUGH. With other judges I know.

Senator HARRIS. Have you discussed Mueller or his investigation with anyone at Kasowitz Benson & Torres, the law firm founded by Marc Kasowitz, President Trump's personal lawyer? Be sure about your answer, sir.

Judge KAVANAUGH. Well, I am not remembering, but if you have something you want to—

Senator HARRIS. Are you certain you have not had a conversation—

Judge KAVANAUGH. I said—

Senator HARRIS [continuing]. With anyone at that law firm?

Judge KAVANAUGH. Kasowitz Benson—

Senator HARRIS. Kasowitz Benson—

Judge KAVANAUGH. Yes.

Senator HARRIS [continuing]. And Torres, which is the law firm founded by Marc Kasowitz—

Judge KAVANAUGH. Yes.

Senator HARRIS [continuing]. Who is President Trump's personal lawyer. Have you had any conversation about Robert Mueller or his investigation with anyone at that firm? "Yes" or "no"?

Judge KAVANAUGH. Well, is there a person you are talking about?

Senator HARRIS. I am asking you a very direct question, a yes or a no.

Judge KAVANAUGH. Okay. I need to know the—I am not sure I know everyone who works at that law firm.

Senator HARRIS. I do not think you need to. I think you need to know who you talked with. Who did you talk to?

Judge KAVANAUGH. I do not think I—I am not remembering, but I am happy to be refreshed or if you want to tell me who you are thinking of that works—

Senator HARRIS. Sir, are you saying that with all that you remember—you have an impeccable memory. You have been speaking for almost 8 hours, I think more, with this Committee about all sorts of things you remember.

Judge KAVANAUGH. Yes.

Senator HARRIS. How can you not remember whether or not you had a conversation about Robert Mueller or his investigation with anyone at that law firm?

Judge KAVANAUGH. I do not—

Senator HARRIS. This investigation has only been going on for so long, sir, so—

Judge KAVANAUGH. Right. I am not sure I—

Senator HARRIS [continuing]. Please answer the question.

Judge KAVANAUGH. I am just trying to think, do I know anyone who works at that firm. I might know—

Senator HARRIS. Have you had—that is not my question. My question is have you had a conversation with anyone at that firm about that investigation? It is a really specific question.

Judge KAVANAUGH. I would like to know the person you are thinking of because what if there is—

Senator HARRIS. I think you are thinking of someone and you do not want to tell us. Who did you have a conversation with—

Judge KAVANAUGH. I am not going to—

Senator LEE. Mr. Chairman, I would like to raise an objection here. This town is full of law firms. Law firms are full of people.

Senator HARRIS. First of all, I would like you to—

Senator LEE. Hold on.

Senator HARRIS [continuing]. Pause the clock.

Senator LEE. He—

Senator HARRIS. Thank you.

Senator TILLIS [presiding]. The clock is paused.

Senator HARRIS. Thank you.

Senator LEE. Pause the clock. Let me raise my objection.

Senator TILLIS. The Senator is recognized.

Senator LEE. This town is full of law firms. Law firms are full of people. Law firms have a lot of names. There are a lot of people who work at a lot of law firms.

[Disturbance in the hearing room.]

Senator TILLIS. Senator Lee.

Senator LEE. On that point, law firms abound in this town, and there are a lot of them. They are constantly metastasizing. They break off. They form new firms. They are like rabbits. They spawn new firms. There is no possible way we can expect this witness to know who populates an entire firm—

[Disturbance in the hearing room.]

Senator LEE [continuing]. That he is not even—

[Disturbance in the hearing room.]

Senator LEE. My point of order, Mr. Chairman, is simply this. If there are names, if there is a list of names he can be given of the lawyers to whom she is referring, I think that is fine, but I think it is unfair to suggest that an entire law firm should be imputed into the witness' memory when he does not know who works at the law firm.

Senator WHITEHOUSE. Mr. Chairman? Mr. Chairman?

Senator TILLIS. Senator Whitehouse—

Senator WHITEHOUSE. We have a—

Senator TILLIS [continuing]. Are you making a point of order?

Senator WHITEHOUSE. Well—

Senator TILLIS. Senator Whitehouse, the—

Senator WHITEHOUSE [continuing]. I am trying to figure out what the rules are here because we had a very, very long discussion about whether or not points of order were in order because this is a hearing. And we were told that all of our points of order—

Senator TILLIS. Senator Whitehouse, there—

Senator WHITEHOUSE [continuing]. About all the documents—

Senator TILLIS [continuing]. Has never been a time in the 2 days where someone has made an inquiry of the Chair where the Chair has not recognized the Member for a point of inquiry or point of order—

Senator WHITEHOUSE. And I have been recognized——

Senator TILLIS [continuing]. And that was one of them.

Senator WHITEHOUSE [continuing]. Now, and I appreciate that. But my point is that if the rule is that nobody on our side can make a point of order, then it ought not to be appropriate for Senator Lee to start making points of order——

Senator TILLIS. Well, the——

Senator WHITEHOUSE [continuing]. After all of ours were summarily——

Senator TILLIS. Senator——

Senator WHITEHOUSE [continuing]. Silenced on the basis that we were in a hearing and not in an executive session. If we have moved out of hearing and into executive session, then I am more than happy to make motions——

Senator TILLIS. Senator Whitehouse——

Senator WHITEHOUSE [continuing]. To adjourn.

Senator TILLIS [continuing]. The mere fact that you are speaking right now means that you have been allowed to make a point of order. The matter that you were talking about yesterday was a motion that the Chair said was out of order because it was an adjournment motion that would have required us to be in executive session. Anyone who wants to make an inquiry of the Chair may do so, but we will limit it to that before we go back to Senator Harris.

Senator WHITEHOUSE. Very good. That is the right result.

Senator HARRIS. Sir, please answer the question.

Judge KAVANAUGH. I do not know everyone who works at that law firm, Senator.

Senator HARRIS. And have you had any discussion with anyone ever about Bob Mueller and/or his investigation?

Judge KAVANAUGH. So you said Bob Mueller—or, so have I——

Senator HARRIS. Or——

Judge KAVANAUGH. Ever had a discussion about Bob Mueller? I used to work in the administration with Bob Mueller.

Senator HARRIS. What about his investigation? Have you had a conversation with anyone about his investigation?

Judge KAVANAUGH. I am sure I have talked to fellow judges.

Senator HARRIS. Anyone aside from fellow judges?

Judge KAVANAUGH. About Bob Mueller?

Senator HARRIS. About his investigation, sir. I will ask again.

Judge KAVANAUGH. But——

Senator HARRIS. I asked the question just a minute ago. I am surprised you forgot. Have you had this conversation with anyone about the investigation that Bob Mueller is conducting regarding Russia interference with our election or any other matter?

Judge KAVANAUGH. The fact that it is ongoing, it is a topic in the news every day, I talk to fellow judges about it. It is, you know, in the courthouse in the District of Columbia so I——

Senator HARRIS. And——

Judge KAVANAUGH. Guess——

Senator HARRIS [continuing]. And I will ask it one last time.

Judge KAVANAUGH. The answer to that is, “yes.” So the answer is “yes.”

Senator HARRIS. Okay. And did you talk with anyone at Kasowitz Benson & Torres?

Judge KAVANAUGH. You asked me that. I need to know who works there.

Senator HARRIS. I think you can answer the question without me giving you a list of all employees of that law firm.

Judge KAVANAUGH. Well, actually, I cannot. I——

Senator HARRIS. Why not?

Judge KAVANAUGH. Because I do not know who works there.

Senator HARRIS. So that is the only way you would know who you spoke with? I want to understand your response to my question because it is a very direct one. Did you speak with anyone at that law firm about the Mueller investigation? It is a very direct question.

Judge KAVANAUGH. Right. I would be surprised but I do not know everyone who works at that law firm, so I just want to be careful because your question was and/or, so I want to be very literal.

Senator HARRIS. That is fine. I will ask a more direct question if that is helpful to you. Did you speak with anyone at that law firm about Bob Mueller's investigation?

Judge KAVANAUGH. I am not remembering anything like that, but I want to know a roster of people and I want to know more.

Senator HARRIS. So you are not denying that you have spoken——

Judge KAVANAUGH. Well, I said I do not remember anything like that.

Senator HARRIS. Okay. I will move on.

Judge KAVANAUGH. Okay.

Senator HARRIS. Clearly, you are not going to answer the question. When you and I met, we talked about race relations in this country, and there has been a lot of talk among my colleagues with you about the subject. And when you and I met, I brought up the incident in Charlottesville where, as you know, there was a rally by White supremacists that left a young woman dead. You will recall that the President who nominated you described the incident by saying, quote, "I think there is blame on both sides." So I think this will be a simple question for you. Do you, sir, believe there was blame on both sides?

Judge KAVANAUGH. Senator, we did talk, and I enjoyed our meeting and to talk about the history of this country. And we talked about that at some length and talked about discrimination. I appreciated your opening statement yesterday where you talked about your experience. One of the principles I have articulated throughout this hearing is the independence of the judiciary.

Senator HARRIS. And, sir, I would appreciate it if you would answer the question.

Judge KAVANAUGH. I am, Senator. So one of the principles I have talked about throughout this hearing is the independence of the judiciary. And one of the things judges do, following the lead of the Chief Justice, and what all the judges do is stay out of current events, stay out of commenting on current events because it risks confusion about what our role is. We are judges who decides cases

in controversy. We are not pundits, so we do not comment on current events. We stay out of political controversy.

Senator HARRIS. Judge, with all due respect, I only have limited time.

Judge KAVANAUGH. But it is—

Senator HARRIS. Are you saying that it is too difficult a question or it is a question you cannot answer, which is whether you agree with the statement that there was blame on both sides? We can move on, but are you saying you cannot answer that pretty simple question?

Judge KAVANAUGH. I am saying that the principle of the independence of the judiciary means that I cannot insert myself into politics in either of two ways: commenting on political events or, in my view, commenting on things said by politicians, a Governor, a Senator, or a Congressperson, a President. I am not here to assess comments made in the political arena because the risk is, I will be drawn into the political arena, and the Justices and judges of the United—

Senator HARRIS. Sir—and I appreciate your point, but there was such a robust conversation that happened, especially with my colleagues on the other side and you about race. So on the subject of race, I raise this question. But we can move on.

Have you ever heard the term, quote, “racial spoils system”?

Judge KAVANAUGH. Yes, and that is a term that sometimes is used to—yes, I have heard that term.

Senator HARRIS. You twice wrote the term in The Wall Street Journal opinion piece describing the *Cayetano* case that you discussed previously with Senator Hirono. And I will tell you, the racial spoils system, that term stood out to me, so I actually decided to look it up in the dictionary, the term spoils, and in the dictionary, spoils is defined as, quote, “goods stolen or taken forcibly from a person or a place.” Can you tell me what the term racial spoils system means to you?

Judge KAVANAUGH. Senator, first of all, the Supreme Court affirmed the position that I had articulated in the amicus brief 7-to-2 in *Rice v. Cayetano*, an opinion written by Justice Kennedy.

Second of all, the State voting restriction at issue in Hawaii was a State office, State office for the Native Hawaiian, and it—

Senator HARRIS. Judge, that is not what I asked you.

Judge KAVANAUGH. But it—

Senator HARRIS. If you can define the term as you used it, what does it mean to you?

Judge KAVANAUGH. But you raised the case, and the State voting restriction in that case denied Hawaiians, residents of Hawaii the ability to vote on the basis of their race. So if you were Latino or African-American, you could not vote in the election.

Senator HARRIS. And I heard your response to that earlier, and I appreciate the point that you made then. My question is, you used this term—

Judge KAVANAUGH. Right.

Senator HARRIS [continuing]. Twice, and I am asking what does the term mean to you?

Judge KAVANAUGH. I am not sure what I was referring to then, to be entirely frank, so I would have to see the context of it. But

what I do know is that the Supreme Court, by a 7-to-2 margin, agreed with the position articulated in the amicus brief and that the voting restriction there was for a State office and denied people the ability to vote on account of their race. So it was——

Senator HARRIS. Sir, I appreciate that, but you have been very forthcoming about the amount of work and preparation that you put into everything you do. You have certainly led me to believe that you are very thoughtful about the use of your words and your knowledge that words matter, especially words coming from someone like you or anyone of us. So I would like to know what you meant when you used that term, but we can move on. But I will say this: Are you aware that the term is commonly used by White supremacists?

Judge KAVANAUGH. Senator, when I wrote that, that was 20 years ago in the context of a voting restriction that denied African Americans and Latinos the ability to vote in Hawaii. I was representing a client when I articulated that. And the answer to your question is no.

Senator HARRIS. Okay. Well, unfortunately, it has been, and it is something that you should know. You should know that the same year you wrote your op-ed, a magazine published a cover story, a magazine that is described as being a White supremacist magazine, published a cover story about what it called, quote, “the racial spoils system,” of, quote, “affirmative action, the double standard in crime, sensitivity toward Black deficiencies, and everything else.”

The same year a self-proclaimed Eurocentrist wrote, quote, “While Blacks are generally regarded as the recognized expert in the game of racial shakedown, it is American Indians who may actually be the real geniuses at obtaining ‘racial spoils’.” So we can move on, but my concern is that this is a loaded term, and it would be important to know that someone who may very well and very possibly serve on the United States Supreme Court would be aware that the use of certain terms will have a profound meaning because they are loaded and associated with a certain perspective and sometimes a certain political agenda.

Judge KAVANAUGH. Well, I take your point. I would point out that Hawaii was denying Latinos and African Americans the ability to vote in a State election at the time, but I take your point and I appreciate it.

Senator HARRIS. Thank you. In *Griswold* and *Eisenstadt*, the Supreme Court said that States could not prohibit either married or unmarried people from using contraceptives. Do you believe *Griswold* and *Eisenstadt* were correctly decided?

Judge KAVANAUGH. So those cases followed from the Supreme Court’s recognition of unenumerated rights in the *Pierce* and *Meyer* cases earlier. And so what those cases held is that there is a right of privacy——

Senator HARRIS. And do you agree, do you personally agree, these cases, those two cases were correctly decided? So I am asking not what the Court held but what you believe.

Judge KAVANAUGH. Right. So to just go back to *Pierce* and *Meyer*, those cases recognized a right of privacy, the ability, one might say

family autonomy or privacy is the term under the Liberty Clause of the Due Process Clause of the Fourteenth Amendment.

Senator HARRIS. And with due respect, then, Judge, I am asking do you agree that those cases were rightly decided——

Judge KAVANAUGH. So I think——

Senator HARRIS [continuing]. And correctly decided?

Judge KAVANAUGH. So in *Griswold*, I think that Justice White's concurrence is a persuasive application because that specifically rooted the *Griswold* result in the *Pierce* and *Meyer* decisions. I thought that was a persuasive opinion and no——

Senator HARRIS. Do you believe that it is correctly decided?

Judge KAVANAUGH. Quarrel with that. That is a——

Senator HARRIS. Do you believe it was correctly decided? Words matter. Again, words matter.

Judge KAVANAUGH. Yes.

Senator HARRIS. Do you believe it was correctly decided?

Judge KAVANAUGH. I think, given the *Pierce* and *Meyer* opinions, like I said, Justice White's concurrence in *Griswold* was a persuasive application of *Pierce* and *Meyer*. I have no quarrel with it. I——

Senator HARRIS. So there is a term that actually both Chief Justice Roberts and Justice Alito used, I believe, and affirmed in their confirmation hearings that these cases were correct. And so I am asking you the same question. Are you willing in this confirmation hearing to agree that those cases were correctly decided?

Judge KAVANAUGH. Well, given the precedent of *Pierce* and *Meyer*, I agree with Justice Alito and Chief Justice Roberts, what they said.

Senator HARRIS. That it was correctly decided.

Judge KAVANAUGH. That is what they said so——

Senator HARRIS. Do you believe the right to privacy protects a woman's choice to terminate a pregnancy?

Judge KAVANAUGH. That is a question that, of course, implicates *Roe v. Wade*, and, following the lead of the nominees for the Supreme Court, all eight sitting Justices of the Supreme Court have recognized two principles that are important: One, we should not talk about, in this position, cases or issues that are likely to come before the Supreme Court or could come before the Supreme Court; and second, I think Justice Kagan provided the best articulating of commenting on precedent. She said we should not give a thumbs up or thumbs down.

Senator HARRIS. No, I appreciate that. And I——

Judge KAVANAUGH. And then——

Senator HARRIS [continuing]. Did hear you make reference to that perspective earlier. But you also, I am sure, know that Justice Ginsberg, at her confirmation hearing, said on this topic of *Roe*, quote, "This is something central to a woman's life, to her dignity. It is a decision she must make for herself, and when Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices." Do you agree with the statement that Justice Ginsberg made?

Judge KAVANAUGH. So Justice Ginsberg, I think there, was talking about something she had previously written about *Roe v. Wade*. The other seven Justices currently on the Supreme Court have

been asked about that and have respectfully declined to answer about that or many other precedents, whether it was Justice Marshall about *Miranda* or about *Heller*—

Senator HARRIS. And we discussed that earlier.

Judge KAVANAUGH. Or *Citizens United*. And it is rooted—I just want to underscore. It is rooted in judicial independence—

Senator HARRIS. No, I appreciate that, but—I am glad you mentioned that Justice Ginsberg had written about it before, because you also have written about *Roe* when you praised Justice Rehnquist's *Roe* dissent. So in that way you and Justice Ginsberg are actually quite similar, that you both have previously written about *Roe*. So my question is, do you agree with her statement or, in the alternative, can you respond to the question of whether you believe a right to privacy protects a woman's choice to terminate her pregnancy?

Judge KAVANAUGH. So I have not articulated a position on that. And consistent with the principle articulated, the nominee precedent that I feel duty-bound to follow as a matter of judicial independence, none of the seven other Justices when they were nominees have talked about that, nor about *Heller*, nor about *Citizens United*, nor about *Lopez v. United States*, Thurgood Marshall about *Miranda*. Justice Brennan asked about his—

Senator HARRIS. And, respectfully, Judge, as it relates to this hearing, you are not answering that question, and we can move on.

Can you think of any laws that give Government the power to make decisions about the male body?

Judge KAVANAUGH. I am happy to answer a more specific question but—

Senator HARRIS. Male versus female.

Judge KAVANAUGH. There are medical procedures—

Senator HARRIS. That the Government has the power to make a decision about a man's body?

Judge KAVANAUGH. I thought you were asking about medical procedures—

Senator HARRIS. No.

Judge KAVANAUGH. That are unique to men.

Senator HARRIS. I will repeat the question. Can you think of any laws that give the Government the power to make decisions about the male body?

Judge KAVANAUGH. I am not thinking of any right now, Senator.

Senator HARRIS. When referring to cases as settled law, you have described them as precedent and, quote, "precedent on precedent." You have mentioned that a number of times—

Judge KAVANAUGH. Yes.

Senator HARRIS [continuing]. Today, and through the course of the hearing. As a factual matter, can five Supreme Court Justices overturn any precedent at any time if a case comes before them on that issue.

Judge KAVANAUGH. Start with the system of precedent that is rooted in the Constitution.

Senator HARRIS. I know, but just as a factual matter, five Justices, if in agreement, can overturn any precedent. Would you not agree?

Judge KAVANAUGH. Senator, there is a reason why the Supreme Court does not do that.

Senator HARRIS. But do you agree that it can do that?

Judge KAVANAUGH. Well, it has overruled precedent at various times in our history, the most prominent example being *Brown v. Board of Education*, the *Erie* case, which overruled *Swift v. Tyson*. There are tons—

Senator HARRIS. So we both agree the Court has done it and can do it.

Judge KAVANAUGH. There are times, but there is a series of conditions, important conditions that, if faithfully applied, make it rare. And the system of precedence rooted in the Constitution, it is not a matter of policy to be discarded at whim.

Senator HARRIS. But there is nothing, you and I agree, that prevents the Court from doing it, meaning that it is not prohibited.

Judge KAVANAUGH. The—

Senator HARRIS. The Court is—if I may finish.

Judge KAVANAUGH. Yes.

Senator HARRIS. The Court is not prohibited from overruling or overturning precedent. No matter what the steps are that the Court must take, the Court may overrule precedent.

And so my question also is, then do you believe that this can happen no matter how long the precedent has been on the books? For example, there is no statute of limitations during which, after that statute of limitations has passed, the Court may not touch precedent. Would you agree?

Judge KAVANAUGH. Well, for example, the Supreme Court this past year said that *Korematsu* had been overturned in the court of history. That, of course, was the case that allowed the internment during World War II—

Senator HARRIS. Yes. Yes, I am familiar with—

Judge KAVANAUGH. Of Japanese Americans. And the Supreme Court this past term—that was a 1942 or 3 decision and the Supreme—

Senator HARRIS. But you would agree there is no statute of limitations? The Court can go back as far as it wanted if it believed it was warranted? There is nothing that prevents the Court from reaching back many years?

Judge KAVANAUGH. What I would say is, there are a series of conditions that the Supreme Court must meet—

Senator HARRIS. I agree.

Judge KAVANAUGH. And the age of a precedent, as, I think, the Supreme Court itself has articulated many times, does ordinarily add to the force of the precedent and make it an even rarer circumstance where the Court would disturb an old—

Senator HARRIS. Thank you.

Judge KAVANAUGH. Precedent.

Senator HARRIS. Thank you. I have a couple of questions for you about voter suppression. Our history, as you know, is littered with shameful attempts to deny voting rights, especially for communities of color and particularly the African-American community in this country. For 50 years, the Voting Rights Act has protected against racial discrimination in voting. I know you had this conversation prior to this with my colleague, Senator Booker. Under

the Act, it states that a record of discriminatory voting practices had to obtain Federal permission in order to change their voting laws. I know you are familiar with that. But then came the Court's decision in *Shelby* and by a 5-to-4 vote, the Court gutted the Act, effectively ending Federal approval requirement.

The majority believed that the requirement had outlived its usefulness. As you know, that was part of the ruling, essentially saying that the threat of race-related voter suppression had diminished.

So my question is, are you aware that within weeks of the Supreme Court's ruling, Republican legislators in North Carolina rushed through a laundry list of new voting restrictions, restrictions that disproportionately disenfranchised racial minorities? And it is just a "yes" or "no" question—are you aware of that?

Judge KAVANAUGH. I recall reading about efforts in the aftermath, but one thing I would point out is I believe the Supreme Court's concern in that case was with the formula that was used for which States were covered by the preclearance requirement. I do not believe the Court said that Congress was proscribed from going back and redoing the formula. So on the "outlived its usefulness," I believe what the Court said—I am just describing it, not saying whether I agree or disagree—was saying the formula had not been updated to reflect current conditions but was not saying that preclearance was precluded if Congress went back and adjusted the formula and studied current conditions.

Senator HARRIS. Are you aware, as it relates again to that North Carolina action, that the Federal court of appeals later held that these restrictions intentionally discriminated against African-American voters, targeting them, quote—and these are the words of the Court—"with almost surgical precision." Are you aware of that ruling?

Judge KAVANAUGH. When was that decision, Senator?

Senator HARRIS. That was—I believe that was in—it was shortly after—

Judge KAVANAUGH. Okay.

Senator HARRIS [continuing]. A few years ago, 2016.

Judge KAVANAUGH. I am aware that there has been a lot of voter ID litigation in other voting-related, election-related litigation in North Carolina—

Senator HARRIS. Yes.

Judge KAVANAUGH. In particular, over the last several years, and so, I am generally aware of all the litigation in North Carolina.

Senator HARRIS. And are you aware that Republicans in Texas, Alabama, Mississippi, Georgia, and Florida have also implemented new voting restrictions since *Shelby*, again, disproportionately disenfranchising minority voters?

Judge KAVANAUGH. Well, I know there is—I am not aware of the specifics of all that, but I do follow election law blogs and election law updates to keep generally aware of developments in the election law area. It is an area—

Senator HARRIS. Would you not agree, then, reading about this on the blogs, that it is troubling? In fact, compounding those with the recent proposal to close more than two-thirds of polling places

in Randolph County, Georgia, where more than 60 percent of the residents are Black. Would you not agree that that is troubling?

Judge KAVANAUGH. I am not aware of that specific, but as I had the South Carolina voter ID case, what I tried to make clear through the trial in that case and the opinion, which was unanimous, that the reality of racial discrimination in America exists.

Senator HARRIS. Yes.

Judge KAVANAUGH. The long march for racial equality is not over and that courts must scrutinize efforts to look for discriminatory intent, or discriminatory effects can always be evidence of an intent, and uncertain laws, the effects themselves can be problematic.

Senator HARRIS. And do you believe that the Court in *Shelby* underestimated, then, the danger that was presented in terms of States' willingness to restrict the right to vote?

Judge KAVANAUGH. Well, I do not want to comment on the—I think that is getting to the correctness or incorrectness of *Shelby*, in particular. I just want to underscore, at least as I recall the opinion, it did say Congress itself could adjust the formula for preclearance, and I do not think Congress has done so, but that is—

Senator HARRIS. And clearly unwilling to do it, so there will have to be some recourse, do you not agree, for those voters in these various States if Congress is unwilling to act, to give them due process in terms of equal access to the polls so that they can vote? Otherwise, we are looking at widespread disenfranchisement. Would you not agree, if Congress does not act?

Judge KAVANAUGH. So *Shelby* dealt with the preclearance requirement. There is still, of course, Section 2 of the Voting Rights Act—

Senator HARRIS. Right.

Judge KAVANAUGH. Which allows litigation brought by plaintiffs to challenge voting restrictions that are enacted with discriminatory intent or discriminatory effects—

Senator HARRIS. All right.

Judge KAVANAUGH. As well.

Senator HARRIS. Do you believe that Section 2 is constitutional?

Judge KAVANAUGH. I think that is asking me a hypothetical about any statute—

Senator HARRIS. Well, because you referred to it, I would like to know—

Judge KAVANAUGH. Well—

Senator HARRIS. I would assume that you think it is constitutional if you think it is a tool.

Judge KAVANAUGH. Well, I think as a general matter—I do not want to pre-commit on any statute that you would identify. If there is some challenge raised, I will, of course, listen to the arguments. But Section 2 is an important tool for the voting rights enforcement. The Voting Rights Act of 1965 is one of the most consequential and effective statutes ever passed by Congress, and, you know, I have said that. And the history is, of course, well-known, but the voting rates before the 1965 act were abysmal because of the discriminatory restrictions that were in place. And the immediate effects of the Voting Rights Act of 1965 were enormous and are very important for people to understand.

Senator HARRIS. I agree. And in fact, to that point, in his confirmation hearing in 2005, Chief Justice Roberts, when asked about Section 2 and whether it was constitutional said, quote, “I have no basis for viewing it as constitutionally suspect, and I do not.” Do you agree with Chief Justice Roberts that the law is not constitutionally suspect, or do you have a different view?

Judge KAVANAUGH. I do not have any basis for viewing it that way either. I was just—if you ask me about any statute, I want to be careful because I do not know what arguments could come up, and I always want to make sure I have preserved the judicial independence and have not pre-committed. But I agree I have no basis for doing that.

Senator HARRIS. And then after the President nominated you to the Supreme Court, you had a chance before now—it was the only chance actually before now—to introduce yourself to the American people. You stood in the East Room of the White House and you thanked the President for your nomination. And then immediately you said, quote, “No President has ever consulted more widely or talked with more people from more backgrounds to seek input about a Supreme Court nomination.” Now, by my count, there have been 163 nominations to the Supreme Court, so unless you have personal knowledge about every one of these nominations before yours, including who those Presidents consulted with and who they talked to, and I cannot imagine that you have that personal knowledge. My question is did someone tell you to say that?

Judge KAVANAUGH. No one told me to say that. Those were my own words. They were based on my—I did look into it a little bit in terms of thinking about what was possible before cell phones and before phones and then thinking about the history. And I know some of the history of Supreme Court nominations, and I also know in that 12-day period, I do know that President Trump talked to an enormous number of people. I think President Clinton, when I look back on it—that is why I said no one—President Clinton, as I recall, had a consultation process that was very wide as well, but that was my analysis of the situation. Those were my words, entirely my words, and I thought it was important to point out the—because I was—as I said yesterday, I was deeply impressed by the thoroughness of the process during the 12 days, and I said as much yesterday and I said as much in the East Room. The 12-day process was—at least it seemed to me—quite a thorough process.

Senator HARRIS. Thank you. And then I am going to follow up with some questions for the record for you on the first question I asked.

Judge KAVANAUGH. Okay.

[The information appears as a submission for the record.]

Senator HARRIS. Thank you. Thank you.

Senator TILLIS. Judge Kavanaugh, we started this about 12½ hours ago. I am amazed that you are able to continue to respond and compose yourself in the way that you have. I want to cover a couple of things, and I am going to try and keep my comments limited so that we can get you, hopefully, with a decent night’s sleep.

A few minutes ago, you were asked some questions about emails or an email chain that you were involved in, and you did not get an opportunity to see them. You have not seen them before. I had

not either. As a matter of fact, when I heard them read, I thought at least in one case they were being presented as your words, and then come to find out, because you astutely asked a question, you found out they were actually somebody else's words. So I did look into reading them. There is a reason why you do not have them, and that is because they are clearly marked "committee confidential."

Senator Lee brought up the point when the gentleman from New Jersey was speaking that we would work hard to try and look and see if we could get those documents cleared, but I also point out that those documents were made available to everybody on this Committee, any staff who supports the Senator on this Committee, on August the 22nd. And the last confirmation process with Neil Gorsuch, Senator Feinstein availed herself of that courtesy to be able to look at documents and have them cleared. In this confirmation hearing, Senator Klobuchar did the same thing.

The reason why it is very important for Members of this Committee to honor the confidentiality requirements is because we become stewards of documents that were provided under the Presidential Records Act. Now, we are going to go back and try and clear these documents. I would encourage all my colleagues that if you have not taken the time in the weeks that these documents were available to go through a process that Chairman Grassley has honored, please do so before you disclose such information before this hearing. So we will see whether or not that information is made available. And I will assume that Senator Lee will work alongside Senator Booker to see if that is possible.

I also want to go back to Kozinski for a minute, and you can actually take a break and drink some water because I do not really expect you to respond to any of this. I am going to get to a couple of questions. You were asked about Judge Kozinski. I think you were a clerk for him about 27 years ago. But you were not allowed to answer those questions. And I am not going to ask you about any of them right now, but I really want to kind of lay the groundwork for maybe where we can go with questions tomorrow. It has given me some food for thought on maybe where I will go down that line if others do.

You know, it is one thing for the people in the back to speak over you and make it difficult to hear, but I find it particularly insulting when Members here ask you questions of what I consider an incendiary nature and really never give you a chance to respond.

So here is a question I want—well, maybe I will ask you this. Are you Judge Kozinski?

Judge KAVANAUGH. No.

Senator TILLIS. Okay. Because all of this was about somebody's else behavior for whom you clerked 27 years ago. You do not even have to answer that. So some of my colleagues are arguing, because you clerked with him and you knew him, that you knew everybody about him. Now, this is what is interesting to me. It turns out you are not the only judge that we have considered who clerked for Judge Kozinski. President Obama nominated and the Democrats voted to confirm Paul Watford on the Ninth Circuit. He clerked for Judge Kozinski. And actually, when the Ranking Member introduced him, she highlighted that fact. And, as a matter of fact,

Judge Watford, I believe, worked with Judge Kozinski on the Ninth Circuit Court for about 5 years. I think that is right, about five and a half years.

So I do not want you to respond to this either, but if we are going to ask somebody who clerked for a judge 27 years ago why did you not know everything about that judge, then I think perhaps I would like to get copies of letters from Members of the Senate here who should be sending letters to Judge Watford and asking him the same question.

And now let us go a little bit further because I think we have got a double standard going on here. We had a Member in the U.S. Senate faced with a number of allegations for sexual harassment by women. When those allegations surfaced, it even included photographs in terms of the behavior in question. And when reporters asked Members about their thoughts on that and whether or not the Member should resign, they said that is not a distraction that we should be dealing with here in the Senate.

So I feel like tomorrow, if we go down this path, then we should be prepared to make sure that we fully explore the double standard and perhaps the questions that we should have for other people who worked with Judge Kozinski.

Now, I want to get to *Rice v. Cayetano*, and I want you to go back very quickly, and the thing that you have said multiple times I think is very important because we have had a number of discussions here about Voting Rights Act and denying various people the right to vote. And this particular case, this case was about potentially denying people in the State of Hawaii the right to vote based on their ethnicity, Latinos, African Americans, Asian Americans. Can you tell me a little bit more about that? And be brief. I am going to try and be brief just so I can yield back some of my time.

Judge KAVANAUGH. Yes. It was the Office of Hawaiian Affairs, and it was a State office, however, and they restricted voting for that office and denied voting to people who were residents and citizens of Hawaii but who were not of the correct race, and therefore, African Americans and Latinos and, as you say, Asian Americans, Whites in Hawaii were barred from voting for that office. And the Supreme Court held that that was a straightforward violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution.

Senator TILLIS. And I believe you said by a 7-to-2—

Judge KAVANAUGH. By a 7-to-2 majority in an opinion written by Justice Kennedy.

Senator TILLIS. Okay.

Now, I actually have to get to one fun thing that you may have to do some damage repair on. Yesterday, when you introduced Margaret and Liza, you told me that Liza, you end every night—she gives you a hug. You said she gives the best hugs in the world. Today, you mentioned to Senator Graham that Margaret came down and gave you a second hug.

Judge KAVANAUGH. She did.

Senator TILLIS. So I was wondering if those competitive instincts are at play where she is trying to make up with quantity over quality.

Judge KAVANAUGH. It is possible. As I think I said—

Senator TILLIS. I am sure it was an act of love, but it could have been competitive, too.

Judge KAVANAUGH. Margaret is 13 now, and when you are 13, the hugs are fewer and far between, but—

Senator TILLIS. That is right.

Judge KAVANAUGH. She came down last night and it was very nice. She gave me a special extra hug.

Senator TILLIS. In the next couple of minutes I want to talk about—you know, we had people here talk about you being an advocate for big business, an advocate for the rich, that you would be somebody who would be beholding to your boss or at least the person who nominated you.

So I want to go back through in just a couple of minutes and talk about a few things that have been discussed but I think they bear repeating, and I think that they—and the first one we need to add a little bit of context. I was in the White House when the President announced your nomination, and I believe in your comments you mentioned that the first date that you had with your wife Ashley was on September the 10th. Is that right?

Judge KAVANAUGH. That is correct—

Senator TILLIS. September the 10th—

Judge KAVANAUGH. September the 10th, 2001.

Senator TILLIS [continuing]. 2001.

Judge KAVANAUGH. Yes, and I—

Senator TILLIS. And we know what happened the next day.

Judge KAVANAUGH. Yes.

Senator TILLIS. And all the terrible events that you had to deal with, including your President that you have said every day came in the office and said this can never happen again. And that was the culture for the whole time you were in the office.

So then you moved forward a few years later and you are on the Circuit and you do *Hamdan v. United States*. Now, you had personally experienced an evacuation of the building that you thought could potentially be at risk. You worked with the President, who was personally very much invested in trying to protect the American people. And then you had this case. And in this particular case, tell me what you did.

Judge KAVANAUGH. The case involved Salim Hamdan, who had been an associate of Osama bin Laden's, and the case came to us through a military commission conviction. And the question was whether it violated ex post facto principles, and what that means was were you being convicted of something that was not a law in place at the time you committed the act.

Senator TILLIS. I read your opinion, and basically you said that—

Judge KAVANAUGH. I said it was a violation.

Senator TILLIS. Right.

Judge KAVANAUGH. Yes. So we reversed the conviction of *Hamdan*. In that case, I wrote the majority opinion in that case.

Senator TILLIS. Incidentally, I mentioned yesterday there was probably a couple of cases that I did not like the way you ruled—that is one of them—but you did it for the right reasons. There is another one, *EMILY's List v. FEC*. Tell me a little bit about that one. We all know who EMILY's List is. They proudly support pro-

moting abortion rights and pro-choice Democratic women candidates. I went on their website today to confirm that that is still out there. Tell me what you did on that case.

Judge KAVANAUGH. They were challenging FEC—Federal Election Commission—registrations that prohibited how much money they could raise and how they could raise it, and I wrote the majority opinion invalidating those restrictions. And I wrote the opinion ruling for EMILY's List in that case.

Senator TILLIS. Another one, it is another one that I find interesting, did not like it but understand why you did it, *Republican National Committee v. FEC*.

Judge KAVANAUGH. In that case, the Republican National Committee was challenging some restrictions on fundraising, donations to, contributions to the Republican Party and Republican Party committees in the wake of—well, in the wake of *Citizens United*, they were arguing that certain other aspects of *McConnell v. FEC* were no longer good law. I wrote the opinion rejecting that challenge and ruling for the Federal Election Commission against the Republican National Committee in that case.

Senator TILLIS. I want to go back to another one. It involved another boss, actually a boss, a prior boss who was sitting right down there as the introducers yesterday, and that was *Adams v. Rice*. Tell me about that case.

Judge KAVANAUGH. That was a discrimination case involving someone who had had breast cancer in the past and was discriminated against in her job on that basis and joined an opinion ruling that that was unlawful discrimination and ruled against the Government in that case. In that case, the Secretary of State, in her official capacity, but the Government in that case, ruled against them.

Senator TILLIS. And some have said that you are not for the employees, you are also big for the big corporations. Tell me a little bit about *Stephens v. U.S. Airways*.

Judge KAVANAUGH. That was a case where I wrote in favor of a group of retired airline pilots who were in a dispute about their retirement compensation with U.S. Airways, and I wrote an opinion favoring the pilots in the litigation against U.S. Airways.

Senator TILLIS. And, you know, if we go a little bit further, I think you already covered *U.S. v. Nixon*, so I will not cover it there, but I think maybe one or two that I will ask you about. Tell me a little bit about your environmental cases, the *American Trucking* case.

Judge KAVANAUGH. That was a case involving a California air quality regulation, and the argument by industry was that that regulation was impermissible under the Federal environmental statutes and Federal environmental law and, in essence—I am simplifying for effect here—but in essence preempted or impermissible. And I wrote the majority opinion rejecting the industry's challenge in that case, which allowed the California law to stay in effect. There was a dissenting opinion in that case that would have cast doubt on or validated the California regulation. I wrote the majority opinion sustaining it.

Senator TILLIS. There were other people—and, you know, I know that there were some in the crowd that expressed a concern about

this, but there were some people here who have suggested that somehow you are unfriendly to the LGBTQ community. If my information is correct, back as early as 2003, you participated in a meeting with some 200 members of the Log Cabin Republicans to solicit their input and feedback. And I was just kind of curious if you have any recollection of that meeting and really what prompted you to go there.

Judge KAVANAUGH. So as a member of the administration working in the White House Counsel's Office on judicial nominations in particular but other issues as well, we would have outreach to groups, and one of the groups was the Log Cabin Republicans. And I went and spoke to them as a representative of the Bush White House to talk, as I recall, about judicial nominations. And I cannot remember all the specifics. I might have talked about some of the other Bush administration initiatives and received feedback on that. And I do recall that.

Senator TILLIS. Well, I am glad you did that. I also think it is interesting again because some people have not necessarily given you a chance to answer the question but have suggested you would be unfriendly to the LGBTQ community. The Human Rights Campaign ultimately put a statement out that said that in fact you have never been involved in any substantive legislation involving LGBTQ issues. Is that correct?

Judge KAVANAUGH. I do not believe I have had any cases involving—

Senator TILLIS. *Lawrence v. Texas, Romer v. Evans, United States v. Windsor, Obergefell v. Hodges, Bowers v. Hardwick*, and they made it very clear that you have not been involved in any of that.

Judge KAVANAUGH. Those cases were not through our court, and I am not remembering any specific cases as a judge that I have had involving those issues.

Senator TILLIS. Well, I would hope that if it comes up tomorrow, that perhaps they have found some evidence that you have, because we have not.

So I am going to try and do what I did yesterday and be the Member who spoke the least, but I am going to do something a little bit different because I found out that I can. I am not going to yield back my time. I am going to potentially reserve it for use tomorrow. But since I am at the end of the dais, I will probably be going last, and I probably will not.

So I just want to again thank you for being here. I want to particularly thank the people that have been sitting in the chairs. You have got the most uncomfortable position in the Chamber, but you have got a far more comfortable chair than all the people sitting behind you, and I am sure they are ready to get up, but we appreciate you being here.

And I do also—I have got some wrap-up comments. I actually want to thank the Members on both sides of the aisle because, consistent with my old Speaker self, I have been keeping a running total on exactly just how many people went over and how much time, and they did an extraordinary job, given the complexity of the issue.

And, Senator Whitehouse, I will add that, technically speaking, you yielded back time, about 3 seconds. You may want to bring that in tomorrow.

[Laughter.]

Senator WHITEHOUSE. I will use it wisely.

[Laughter.]

Senator TILLIS. But I think it was a sea-change difference in terms of what we saw here at the dais, and I think it is the right way to run these Committees.

So, Judge Kavanaugh, I want to thank you. I want to thank you for your patience; I want to thank you for your stamina. And the good news is you are more than halfway done. These were 30-minute rounds. Tomorrow will be 20-minute rounds, and I suspect that the Chair will also ask Members to try and stay within their time limits.

So we will be back here tomorrow morning at 9:30.

For the information of all the Members, we will stand in recess and reconvene tomorrow at 9:30 for the 20-minute rounds. Thank you.

Judge KAVANAUGH. Thank you, Senator.

[Whereupon, at 10:07 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 2 follows Day 5 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

THURSDAY, SEPTEMBER 6, 2018

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:33 a.m., in Room SH-216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Graham, Cornyn, Lee, Cruz, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. Well, Judge, I see you got here without my walking you in.

[Laughter.]

Judge KAVANAUGH. Good morning.

Chairman GRASSLEY. Good morning, and welcome back, of course, and that is to all the people that are here for 3 days as well as the people that might be here just for a few minutes. Everybody is welcome. Your testimony yesterday over a nearly 30-hour day made very clear that you have a strong command of the law, and even Ranking Member Feinstein said that you were forthcoming in your answers to questions. Your 12 years of exceptional judicial service, and that obviously includes your 307 opinions that you wrote and hundreds more that you joined in, make you very well qualified to receive a promotion from the second highest court in the land to the highest court in the land, and we will have the American Bar Association in tomorrow that will say particularly the same thing.

I am particularly impressed with your lifetime of public service that tells something about you, but also more so than your 12 years, what you have done as an outstanding professor. You have talked a great deal about being a coach for your daughters. You have talked a great deal about volunteering for meal service. I have only done that once in my life, so—and I should do it more, but you

do it regularly, so you are to be complimented, and, most importantly, being a father.

And, of course, I have enjoyed conversation with your wife and two daughters, and my wife was here yesterday, and she was talking about that all night, talking to your wife I mean.

Judge KAVANAUGH. Thank you.

Chairman GRASSLEY. And I heard some of my colleagues on the—I have had some of my colleagues, as I get into some of the business of this Committee, complain again yesterday about publicly releasing committee confidential documents. But anyone who did not get documents released to use during the hearing, I have to say, as I have tried to cooperate and make everything available to everybody that they wanted, they only have themselves to blame if they did not get the documents they wanted.

This is what I did a long time ago, sent a letter to each Member of this Committee on August 22nd, and a short quote from that is, “I invite all Members of the Committee to submit to me by noon, August the 28th, a list of document control numbers specifically identifying committee confidential documents, or documents publicly released with redactions, that a Member wishes to use in the hearing.” And I said I would work with the former and current President to secure their public release, and that meant working with lawyers in the Department of Justice on redaction and all that stuff.

Senator Klobuchar was the only Senator who requested the release of specific documents, and we secured their release. And as she told me yesterday, she gets an A for cooperation. She does get an A for her cooperation. Every Senator who complained about this process needs then to only look to Senator Klobuchar as an example to see that my process was fair and would have resulted in public release of documents before the hearing if they had only asked me.

But then yesterday, and I think we have accommodated these Senators, but Senator Leahy, Coons, Blumenthal, and Booker asked that I obtain the public release of certain confidential documents, and I have attempted to do so despite the untimely request. These Senators could have made the same request last week, but maybe that would have deprived them of more talk that they have been able to express about my hiding of documents.

With respect to Senator Booker’s question to Judge Kavanaugh, my friend my New Jersey asked the nominee to answer some questions regarding an email exchange from over 15 years ago without showing the nominee the email in question. And then you know what happened? The Senator from New Jersey blamed it on the fact that the email was labeled “committee confidential.” Well, there was nothing preventing any Senator from asking me before the hearing to get this document publicly released. In fact, the request was made to release these documents for the first time last night after the Senator asked the question of the nominee. We did not get some requests until after midnight.

And we have—we, quite frankly, had to have quite an argument with people in the Department of Justice to get these released and all the redactions that have to be done. What Senator would want to release their emails with all the emails and everything without

redaction of phone numbers, Social Security numbers, addresses, and Social Security numbers? That all has to be done under law to reduce this. But I think that we have the Department of Justice cooperating with that, so before this day is over, Members will have the documents that they need to ask the questions that they want to ask.

Now, before I ask my questions, and one Senator wants to make a 30-second comment. I am willing to turn to that, but let me say, each of our 21 Senators on the Committee get to ask questions for the 20-minute round. Every couple of hours we will take a break, and that would include a lunch break. And, Judge, if you need a break at any time, have your staff inform my staff. And, as is the standard practice for every judicial nominee, the FBI conducts a background investigation and provides to the Senate a background report. Moreover, like with prior nominees, including Justices Kagan and Gorsuch, there are a number of Presidential records that are restricted by Federal law from public release because they contain sensitive information, including highly confidential advice delivered to the President, and personal identifying information such as full names, date of birth, and Social Security numbers.

So, at the end of the questions today, we will move, as we have before, into a closed session with the nominee where we will review the FBI report and any committee confidential records that any Member would like to discuss. This is standard practice that we do for all Supreme Court nominees, and every Member is invited to participate.

Now I would like to call on Senator Hirono.

Senator HIRONO. Thank you very much, Mr. Chairman. I wanted to set the record straight on a matter that was brought up late last night with regard to me and my questioning of Judge Kavanaugh and his relationship to Judge Kozinski, and whether I would ask Judge Watford the same questions. I would like to quote from my response to the Washington Times on September 4th, 2018. And that quote is, and this is from me, "If President Trump would be so enlightened as to withdraw Judge Kavanaugh's nomination and nominate Judge Watford to the Supreme Court, I would certainly ask Judge Watford about his relationship with Judge Kozinski." Thank you very much, Mr. Chairman.

Senator BOOKER. Mr. Chairman.

Chairman GRASSLEY. Senator Booker, before you speak, I hope that you are not going to say that we have not gotten the document you want and all that sort of thing because we worked—my staff was here until 3 trying to accommodate everybody that asked for documents. Would you proceed, please?

Senator BOOKER. I appreciate that, sir. And, sir, the very section of the process that you read points out the absurdity of the process, and that is what is deeply frustrating to me and deeply disappointing. The process you read, you invite Committee Members "to submit to me by noon, on August 28th, a list of document control numbers specifically identifying the committee confidential documents or documents publicly released with redactions that the Members wish to use in the hearing, so long as it is a reasonable request," so no guarantee that we will be able to use them, but to

submit the ones we want to ask questions about. And then you will go back to President Trump, go back to President Bush for review.

Now, I see that plainly—sir, if I could just finish my point. We were—we had a number of those documents released to us the night before, and to think that we could somehow ask you about the documents, reveal to you what questions we wanted to ask, and then it is not even your determination. It goes back to Bill Burck, who is then making a determination about documents. Now, the specific document that I brought up is a great illustration of the absurdity of the process.

I brought up a document entitled, “Racial Profiling.” And by the way, I asked the candidate about his views today about that issue. It is a controversial issue, and that document actually does reveal his thinking about that issue at the time. And the fact that there is nothing in that document that is personal information, there is nothing national security related, the fact that it was labeled as “committee confidential” exposes that this process, sir, is a bit of a sham; that we are now—this has never been before. We are holding back not only—not only holding back documents labeled “committed confidential,” but not even giving us the time to review those documents.

In addition to that, this is just the tip of the iceberg of all the documents that will continue to be released, I assume, up until the time that we have a vote on the Senate floor and beyond that. I am sure you can understand, sir, how it puts all of us in a very difficult situation when it is not you. It is somebody—you have to then go back to a person named Bill Burck to decide if some document, who is an associate—who is an associate and colleague of the nominee to figure out which documents are going to be released.

And by the way, if all these documents were things, as you characterized them, they were personal information, if these were things that were delicate information. But as I read these, the documents we got the night before the hearing, including the ones we got before the hearing, I find it—I am actually flabbergasted that so many of these things are not controversial whatsoever, but bring up pertinent issues that we should have a time to digest and to ask the candidate about.

Chairman GRASSLEY. Okay.

Senator CORNYN. Mr. Chairman?

Chairman GRASSLEY. I think—can I—I will call on you, but I think I ought to respond to the Senator. I would like to respond at least on two points, one, the word “sham.” Senator Leahy, Chairman of the Committee, accepted documents, committee confidential. During Gorsuch’s nomination, we accepted committee documents—committee confidential. At that particular time, Senator Feinstein asked for 19 documents as we are getting documents for you now in the same way.

So, you read from my letter and you called it a sham. Was it a sham when we did it for Gorsuch? Was it a sham when Senator Leahy did it? And the reason we did it is so that we could get documents so you could review them almost from, I think, August the 5th or some time—maybe it was August the 10th—so you could start on it very early. And then do not forget that documents become committee confidential, and then do not forget on a regular

rolling basis, they are not committee confidential and then put on our website so that 300 million people can view them if they want to.

And then the second point about the lawyer for President Bush, all of our conversations last night were with the Department of Justice. Now, I hope you understand that these people in the Department of Justice are people that are there for years under both Republican and Democrat administrations. They are supposed to be non-political. I hope they are non-political. They are civil servants. We ought to respect their judgment as they try to take care of the privacy of people by redacting late into the night Social Security numbers, phone numbers, cell numbers, and all those sorts of things.

Senator—and then we also have Senator Whitehouse, but I want to go and let him comment.

Senator BLUMENTHAL. Senator Grassley, may I be recognized after Senator Whitehouse?

Chairman GRASSLEY. Yes.

Senator CORNYN. Mr. Chairman, thank you. I was disappointed to see last night that some of our colleagues are unwilling or unable to conduct themselves in this hearing with regular order and in accordance with the Rules of the Committee and the Rules of the Senate. I know last night some of our colleagues even tried to cross-examine the nominee about documents, but refused to let him even read them.

Members of the Senate and Members of Congress generally are privy to sensitive information, including classified information on occasion, and we are expected to protect that information for all of the obvious reasons. And it is inappropriate to raise these in an open session before the Committee. And I think our colleagues understand that, but nevertheless decided to go ahead anyway. So, I just think it is important that we remind one another that there are clear rules about the discussion of confidential material, and that there can be consequences to the violations of those rules. And this idea that somehow President Bush, when his lawyer and the President decide that information represents legal advice or other protected information that was given to the President during the time he was President of the United States, and that somehow he is unable to make a claim of privilege, or that once the claim is made in consultation with his private lawyer that that would be not respected by the Senate is outrageous.

And so, I just—I thought we were doing pretty well yesterday, but things went off the rails, it looks like, last night. And I hope we will return to a hearing process that respects the Rules of the Senate and that treats each other and particularly the nominee with the civility that he and this process is entitled to. And I would encourage our colleagues to avoid the temptation to either violate the Senate Rules or to treat the witness unfairly by cross examining him about a document and refusing to show it to him, and violating the confidentiality of some of these documents as requested by President Bush in consultation with his private lawyer.

Senator BOOKER. Sir, maybe I respond because it was a direct—it was directly invoking—may I respond, sir? No Senate rule accounts for Bill Burck's partisan review of the documents. No Sen-

ate rule and no history of the Senate accounts for what is going on right now. There was a—that was following this archive's—this partisan operative following his involvement in this process that I think, in my opinion, undermine the process. And the idea that we could somehow go through your lengthy process and these documents are—many of these documents were dumped on us at the last minute.

But Senator Cornyn actually made a very good point. I knowingly violated the rules that were put forth, and I am told that the committee confidential rules have knowing consequences. And so, sir, I come from a long line, as all of us do as Americans, to understand what that kind of civil disobedience is, and I understand the consequences. So, I am right now before you—before your process is finished, I am going to release the email about racial profiling, and I understand that that—the penalty comes with potential ousting from the Senate. And if Senator Cornyn believes that I have violated Senate Rules, I openly invite and accept the consequences of my team releasing that email right now.

And I am releasing it to expose, number one, that the emails that are being withheld from the public have nothing to do with national security, nothing to jeopardize the sanctity of those ideals that I hold dear. Instead, what I am releasing this document right now to show, sir, is that we have a process here for a person—the highest office in the land for a lifetime appointment. We are rushing through this before me and my colleagues can even read and digest the information. And I want—

Chairman GRASSLEY. Can I ask you—can I ask you—can I ask you how long you are going to say the same thing three or four times?

Senator BOOKER. No, sir, I am saying—I am saying—

Chairman GRASSLEY. How long do you want to take?

Senator BOOKER. I am saying I am knowingly violating the rules.

Chairman GRASSLEY. Okay.

Senator BOOKER. Senator Cornyn called me out for it.

Chairman GRASSLEY. How many times—how many times are you going to tell us?

Senator BOOKER. Sir, I am saying right now that I am releasing—I am releasing committee confidential documents.

Senator CORNYN. Mr. Chairman—

Senator KENNEDY. Mr. Chairman.

Senator CORNYN [continuing]. Since the Senator invoked my name, can I insist on an opportunity to respond?

Chairman GRASSLEY. Yes.

Senator CORNYN. I did not mention his name—

Chairman GRASSLEY. Okay.

Senator CORNYN [continuing]. But he mentioned my name, and he is right. Running for President is no excuse for violating the Rules of the Senate or of confidentiality of the documents that we—that we are privy to. This is no different from the Senator to release classified information that is deemed classified by the executive branch because you happen to disagree with the classification decision. That is irresponsible and outrageous, and I hope that the Senator will reconsider his decision because no Senator deserves to sit on this Committee or serve in the Senate, in my view, if they

decide to be a law unto themselves and willingly flout the Rules of the Senate and the determination of confidentiality and classification. That is irresponsible and conduct unbecoming a Senator.

Chairman GRASSLEY. Since——

Senator KENNEDY. Mr. Chairman——

Chairman GRASSLEY. Well, just a minute——

[Voice off microphone.] Mr. Chairman.

Chairman GRASSLEY. I have got something I want to say. I think we ought to be thinking about this is the last—I got three Senators are asking for—Senator Kennedy, Senator Whitehouse, and the Senator from Connecticut.

Senator HIRONO. And, Mr. Chairman, I would like to also be recognized.

Chairman GRASSLEY. So, here is—this is the last day, so here is something you got to think. We will be here until midnight if you want to be here, but I have been told that the Senate Minority Leader or somebody in the Democrat Party invoked the 2-hour rule. So, if the 2-hour rule is invoked, that is—nobody on this Committee, Republican or Democrat, is going to have an opportunity to do what they want to do today because this is the last day he is going to be here. And so, I hope you do not invoke the 2-hour rule. So, if you want to talk now before I start to ask my questions, I will do it.

Senator Whitehouse was the next one, and then Senator Kennedy.

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Senator HIRONO. Mr. Chairman, I would also like to be recognized because I am in a similar situation as my colleague here.

Chairman GRASSLEY. Senator Whitehouse. I think—I think he asked before you did.

Senator DURBIN. He did.

Senator WHITEHOUSE. Mr. Chairman, you recognized for 30 seconds, and I will take 30 seconds. Lest silence imply consent, speaking for myself, I want to make it absolutely clear that I do not accept the process of this committee confidential routine that we went through. I do not accept its legitimacy. I do not accept its validity. Because I do not accept its legitimacy or validity, I do not accept that I am under any obligation.

I have not made a big fight about this. I have just gone ahead with my questioning. But, again, lest silence imply consent, I think that that rule is as ineffectual as if the Chair had unilaterally repealed the law of gravity. It simply is not so. I have not agreed to this rule. I have not voted on this rule. This rule does not exist in our Committee or Senate rules, and I will leave it at that.

Chairman GRASSLEY. Did you——

Senator WHITEHOUSE. Just me speaking. I am not willing to concede that there is any legitimacy to this entire committee confidential process in this hearing.

Chairman GRASSLEY. Was it just——

Senator WHITEHOUSE. And nothing sensitive, nothing personal, nothing classified, and nothing confidential has been released.

Chairman GRASSLEY. Did you object to it when it was previously used under other Supreme Court nominees?

Senator WHITEHOUSE. It was developed then through a bipartisan process in which—

Chairman GRASSLEY. Okay.

Senator FEINSTEIN. That is correct. That is correct.

Senator WHITEHOUSE [continuing]. We had reached an agreement by unanimous consent effectively, not by decree.

Senator FEINSTEIN. No, there was agreement between—

Chairman GRASSLEY. Okay.

Senator FEINSTEIN [continuing]. The Chairman and me.

Senator WHITEHOUSE. Precisely, and that did not exist this time. And now you have documents that are not personal, not classified, not confidential, not sensitive that are nevertheless covered under this—

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I was in the Chair last night when this issue came up. I made the call when I—I want to explain why I made it. Senator Tillis my colleague, raised the point. I allowed Senator Booker to continue. Sometimes patience ceases to be a virtue, but I did not think in these hearings following the Chairman's example that that was appropriate.

Senator Booker examined Judge Kavanaugh about the racial disparities in this country. I gave Judge Kavanaugh, I think I—it was 6 minutes and 39 seconds to respond uninterrupted. So, I was trying to be, and we will continue that, was trying to be fair to both sides following the example of our Chairman.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman. There has been a lot of commentary over the last couple of days about how we are in uncharted and unprecedented territory here, that the process has broken down, reflecting what is happening in our Nation generally, and particularly in the last couple of days with the publication of a new book and an op-ed that indicate very serious chaos and breakdown in other parts of Government. And I am hoping that we can come together as a Committee, and if there are any rules, do what we have done in the past, which is adopt them on a bipartisan basis. That has been the way that "committee confidential" designation—

It is not classification. There are no classified documents here. It is a designation. It is an arbitrary and seemingly capricious designation designed to spare people embarrassment possibly, but all these documents belong to the people of the United States. They are covered by the Presidential Records Act, and eventually they will come out. So, shame on my colleagues if they conceal them now and deny us the benefit of questioning this nominee who comes before us for the last time today. He comes before us for the last time today. This is our last opportunity, up or down, whether he is confirmed or not, to question him.

And like any trial lawyer, documents have to be assessed as the trial goes on, as this witness responds to our questions. We cannot give the Chairman a list of what documents are relevant before we hear his answers and our colleagues' questions. So, not only from the standpoint of there being no basis for the rules, but also to deny the fairness and effectiveness of the process, that is the reason that we are making this protest and we are here under protest.

That is the reason why I asked to adjourn so that we could consider fairly all of these documents. I appreciate that Senator Grassley has decided to release the documents that I would have used yesterday. He has released the documents that Senator Booker, commendably, would have released even if not reclassified or redesignated. But I want to reserve the right—I hereby reserve the right to release documents before any confirmation vote so that my colleagues can see what the truth is.

We are literally trying to get at the truth here, and between now and any vote on confirmation, there is the right, in my view, on the part of every Member of this Committee to release documents that she or he believes are appropriate. And to delegate this decision to an unappointed, and unconfirmed, and largely unknown figure, Bill Burck, who used to used to work for the nominee, is the height of irresponsibility. Thank you.

Senator LEE. I want to start by pointing out that when this part of the discussion started last night, I was concerned that as with any witness in any courtroom or any proceeding before this Committee, I want to make sure that when a witness is questioned about a particular document, the witness has access to that document. It is not fair to the witness. The witness who has over the course of his career been involved in the creation, the authorship, the review of not just hundreds of thousands, but many millions of documents in his lifetime. It is not fair to this witness or any other witness in any other proceeding anywhere to not give the witness a copy and allow him to respond to it while he is being questioned about it.

So, that is why I offered to Senator Booker—and Senator Booker and I had a helpful conversation with the very helpful Committee staff last night, and they have agreed in the meantime to release this same document that was now the subject of it. So, the process worked. It works. We do have the ability to make these things available, to make them public so that we can be fair to Senator Booker, we can be fair to the witness, to the nominee.

I do want to point out since the charge has been made that this process is somehow rigged, that it is charged, that it is unfair, that it is arbitrary and that it is capricious, I completely disagree. We are not dealing in a lawless environment here. We are dealing here with the Presidential Records Act. We have got documents that are the subject of privileges, privileges that have to be asserted.

Now, Bill Burck is the designee for that Presidential administration, and has the prerogative of asserting privileges. But through an accommodation with the Senate, with the Senate Judiciary Committee to allow us to gain access to other documents to which we would never otherwise be able to have access, they have agreed to hand those over with the understanding that we have this committee confidential process, and that there are means by which we can clear documents like this one that we would otherwise not be able to clear. It worked here. It has been cleared, and I think we should move forward. Thank you.

Senator HIRONO. Mr. Chairman.

Chairman GRASSLEY. Senator Durbin or Senator Feinstein, whichever one wants to go first.

Senator DURBIN. No, I would defer to Senator Feinstein.

Senator FEINSTEIN. Well, I will accept it. Thank you. It is my understanding that by agreement with private lawyer, Bill Burck, the Chairman has designated 190,000 pages of Kavanaugh's records "committee confidential." And by doing this, Republicans argue Members cannot use these documents at the hearing or release them to the public. Unlike the Intelligence Committee, and I have been a Member for about 2 decades, the Judiciary Committee does not have any standing rules on how and when documents are designated "committee confidential." Previously, the Judiciary Committee has made material confidential only through bipartisan agreement. That has not been done in this case, so this is without precedent.

Republicans claim that Chairman Leahy accepted documents on a committee confidential basis during the Kagan administration. It is my understanding that those documents were processed through the National Archives, not private partisan lawyers, and Republicans agreed. Ninety-nine percent of Elena Kagan's White House records were publicly available and could be used freely by any Member. By contrast, the Committee has only 7 percent of Brett Kavanaugh's White House records, and only 4 percent of those are available to the public. No Senate or Committee rule grants the Chairman unilateral authority to designate documents "committee confidential." So, I have no idea how that stamp, "committee confidential," got on these documents.

I sent a letter on August 10th, 2018 objecting to the blanket designation of documents as "committee confidential." I offered to work with the Chair. He refused. Judiciary Democrats sent the Chairman a letter on August 28th restating the objection to the Chair's designation of the documents as "committee confidential" and requesting public release. As I have looked at the documents that are committee confidential, they do not affect any of the usual standards that would deny Committee confidentiality, and, Mr. Chairman, I think that is a problem.

I think we are entitled to all records, and I think the public is entitled to all records that are appropriate and do not put forward personal information or information that otherwise should not be disclosed. So, I do think we have a problem, and I think for the future we ought to settle that problem with some kind of a written agreement between the two sides, whether that is an agreement between the two sides of the entire Committee or between the Chairman and the Ranking Member, I think does not matter much. But I think the fact is that we should agree on who determines something is "committee confidential," what the criteria are for it, and the release to the public, and particularly in the event of a Supreme Court hearing.

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. And like my colleague, Senator Whitehouse, I do not want my silence to be interpreted as consent to the process that we have faced before this Senate Judiciary Committee. It is unlike any process I have ever seen. This designation of "committee confidential" should be put in historic context. There will be an opportunity for us later this afternoon to meet in confidential and secret, private session to discuss this nominee. That is not unusual. It is done for virtually every

nominee. Some of the meetings literally last a matter of a minute or two and we say there is nothing to talking and we are leaving.

But it has happened in the past, but whenever we dealt with "committee confidential," it was something that was very specific and usually personal to a nominee, and it was done by bipartisan agreement that we would protect the nominee from assertions or comments that may not have any truth to them whatsoever, but the Committee should take into consideration. That is a far cry from what we have faced with this nominee.

I cannot understand, and I said this in my opening statement here, the authority that we have given to a man named Bill Burck, a former assistant to the nominee; that we have said to Mr. Burck, you will decide what America gets to see about Brett Kavanaugh. You will make the decision as to which documents we will be allowed to discuss openly and publicly and which documents we cannot. Who is this man? By what authority could he possibly be denying to the American people information about a man who is seeking a lifetime appointment to the highest court in the land?

The National Archives is usually the starting point of this process. I put in the record yesterday a statement from the National Archives disavowing this whole process, saying this is not the way we have done in the past. We usually initiate this, please give us a few weeks to do it in an orderly way. But the decision was made by the White House and the administration not to go down that path, not to take the same course we have on previous nominees, but instead to allow this gentleman, Bill Burck, a private attorney, the authority to decide what the American people can see about the background of Brett Kavanaugh in other capacities.

Who is Bill Burck? All that I know of him is that he was once an assistant to the nominee. I am told that he is not only the attorney for George W. Bush, but also for the White House Counsel, Mr. McGahn, Mr. Preibus, the former chief of staff to the President of the United States, and Steve Bannon, a man whom I could not characterize in a few words, but he is his personal attorney.

And in this situation, he is now the litmus test. He is the filter to decide what the American people will see about this nominee, and that is why we bring this issue before you. Lest you think we are carping on a trifle here, we are talking about whether the American people have the right to know, and we now know that less than 10 percent of the documents reflecting the public career of Mr. Kavanaugh have been made available to this Committee.

And I just want to say to my colleagues, particularly my colleague from New Jersey, I completely agree with you. I concur with what you are doing, and let us jump into this pit together. I hope my other colleagues will join me. So, if there is going to be some retribution against the Senator from New Jersey, count me in. I want to be part of this process. I want to understand how Bill Burck, this private attorney, has the right to say, as one of my colleagues mentioned, this should be considered a classified document, a top secret document, a document that relates to the national security of the United States.

By what right, by what authority can Mr. Burck possibly designate a document as "committee confidential"? He has no authority to do that. He only has authority because he has the consent

and the cooperation of the Republican Majority on this Committee. That is the only thing that brings us to this moment.

And let me just say in closing one last thing. I am sorry that one of my colleagues has characterized all of us on the Democratic side on the first day of this hearing as contemptuous. I have never heard that said before in a full Committee meeting, but it has been said. And I am particularly sorry that he singled out one of our colleagues on this side and accused him of conduct unbecoming a United States Senator. I think statements like that are personal. They are disparaging. They question the motive of a colleague, something that we should do our very best to avoid in the United States Senate if we are ever going to restore the reputation of this body.

Senator CORNYN. Mr. Chairman?

Senator HIRONO. Mr. Chairman?

Senator CORNYN. May I make just a brief point? Mr. Chairman, I am looking at a Wall Street Journal article back during the Elena Kagan nomination. It says, "Document production from Elena Kagan's years in the Clinton White House Counsel's Office was supervised by Bruce Lindsay, whose White House tenure overlapped with Ms. Kagan." Bill Clinton designated Mr. Lindsay to supervise records from his Presidency in cooperation with the National Archives Records Administration under the Presidential Records Act. So, President Bush, by choosing Mr. Burck, is doing exactly what President Clinton did in choosing Bruce Lindsay for that same purpose.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Senator Hirono was first.

Senator HIRONO. I thank my colleague. Count me in, too. Mr. Chairman, I, too, referred to a so-called "committee confidential" document, deemed such by one Bill Burck, and we all know who he is at this point. And had the nominee asked me for a copy of that so-called "committee confidential" document, I would have been happy to release to him or give it to him. I am releasing that document to the press, and I would defy anyone reading this document to be able to conclude that this should be deemed confidential in any way, shape, or form. Thank you.

Senator KLOBUCHAR. Mr. Chairman, I know you have mentioned a number of times that I went through the process. I do want to point out, however, that I also was on numerous letters asking for all these documents to be released, and that my colleagues have repeatedly asked for documents to be released. And I go back to what happened on the first morning of this hearing, and that is that we pointed out that when there are 42,000 documents that are dumped on us in one night, there is absolutely no way people are going to be able to adequately review them. And as they review them, they are going to find documents that they want to be made public, that they want to ask the nominee about.

So, the whole point of this is because this hearing was ramrodded through and we were not given, say, maybe the month it would take to look at these documents, we are where we are. So, my remedy for this, in addition to making it clear that I join my colleagues that we support what Senator Booker is doing here, is that you must somehow expedite the review of every single docu-

ment, and we must have some kind of rules in place to get them out. I understand you would want to take out Social Security numbers and things like that. That is normal. But we simply cannot hide these documents from the American public. It is the highest court of the land.

And I was looking back. Everyone was citing people—the Founders of this country, and I found a quote that really works here by Madison: “A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy.” That is what we are talking about here. By ramrodding this through for political reasons, by denying us the access to the documents, we are denying the public the right to see what is out there, and it is just now how we do things in my State, and it is not how we have done things in this Committee.

Senator COONS. Mr. Chairman.

Chairman GRASSLEY. I am going to call on Senator Lee, and then you, but before that, a couple things she just reminded me of in her comments. Number one was to take care of all the people that did not act promptly, like you did, Senator Klobuchar. That is why we extended it and gave the courtesy of doing whatever anybody else wants from now, and those are—can either be brought. Now those that you have got can be brought up right now to him, and the things that you—that are not cleared that you want to bring up with the Judge, you can bring up in the closed session today.

And the other thing is when you talk about getting all the documents, I do not know who might work for Members of this Committee, sometimes want to be on the Supreme Court. For instance, would you—we did not ask for all the documents that Kagan had and emails or whatever communications she would have had when she worked with Senator Kennedy. Would you—would you want to be exposed to that sort of thing? If you want everything to be made public or all the emails that you have, whether—I think they are protected for 50 years for a United States Senator. So, you are talking about the public right to know, do you want to give up your emails right now, make them public? I do not think you do.

Senator Lee.

Senator LEE. First of all, Mr. Chairman, I want to say I am deeply sympathetic to the frustration people feel when they do not have access to documents they want. As a United States Senator, I have faced this on a number of occasions. There have been times when we have been called upon to vote on legislation literally at the midnight hour, sometimes much later than that, that we have not seen until moments before it was voted on. There have been other times, and I kid you not, when I have been asked to vote on a piece of legislation that has an annex to it, and I have been told that I cannot see the annex to the legislation because it is classified and it is classified in a way that I do not have access to because of a Committee assignment that I do not have.

It is incredibly frustrating. In those circumstances, we look for a demon. There are demons in those circumstances. They are too numerous to name here. In this circumstance, there is a demon, but that demon is a law of our own creation, and it is called the Presidential Records Act. That is the demon that you are after here. That is the only reason we have got this issue.

Now, the custodian of those documents holds and exercises a privilege on behalf of the Bush administration. These are documents we would otherwise not have access to because they are privileged. Pursuant to an agreement with the Senate as an accommodation to the Senate, the custodian of those records has agreed, notwithstanding the privileged nature of those documents, to hand them over to us with an understanding that when there is a need that arises with respect to one or more of those documents to make them public, we can as a Committee go through a process to do that. That is exactly what has happened. It is what has worked, and it is what has worked here today.

So, if you are frustrated with the process, then let us review the Presidential Records Act, but we are just doing what the law allows us here to do. These documents are not ours. They belong to someone else. It is not written into the Constitution. It is not written on stone tablets anywhere that we are entitled to documents that do not belong to us. It is significant that William Howard Taft did not release his Presidential papers. It is significant that Robert Jackson, having served as Attorney General, did not release all the papers he had as Attorney General. Why? Well, I assume it had a lot to do with the fact that they did not belong to us as a Senate.

If we want to be able to have a process not just with this administration, but in every Presidential administration, Democratic, Republican, or of other stripe in the future, we need to respect the process and respect the privilege that is accorded to documents that do not belong to us. That is all we are asking, and the process is working. Let us move forward.

Senator FEINSTEIN. Mr. Chairman?

Chairman GRASSLEY. Yes.

Senator FEINSTEIN. On behalf of this side, I would like to just say a couple of things. There is no process for the “committee confidential.” It used to be that both sides had to concur, the Chair and the Ranking Member, but now this is—this is just simply not the case. To some extent with this kind of thing, “committee confidential” becomes a kind of a crock, and it should not.

I think we need to sit down. I think we need to have a rule on how “committee confidential” is determined, on what it means, and who makes that decision. For all I know, some Republican staffer could have made the decision, and I just do not know. Documents appear. Our side had nothing whatsoever to do with the designation of “committee confidential.” So, it becomes a way, if there is no rule, for the Majority to essentially put all information through a strainer. Should we let this go out, be public, or should we not? And I do not think that is what this Committee is about.

Senator BOOKER. Mr. Chairman?

Chairman GRASSLEY. Well, you know—you know, in the absence of a majority of a Committee opposed, the Chairman acts on behalf of the Committee, and Chairman Leahy accepted documents on a committee confidential basis during Justice Kagan’s nomination. And there is no indication that the Ranking Member agreed to that at that particular time.

Senator Coons.

Senator COONS. Thank you, Mr. Chairman. Just two quick points if I could. First, the question has been raised whose documents are

these. These are the American people's documents. The Presidential Records Act gives us a right to obtain them for a Supreme Court nomination after the review of the professionals at the National Archives, and Bill Burck is not a professional at the National Archives. The Archives has said that this is not their process.

Equally importantly, because some will now make dire predictions about the appropriateness of the release of any these documents, Bill Burck himself in his letter to us of August 31st said, and I quote, "The Presidential Records Act exemption, one which protects against the disclosure of classified information, did not apply to any documents our team reviewed."

I agree with Senator Booker. This confirmation is too important for us to conceal documents that may reveal the nominee's views, and I think we should not be proceeding under these grounds.

Senator BOOKER. Mr. Chairman, may I be recognized, sir?

Chairman GRASSLEY. I hope you do not say the same thing again.

Senator BOOKER. Sir, I will not. And first of all, I will say something that I have not said, which is I appreciate the patience of Job that you are showing here. And I just also want to say, too, the representations from Senator Kennedy and Senator Lee were right on point, right on correctly. They stood strong last night, challenged me, but they not only were collegial, but they looked to find a fair way to deal with this process, and I want to express my appreciation.

I want to clarify something that I said before. There is no Senate rule that accounts for this process, period. This is not a Senate rule. I did not violate a Senate rule.

[Disturbance in the hearing room.]

Senator BOOKER. I will pause. I will pause. There is no Senate rule that I violated because there is no Senate rule that accounts for this process. And I say to a Chairman that I respect, that I believe has been fair and good to me, I will say that I did willingly violate the Chair's rule on the committee confidential process. I take full responsibility for violating that, sir, and I violate it because I sincerely believe that the public deserves to know this nominee's record, in this particular case, his record on issues of race and the law. And I could not understand, and I violated this rule knowingly, why these issues should be withheld from the public.

Now, I appreciate the comments of my colleagues. This is about the closest I will probably ever have in my life to an "I Am Spartacus" moment.

[Laughter.]

Senator BOOKER. My colleagues, numerous of them, said that they, too, accept the responsibility. There are very serious charges that were made against me by my colleague from Texas. I do not know if they were political bluster or sincere feelings. If what he said was sincere, there actually are Senate rules governing the behavior of Senators. If he feels that I, and now my fellow colleagues who are with me, have violated those rules, if he is not a tempest in a teapot, but sincerely believes that, then bring the charges. Go through the Senate process to take on somebody that you said is unbecoming to be a Senator.

Let us go through that process because I think the public should understand that at a moment that somebody is up for a lifetime appointment, that this issue—does the public have a right to know. This is not about the Presidential Records Act. This is not a violation of the Presidential Records Act, not a violation of Senate rules, sir.

But if somebody is going to land those charges, I hope that they will follow through with me and Senator Durbin, Senator Coons, Senator Whitehouse, Senator Hirono, Senator Blumenthal, now Senator Feinstein. I hope that they will bring charges against us, and I am ready to accept the full responsibility for what I have done, the consequences for what I have done, and I stand by the public's right to have access to this document and know this nominee's views on issues that are so profoundly important, like race and the law, torture and other issues. Thank you.

Senator CORNYN. Mr. Chairman, may I read the Senate Rule 29.5, the Standing Rules of the Senate, for the benefit of all Senators. "Any Senator, officer, or employee of the Senate who shall disclose the secret or confidential business or proceedings of the Senate, including the business and proceedings of the Committees, Subcommittees, and Offices of the Senate, shall be liable, if a Senator, to suffer expulsion from the body, and if an officer or employee, to dismissal from the service of the Senate and the punishment or contempt."

Senator BOOKER. Bring it. Bring it.

Senator COONS. Bring it on.

Senator CORNYN. So, I would correct the Senator's statement, there is no rule. There is clearly a rule that applies—

Senator BOOKER. If it applies, Chairman, bring the charges.

Senator BLUMENTHAL. Mr. Chairman, all of us are ready to face that rule on the bogus designation of "committee confidential." Just because there is a Senate rule does not mean it can be misapplied, or misconstrued, or misused. And I think even the threat raised by one of my colleagues here is unfortunate, and that is a kind way of putting it, with all due respect.

And I would just make one other point. We are dealing here with a lifetime appointment. Nothing we do here is more serious than confirming a Justice on the United States Supreme Court. Let the American people appreciate that we are here in the most solemn responsibility we have under the Constitution. We need the full truth. Just as this nominee has sworn to give it us, we are entitled to it from our colleagues.

And the question is, what are they concealing by this procedure? What are they afraid the American people will see? What are they afraid we would be asking of this nominee if we had all of those documents that have been denied us in this sham and charade.

Chairman GRASSLEY. Senator Lee, then Senator Tillis.

Senator LEE. To Senator Booker's point, the document you are talking about has now been approved through the Committee processes. It has been made available to the public. The process worked, and I pledge to work with each and every one of you. If you have got a document as to which a privilege has been asserted such that it is not public yet, I will work with you to try to make it public. Let us do it. I think we can do this. It is not that difficult,

and we have done it several times, at least three times now. We can do it more.

The privilege thing is real, though, and this is not our privilege we are dealing with. This is the privilege that belongs to somebody else. The privileged nature of documents has been around for a long time, since the early days of the republic. The records, the notes of the Constitutional Convention were ordered sealed for 30 years after the Constitutional Convention occurred in 1787. I am not sure all the reasons why, but those who participated in it decided that that was going to be the rule, sealed 30 years. Those documents did not belong to anyone else. They belonged to those who attended that Convention and participated in it.

Now, there were at least two from that list, Oliver Ellsworth and James Wilson, I believe, who were subsequently nominated to serve on the United States Supreme Court. No one demanded, to my knowledge, and no one could have gotten, notwithstanding the 30-year seal agreement, the notes to the Constitutional Convention, even though those certainly would have been probative as to how those people might have served on the Supreme Court.

Yet no one was accusing the U.S. Senate back then of being a rubber stamp for the Washington administration or anyone else. In fact, in 1795, the United States Senate disapproved of at least one of President Washington's Supreme Court nominees. This was no rubber stamp, and yet they respected the fact that they did not own every document, that other people might own them. We do not own these, and so we have to go through the process, a process ordained by a law that we passed and that only we have the power to change. Let us follow that law. We can follow the law and respect the process, and respect the rights of each of our colleagues and the rights of the American people to review documents that might be relevant here. But let us go through the appropriate process to do it.

Senator FEINSTEIN. Mr. Chairman—

Chairman GRASSLEY. I think I ought to be fair to the Republicans.

Senator FEINSTEIN. I think you should, too.

Chairman GRASSLEY. Okay. Go ahead, Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. You know, Mr. Chairman, it took nearly 17 years to get my college degree. I went to five different institutions. I am pretty sure none of them have been elevated to the Ivy League.

Chairman GRASSLEY. You finally found one that was right.

Senator TILLIS. That is right. I do not ever plan on running for President in 2020 or any point in the future. I want to make—I want to make one comment and then one request. The comment is, I hope everybody will record a transcript of what is going on right now. Senator Lee explains things, I think, in eloquent legal terms, but let us talk about the consequences of making this an untrusted body to receive documents under the Presidential Records Act. You may rue the day that you do that because you will probably get fewer documents in the future.

Now, what I would like to do is ask all of our Members, is perhaps we can actually demonstrate to the American people that we are prepared to expose our own records. I would like to suggest for

the purpose of the SCOTUS nomination that all of us waive any right to the Speech and Debate Clause, and that we allow all of our email records related to this SCOTUS nomination to be made public on an immediate basis. I for one am ready to sign up for it now. I hope all my other Members would do the same thing, because in the interest of transparency, certainly it would make sense for every one of us, regardless of what we want to do in the future, to expose that information to the American people.

Chairman GRASSLEY. Are you done? I will start with my questioning. By the way, we are going to have to protect—so everybody gets an opportunity to look at the FBI and anything else you want to ask, at 1 we are going to have to go into executive session and get that done before—if the Senate does close down at 2. I mean, if they do not give us permission to meet after 2, we have got to get that out of the way. So, we will do that at 1.

Senator FEINSTEIN. May I just put a document in the record?

Senator KENNEDY. Mr. Chairman, would you yield to a question?

Mr. Chairman, would you yield to a question about procedure?

Chairman GRASSLEY. I used the wrong word—“closed.” We are talking about “closed” instead of “executive” session. So—

Senator KENNEDY. Would you yield to a question about procedure, Mr. Chairman?

Chairman GRASSLEY. Go ahead.

Senator KENNEDY. Could you explain to me why we are having to truncate the hearing today?

Chairman GRASSLEY. Well, I am not sure we do have to truncate it, but just in case—well, it would be because the Minority may object to the unanimous consent request the Leader would make for this Committee to continue to work while the Senate is in session.

Senator KENNEDY. Well, let me be sure I understand. Senator Schumer is saying that we have to shut down while the Senate is in session. Do we not generally waive that rule?

Chairman GRASSLEY. Yes, generally it is waived, but if it is objected to, we cannot meet. So, that means that we want to make sure that we get the executive—or the closed session out of the way.

Senator KENNEDY. May I ask why Senator Schumer is doing that?

Senator DURBIN. Has he done it?

Chairman GRASSLEY. I do not know.

Senator KENNEDY. We have a nominee to the Supreme Court of the United States. We have all talked about transparency. What is his basis for doing that?

Chairman GRASSLEY. You will have to ask him. I do not know.

Senator FEINSTEIN. Mr.—

Chairman GRASSLEY. Yes, you go—

Senator FEINSTEIN [continuing]. If I may, I would just like to put a document in the record. The Committee was told that President Trump has decided to withhold 102 pages of Kavanaugh’s White House Counsel records.

[Voices off microphone.] A hundred and two thousand pages.

Senator FEINSTEIN. A hundred and two thousand? What did I say?

Senator DURBIN. You were close.

Senator FEINSTEIN. Thank you, 102,000 pages of Kavanaugh's White House Counsel records, and asserted a new claim of constitutional privilege. And, of course, that has not been done before. I am told there is no such privilege. There is an executive privilege, which is outlined in the Presidential Records Act and requires the President to notify Congress and the Archivist, which was not done here. There is a little bit more to it, but I would just like to put this in the record.

Chairman GRASSLEY. Without objection—

Senator FEINSTEIN. Thank you.

Chairman GRASSLEY [continuing]. That will be put in the record, yes.

[The information appears as a submission for the record.]

Chairman GRASSLEY. Judge Kavanaugh, we heard a lot yesterday about your record of independence and impartiality, and you have done more than talk about your independence and you have done more than talk about your independence and impartiality. You have demonstrated the judicial values of the bench. By my account, you ruled against executive branch agencies 23 times between May 2006—January 2009.

Of course, President Bush was nominated—who nominated you to the bench, was the head of the executive branch. You had no problems ruling against the President who appointed you, if that is what the law required, and I have no doubt that you would do the same on the Supreme Court, if that is what the law requires. You have demonstrated your impartiality.

Some of my colleagues tried to depict you as hostile to the little guy and always willing to rule for the powerful, but your record shows that you rule for the party that has the law on their side. So that makes you out to be not a pro-plaintiff judge or pro-defendant judge, but to be a pro-law judge.

So let me ask you about a few of your cases that I think demonstrate that you will vindicate the rights of those who are less powerful in our society. After all, our aspirations as Americans is equal justice under law.

[Disturbance in the hearing room.]

Chairman GRASSLEY. So I will ask you on each one of them, but just so you know the three cases I am thinking about is *Rossello*, *Essex Insurance*, and *United Food and Commercial Workers*. So in the first one, a case in which you ruled for the woman wrongfully denied Social Security benefits, tell us your approach to that case.

Judge KAVANAUGH. This case, Mr. Chairman, was a case in which the Social Security Administration had denied benefits—

[Disturbance in the hearing room.]

Judge KAVANAUGH. Was a case where the Social Security Administration had denied benefits to a woman who had a history of mental illness, and they had done so because at one point in time, she had been employed for a brief period of time with a family member, but it had been subsidized. And this was, in my view, the height of arbitrary agency decisionmaking.

The case had gone on for 15 years, was kind of a hall of mirrors for the woman, and we wrote an opinion, I wrote an opinion reversing the denial of benefits for the woman and also making clear to the Social Security Administration that any further delay would

not be tolerated and that these kinds of delays in denying benefits to people with mental illness were unacceptable.

Chairman GRASSLEY. Let us go to the *Essex Insurance Company* case.

[Disturbance in the hearing room.]

Chairman GRASSLEY. *Essex Insurance*?

Judge KAVANAUGH. In the *Essex* case, it was a case of a child's family and an insurance company, and the child had been the victim of sexual abuse, and the—on three occasions, and the insurance company was trying to give—pay out simply \$100,000 for the total number of—for the abuse. And the insurance policy said \$100,000 for each occurrence, in essence.

And we ruled that the insurance company had to pay \$100,000 for each occurrence, each incident of the abuse, and, therefore, a total of \$300,000. So in that case, we ruled and I wrote for a victim of abuse against an insurance company that was seeking to squeeze the benefits that were paid under a policy that was owed to the plaintiff in the case.

Chairman GRASSLEY. Okay. Then the last one would be *United Food and Commercial Workers*.

Judge KAVANAUGH. And that is a case, a union case against Walmart, and the case came from the NLRB, and the question was whether Walmart had engaged in unfair labor practices against a union in that case. And in that case, we ruled for the union against Walmart in that case on the ground that the factual record supported the conclusion that the company had engaged in unfair labor practices and, therefore, violated the rights of the union members.

Chairman GRASSLEY. Now to something that I believe I have discussed with every nominee to the Supreme Court probably for the last 15 years. It is not about a case or your approach to the law, and it is something that Senator Kennedy talked to you about yesterday. It is not a very popular subject with some of the current and former Justices. I think I make Chief Justice Roberts uncomfortable when I raise the issue with him when I speak for a short period of time at the Judicial Conference.

And then there was a former—when Justice Souter was on the Supreme Court, he made a famous quip about television cameras, that they would have to roll over his dead body. I can respect that view. I just think it is plain wrong.

I, and many of my colleagues on this Committee, believe that allowing cameras in the Federal courthouse would open the courts to the public and bring about a better understanding of the Court and its work. You may be aware of that for a number of years, I have sponsored a bill, the Sunshine in the Courtroom Act, which gives judges the discretion to allow media coverage of Federal court proceedings.

Would you keep an open mind on cameras in the courtroom? Or if you have strongly held views on it, do not be afraid to tell me.

Judge KAVANAUGH. Mr. Chairman, I appreciate your longstanding interest in the issue and transparency for the courts, of course. I will tell you what we have done on my court briefly and then tell you some general thoughts going forward, if I were to be confirmed.

On our court, we have gone from audio release at some date much later. Then we went to audio release same week. Then we went to audio release same day. And now we are allowing audio to go out live with the oral arguments, and that process has been one in which the judges have learned, experienced, and become comfortable with the additional transparency that has become in the same-time audio over time, and that process has worked well in our court.

On the Supreme Court, I think the best approach for me is to listen to the views of people like yourself, Mr. Chairman, and others I know who are interested in that to learn, if I were to be confirmed, from the experience there and to see what the experience there is like, to listen to the Justices currently on the Supreme Court. As I have said, be part of a Team of Nine, well, I would want to learn from the other Justices what they think about this. Because several of them, as you know well, Mr. Chairman, when they were in my seat, expressed support for the idea of cameras for oral arguments, and then, when they were there for a few years, switched their position after experiencing it. So I would want to talk to them, why that position.

And as I said to Senator Kennedy last night, too, I would want to think about the difference between oral argument and the actual announcements of the decisions. I think those are two distinct things. There has not been much focus on the possibility of live audio, for example, of the decision announcements or video of the decision announcements.

And I think that is a distinct issue from oral arguments, and I would be interested in thinking about that and talking to my colleagues, if I were to be confirmed. I will have an open mind on it, and I do think when you attend oral argument at the Supreme Court, as I have many times, or you attend the announcement of decisions, it is extraordinarily impressive to walk into that building and the majesty of that building.

The building itself conveys the stability and majesty of the law, and to go into the courtroom and to see the Justices working together, as they do, to try to resolve cases is extraordinarily impressive. It makes you confident, I believe, in the impartial rule of law and in each member of the Supreme Court to see them in action.

And so I do understand your point of view on this, and I would certainly keep an open mind on it and listen to you and listen to the other Justices on the Court, of course.

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thank you, Mr. Chairman.

I am going to go back to *Roe* because most of us look at you as the deciding vote, and I asked yesterday if your views on *Roe* have changed since you were in the White House. You said something to the effect that you did not know what I meant, and we have an email that was previously marked "confidential" but is now public, and shows that you asked about making edits to an op-ed that read the following, and I quote:

"First of all, it is widely understood, accepted by legal scholars across the board, that *Roe v. Wade* and its progeny are the settled law of the land," end quote. You responded by saying, and I quote, "I am not sure that all legal scholars refer to *Roe* as the settled law

of the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices on the Court would do so.”

This has been viewed as you saying that you do not think *Roe* is settled. I recognize the word said is what legal scholars refer to. So, please, once again tell us why you believe *Roe* is settled law, and if you could, do you believe it is correctly settled?

Judge KAVANAUGH. So thank you, Senator Feinstein.

In that draft letter, it was referring to the views of legal scholars, and I think my comment in the email is that might be overstating the position of legal scholars, and so it was not a technically accurate description in the letter of what legal scholars thought. At that time, I believe Chief Justice Rehnquist and Justice Scalia were still on the Court at that time.

But the broader point was simply that I think it was overstating something about legal scholars. And I am always concerned with accuracy, and I thought that was not quite accurate description of legal, all legal scholars because it referred to “all.”

To your point, your broader point, *Roe v. Wade* is an important precedent of the Supreme Court. It has been reaffirmed many times. It was reaffirmed in *Planned Parenthood v. Casey* in 1992 when the Court specifically considered whether to reaffirm it or whether to overturn it. In that case, in great detail, the three Justice opinion of Justice Kennedy, Justice Souter, and Justice O’Connor went through all the factors, the stare decisis factors, analyzed those, and decided to reaffirm *Roe*.

That makes *Casey* precedent on precedent. It has been relied on. *Casey* itself has been cited as authority in subsequent cases such as *Glucksberg* and other cases. So that precedent on precedent is quite important as you think about stare decisis in this context.

A similar analogy, the *United States v. Dickerson* case in 2000, where the Court considered whether to overturn *Miranda v. Arizona* or to reaffirm it. And in that case, the Court, through Chief Justice Rehnquist, specifically reaffirmed *Miranda* despite the fact that Chief Justice Rehnquist had been a critic of *Miranda* in his early days and had written some opinions quite critical of it.

It became that—so that *Dickerson* case is similarly precedent on precedent, which is important going forward as you think about the stare decisis calculation for a case like *Miranda*.

So that is why both of those cases, *Planned Parenthood v. Casey* and *Dickerson*, are cases where I would refer to them as precedent on precedent.

Senator FEINSTEIN. So you believe it is correctly settled, but is it correct law in your view?

Judge KAVANAUGH. Senator, there is on that case or on *Dickerson*, or on cases like *Citizens United* or *Heller* or *United States v. Lopez* or *Kelo*, just the whole body of modern Supreme Court case law, I have to follow what the nominees who have been in this seat before have done.

Senator FEINSTEIN. Judge, a “yes” or a “no” will do.

Judge KAVANAUGH. Well, just if I can briefly explain, Senator?

Senator FEINSTEIN. Yes, you can.

Judge KAVANAUGH. Briefly. I will try to be brief. But this—when you are in this seat, I am not just sitting here for myself. I am sit-

ting here as a representative of the judiciary and the obligation to preserve the independence of the judiciary, which I know you care deeply about. And so one of the things I have done is studied very carefully what nominees have done in the past, what I have referred to as “nominee precedent.”

And Justice Ginsburg, but really all the Justices have not given hints or forecasts or previews. And Justice Kagan, I think, captured it well, as she often does, with in talking about questions like the one you are asking, you cannot give a thumbs up or thumbs down and maintain the independence of the judiciary. So I need to follow that nominee precedent here.

Senator LEE. Mr. Chairman, could I ask that the email at issue be made part of the record?

Senator FEINSTEIN. Pardon me?

Senator LEE. I would like to ask that the email at issue be made part of the record.

Senator FEINSTEIN. We will be happy to do that. Thank you.

During your time in the Bush White House, the administration actively took steps to limit women’s reproductive choices. This included re-imposing the global gag rule to prevent foreign organizations from spending their own money on reproductive health and trying to prevent the FDA from making Plan B contraception available over the counter.

During your service at the White House, 2001 to 2006, did you work on any issues related to women’s reproductive health or choice?

Judge KAVANAUGH. President Bush was a pro-life President, and so his policy was pro-life. And those who worked for him, therefore, had to assist him, of course, in pursuing those policies, whether they were regulatory. There was partial birth legislation that was passed as well, and some of those things might have crossed my desk. I cannot remember specifics.

But he—I think this came up in Justice Kagan’s when she worked for President Clinton. He had a different view than President Bush on that issue, and she had some work for President Clinton. I consider myself working for President Bush, was there to assist him.

Senator FEINSTEIN. Let me go to torture. During the time you worked in the White House, the Office of Legal Counsel concluded that harsh interrogation techniques were legal, even though Congress had passed a law in 1994 banning torture.

The Office of Legal Counsel took a sweeping view of Presidential power and concluded that the President could override the statute. In response, in 2005, the Congress adopted an amendment championed by our colleague Senator McCain—I was the cosponsor—that stated that only interrogation techniques that can be used are those authorized in the Army Field Manual.

Was the Office of Legal Counsel correct when it concluded that the President could ignore the torture ban?

Judge KAVANAUGH. So the Office of Legal Counsel, Senator, subsequently withdrew those memos, as you know. And as I have made clear in some of my writings—the review of Judge David Barron’s book, some of my opinions as well—the President does not have the authority to disregard statutes passed by Congress regu-

lating the war effort, except in certain very narrowly described circumstances that are historically rooted. The common example being command of troops in battle.

So as a general proposition, the President has to comply with the law. The President is subject to the law, including in the national security context.

That is the lesson, I think, of the *Youngstown Steel* case, of Justice Jackson's categories. Category 3, as I have said repeatedly in my writings, which is where Congress has prohibited the President from doing something, is critically important. That is essential to the rule of law. As Justice Jackson said, that is the equilibrium of the country is at stake in Category 3, and I have written about that quite frequently.

Senator FEINSTEIN. Got it. Thank you.

Today, we have a President who said he could authorize worse than waterboarding. How would you feel about that?

Judge KAVANAUGH. Senator, I am not going to comment on and do not think I can sitting here on current events.

Senator FEINSTEIN. Well, but you know what the law is. You have made that clear.

Judge KAVANAUGH. I know what the law is, Senator, and I know your—

Senator FEINSTEIN. So I ask specifically how do you feel about that?

Judge KAVANAUGH. I feel that I should follow the law as a judge. I know what the law is, and I know your leadership on this issue, both with the report you did, which was the thorough documentation of things that happened, as well as recommendations for the future. And I know your leadership with Senator McCain on the 2005 Act as well. And I know what the law is, and I have written about the—how the separation of powers works when Congress passes laws of the kind that you have.

Senator FEINSTEIN. One last question on this. In December of 2005, President Bush issued a signing statement regarding the Detainee Treatment Act of 2005, reserving the President's right to disregard that the law's ban on torture—disregard the law's ban on torture if it interfered with his constitutional authorities as President.

What was your involvement, if any, with this signing statement?

Judge KAVANAUGH. While I was staff secretary, any issue that reached the President's desk, with the exception of a few covert matters, would have crossed my desk on the way to the President's desk. I would not have in the ordinary course provided the policy advice or the legal advice, but it would have crossed my desk. So in that case, the signing statement—the drafts of it, that process—would have crossed my desk at some point.

Senator FEINSTEIN. Okay. In a 2013 panel discussion, as—well, you did nothing about it, though. It crossed your desk, and that was that.

Judge KAVANAUGH. Well, there was debate, as I think I have mentioned, about that. The Counsel to the President, Ms. Miers at the time, was the ultimate adviser on that matter for the President and, thus, would have been the one who primarily dealt with that with the President.

It was important as in the job I had there not to supplant the policy or legal advisers. That was not my job. My job was to make sure the President had the benefit of the views of his policy and legal advisers.

Senator FEINSTEIN. One more Bush era question on this. In a 2000 panel discussion at NYU Law School regarding Bush administration anti-terrorism policies, you said the Bush administration went “right up to that legal line to defend the security of the United States,” implying that Bush policies did not cross the legal line. Do you mean to suggest that Bush administration’s post 9/11 programs, including the CIA torture program, were legal?

Judge KAVANAUGH. No, Senator, that is not what I was suggesting there, and let me try to provide you an explanation. President Bush’s view, as I think he had said publicly, was in trying to keep America safe, he was going to do everything he could within the law. He relied on his lawyers to provide him the boundaries of what the law is, and then he would go up to that line as he thought effective as a matter of policy.

It was up to the lawyers, therefore, to make sure that they were giving sound advice and not—and having the backbone. And this is something that your legislation reinforces. Lawyers need to have backbone, even in pressurized moments, to say no, and I have talked about that many times.

One of the most important responsibilities of an executive branch lawyer in the passions of the moment, where the pressure is on, where the President wants to do something perhaps, is to go into the Oval Office and say, “No, you should not do this.” And that is something that I have written about, talked about, and experienced in my time with President Bush, and I have encouraged young lawyers to have that backbone and fortitude to say no. That is about the most important thing.

Senator FEINSTEIN. Thank you.

A quick change of subject. You sat on a case where a trainer, Dawn Brancheau, was killed while interacting with a killer whale during a live performance. Following her death, the Occupational Safety and Health Administration found that SeaWorld had violated work force safety laws. The majority agreed with the agency that SeaWorld had violated the law.

According to what I know, you disagreed. In your dissent, you argued that the agency lacked the authority to regulate employers to protect participants in sporting events or entertainment shows.

However, the statute as enacted applies to each employer, and it defined “employer” as anyone engaged in business affecting commerce who has employees. Where in text of the law did Congress exempt employers of animal trainers?

Judge KAVANAUGH. Thank you for the question, Senator.

The first point I want to make is that was not a case that involved potential compensation to the family. That was handled through the State tort system or through insurance or through a settlement with the—SeaWorld and the family. So the case before us had nothing to do with compensation to the family. It had to do with a separate regulation of SeaWorld.

The issue, Senator, was precedent. I follow—as a judge, I follow precedent. The precedent of the Labor Department, as I read it,

was that the Labor Department under the statute would not regulate what it called the intrinsic qualities of a sports or entertainment show.

So lots of sports and entertainment shows have serious dangers, whether it is football or the balance beam in gymnastics or the high wire act at the circus or the lion tamer show. And the SeaWorld show was of—as I saw it, of a piece under those with that precedent that said the Labor Department would not regulate, for example, whether baseball helmets had to have ear flaps or whether to prohibit the punt return or to make the balance beam have nets.

And this seemed to be covered by that precedent, as I saw it. The Labor Department in the oral arguments tried to distinguish, for example, the dangers of football from the dangers of the SeaWorld show, and I did not, as I explained in the opinion, find that distinction persuasive.

But I did make clear two things, Senator. One is Congress could, of course, regulate the intrinsic—Congress could make the decision to regulate the intrinsic qualities of sports and entertainment shows, or the Labor Department could change its precedent. And I made clear that, of course, State tort law—as the NFL has experienced with the concussion issue, State tort law always exists as a way to ensure or help ensure safety in things like the SeaWorld show.

Senator FEINSTEIN. Thank you.

A question, if I may, about independent agencies. Congress has established several independent agencies. We believe they are essential to enforcing our laws and safeguarding consumers. Congress requires the President to have good cause to remove the heads of these agencies to insulate them from political interference.

You have objected to this limit on the President's power and struck down the for-cause requirement in a case involving the Consumer Financial Protection Bureau. The D.C. Circuit disagreed and overturned your decision.

If the President can fire the heads of independent agencies for any reason, what is to prevent political interference in these independent agencies?

Judge KAVANAUGH. Senator, I have followed the *Humphrey's Executor* precedent. I have referred to it as entrenched. That is the precedent that allows independent agencies and protects them from at-will firing, the for-cause restriction. So as a general matter, I have affirmed the—or I have followed the precedent of *Humphrey's Executor*.

The example you are talking about, the Congress established a new independent agency that did not follow the traditional model of independent agencies—

Senator FEINSTEIN. Yes.

Judge KAVANAUGH. Of having multiple members. That is all I thought was problematic there, and I did not invalidate or did not say the agency should stop operating. I said the agency can continue performing its important functions on behalf of consumers. But either it had to be restructured as a multi-member agency, or the President had to be able to remove the single head at will.

Senator FEINSTEIN. The limited set of documents we have received indicates that you were heavily involved in the Bush White House's response to congressional investigations after the Enron scandal. Is that accurate?

Judge KAVANAUGH. That is accurate. We had a document request from Senator Lieberman's Committee, and I was one of the lawyers that had to help gather the documents from people within the White House and then had to negotiate documents—I had to negotiate documents with Senator Lieberman's staff.

Senator FEINSTEIN. Right. So you know that Enron was one of the greatest corporate scandals in American history. And I can tell you as a Senator from California, not only did many of my constituents lose everything financially when Enron collapsed under the weight of its accounting fraud, but the fraud and market manipulation contributed to an energy crisis in California.

White House emails show that you were asked to review a set of draft talking points for Press Secretary Ari Fleischer that addressed the role of Enron's market manipulation in the California energy crisis. Essentially, the talking points said if there was any misconduct by Enron, it was up to the Federal Energy Regulatory Commission to investigate and punish the company.

I am not going to ask you if you remember the specific document, but was that your view that FERC was the regulatory body that was supposed to stop this sort of misconduct?

Judge KAVANAUGH. I am not recalling the specifics of that, Senator. My role, as a general matter, was to help gather documents in response to Senator Lieberman's Committee's request, as I recall. And I know FERC would have a role necessarily in something like that, but I do not know if I thought primary or I do not think that was my area of expertise. So I am just not recalling it specifically, Senator.

Senator FEINSTEIN. Yes.

[Disturbance in the hearing room.]

Senator FEINSTEIN. Thank you, Mr. Chairman. Thank you.

Chairman GRASSLEY. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate the way you have conducted these hearings in spite of these type of irresponsible outbursts and so forth that it is hard to believe.

Now, Judge Kavanaugh, I would first like to commend you for how you have conducted yourself these last 2 days. You have displayed the level-headedness and decency that so many of your friends tell us actually exist and I would say your friends and former colleagues have described in their letters to this Committee. I wish you could say the same about everyone who has attended this hearing or conveyed it—or covered it on social media, but I cannot.

I am deeply concerned about the theatrics we have seen these last 2 days. I have been on this Committee for 42 years, longer than any other person except Senator Leahy. I am the former Chairman. Never have I seen the constant interruptions we have witnessed at this hearing.

Confirmation hearings are supposed to be an opportunity for the American people to hear from the nominee. Unfortunately, it seems that some on the political left have decided to try to turn this hear-

ing into a circus. Now I worry about the precedent this is setting for future confirmations, but that is not the worst.

The worst of it are the attacks against people who are not even up for confirmation who just happen to be here in the room to support the nominee. It is bad enough that Supreme Court nominations have turned into all-out war against the nominee. Have we really reached the point where anyone who supports or even sits behind a nominee must also be destroyed? Has our tribalism really reached that low?

To those who have been unfairly caught up in the mob mentality of the last 2 days, I just want to say you are right to be here supporting someone you believe in. Do not let the fact that there are a lot of, frankly, sick people out there cause you to lose faith in our political process. We need good, decent people to step forward to contribute even when it is ugly, particularly when it is ugly.

Just now to my questions. Let me ask you this. As I did yesterday, I would like to ask you to keep your answers to my questions concise so we can get through as many of them as we can.

Late last night, one of my colleagues asked you a series of open-ended questions about any conversations you have had with anyone at a 350-person law firm about Special Counsel Bob Mueller or his investigation. You said you do not remember having had any such conversations.

My colleague did not clarify why my colleague was asking the questions and did not allow you to complete your answers. I want to give you a chance to respond if you would like to.

Judge KAVANAUGH. Sure, Senator. I do not recall any conversations of that kind with anyone at that law firm. I did not know everyone who might work at that law firm, but I do not recall any conversations of that kind.

I have not had any inappropriate conversations about that investigation with anyone. I have never given anyone any hints, forecasts, previews, winks, nothing about my view as a judge or how I would rule as a judge on that or anything related to that. So I thank you for the opportunity to clarify and reassure you on that.

Senator HATCH. Well, thank you.

With all of the accusations and insinuations and innuendo being hurled around yesterday, there is something I have to come clean about. I am on the Board of Visitors of the Federalist Society. It is true. For those who are not familiar with the Federalist Society, it generally holds debates and puts together panels on legal issues, covering all sides of these issues—the liberal, the conservative, et cetera. It is a very responsible organization.

The American Constitution Society, the Democrat organization, does much the same thing, and I respect them, except it focuses on liberal or progressive lawyers. So this is familiar to my Democratic colleagues on this Committee.

They have been involved with ACS'—with the ACS from keynoting the annual conference to being an honorary host committee chair, to speaking on panels, to writing blog entries for the organization. I even heard the nasty rumor that one of them spoke at a Federalist Society event. Can you believe that?

You have already said that when it came to your nomination, you spoke with the President, the Vice President, and the White House

Counsel Don McGahn, not the Federalist Society. So I do not need to ask you about that. My question for you is this. What has your experience with the Federalist Society been?

Judge KAVANAUGH. Senator, thank you.

The Federalist Society, as you noted, holds debates at law schools—

Senator HATCH. On both sides.

Judge KAVANAUGH. On both sides. The typical program of a Federalist Society event at a law school will have two speakers and a moderator—that is typical—with the two speakers presenting different views on an issue. It could be, for example, Fourth Amendment privacy, where you have someone who has got different view on national security-related Fourth Amendment issues or on free speech issues or all sorts of legal issues. They try to have debates where both sides are presented at the law school events that I have been to.

At the conventions, they will always have panels of four or five with a moderator, where they will have a spectrum of views represented on a different topic. They are very enriching in terms of your knowledge of the law, and they are also enriching, I believe, in terms of providing different perspectives on the law. And they have—they welcome people and actually insist on having people from all different perspectives at the event.

So it is very beneficial to the law. I think the programs they have at the law schools, they are very educational. They provide some of the best debates that are held with the law schools, I believe.

And so I think the organization itself, which itself does not lobby and does not file amicus briefs or anything like that, does a very valuable service at law schools and the legal community as a whole for bringing together different views on important legal issues. And I applaud them for their efforts to bring speakers to campus and provide legal debates on campus and in lawyers' conventions.

Senator HATCH. You have described it quite well.

Earlier this year, I attended oral argument in *Microsoft v. United States*, also known as the Microsoft Ireland case. Naturally, I was very interested in that. At issue in the case was the meaning of the Stored Communications Act and whether a warrant for data stored overseas, but accessible in the United States, falls within the Act's confines.

I had introduced legislation known as the CLOUD Act to resolve this issue. Following oral argument, Congress passed the CLOUD Act, thus mooting the case before the Court.

Now the specific question at issue in the Microsoft Ireland case has been resolved by my legislation, but the case also raised a broader question that I would like to ask you. When the Stored Communications Act was passed in 1986, no one imagined a world where data could be stored overseas but accessible instantaneously in the United States. It was clear that the act covered data stored in the United States, but it was less clear that it extended to data stored abroad using new technologies that were not available in 1986.

How do we interpret our laws in light of changing technology? How do we determine whether the authors and enactors of legisla-

tion would have intended the legislation to cover new technologies and unforeseen situations?

Judge KAVANAUGH. Senator, I think there, as elsewhere, the job of a judge is to focus on the words written in the statute passed by Congress. Sometimes Congress will write a statute where the words are very precise, and it is quite clear it covers only something that might be in existence at the time. Sometimes Congress will write broader, more capacious words, as does the Constitution at times, that can apply to new technologies.

For example, the Fourth Amendment, of course, in the Constitution applies to things that were not known at the founding, including cars and communication devices that were not known at the founding. So, too, with statutes. It depends on how broadly or narrowly you have written it.

And your question raises a broader point, which is the issue of privacy and liberty on the one hand versus security, law enforcement on the other is an enormous issue going forward for the Congress, in the first instance, I believe, and also for the Federal courts, including the Supreme Court, going forward. The *Carpenter* case this past term is a good example of that, written by Chief Justice Roberts.

As I look ahead over the next 10 to 20 years, that balance of Fourth Amendment liberty and privacy versus security and law enforcement is an enormous issue.

Senator HATCH. Well, I appreciate your elucidation on that. On the domestic front, there has been debate for some time now in Congress about whether our laws should be updated to require a warrant for the content of electronic communications, regardless of how old those communications are.

As you may know, the Electronic Communications Privacy Act currently distinguishes between communications that are less than 180 days old and those that are more than 180 days old, requiring a warrant for the former, but not the latter. Can you speak generally to the importance of warrant requirements and why they are an important bulwark against the Government overreach?

Judge KAVANAUGH. The warrant requirement helps ensure, as a general matter, that the executive branch is not unilaterally able to invade someone's privacy, someone's liberty without judicial oversight. That ensures that there is probable cause or whatever the standard might be in a statutory situation to get someone's records or information or otherwise invade their liberty or privacy.

So that judicial oversight is part of the checks and balances of the Constitution, and Congress has written that also into several statutes, as you know, Senator.

Senator HATCH. Well, I want to return to the email Senator Feinstein was asking you about. You were asked for your comments on an op-ed that was going to be published by a group of pro-choice women in support of a circuit court nominee. You said, "I am not sure that all legal scholars refer to *Roe* as the settled law of the land at the Supreme Court level since Court can always overrule its precedent."

You then added, "The point there is in the inferior court point." Were you giving your opinion on *Roe* there, or were you talking about what law scholars might say?

Judge KAVANAUGH. I was talking about what legal scholars might say, and I thought the op-ed should be accurate about what, in describing legal scholars.

Senator HATCH. Okay. So we have got that cleared up.

You have been critical of the practice of judges sentencing defendants based on uncharged or acquitted conduct. With regard to acquitted conduct in particular, I agree that the notion that a judge can sentence a defendant to a long prison term for a crime that a jury acquitted the defendant of flies in the face of the right to a jury trial.

You have written that you believe, “It likely will take some combination of Congress and the Sentencing Commission to systematically change Federal sentencing to preclude use of an acquitted or uncharged conduct.”

Why do you take issue with the use of acquitted conduct at sentencing, and why do you believe this is an issue that will likely require intervention by Congress to resolve?

Judge KAVANAUGH. The opinions I have written on this, and I have written several, say, in essence, the following, Senator. When a criminal defendant, for example, let us say is charged with 10 counts, let us suppose, and is acquitted on 9 and convicted on 1, and then the criminal defendant is sentenced as if he or she had been convicted of all 10 because the judge just says, well, I think, you know you did X or that Y, and under my discretion—which you now have under the Supreme Court’s case law for sentencing—I am just going to sentence you the same anyway.

Defendants and the public, the families of the defendants understandably say that seems unfair. I thought the point of the jury trial was to determine whether I was guilty or not guilty on all those charges. And if I am getting sentenced exactly as if I were guilty on all the charges, that seems a violation of due process.

So I have written about the fairness and perceived fairness of the use of acquitted conduct at sentencing. Judge Millett on my court and I have both written about it several times and made clear our concern about the use of acquitted conduct and how it affects the sentencing system.

Why I have said Congress might need to look at it, although I have also pointed out individual district judges can look at it, is because under the current system, sentencing judges have wide discretion in picking sentences. So it is hard for an Appeals Court to say that you have infringed your discretion, given some of the case law of the Supreme Court which grants that discretion.

But I do not like the practice, and I have made the clear in my opinions. So I am just repeating my opinions here because of the unfairness and perceived unfairness of it.

Senator HATCH. Okay. This Committee has been chasing an elusive deal on criminal justice reform for quite some time now. One particular focus of mine in this area has been mens rea reform. Without adequate mens rea protections, that is, without the requirement that a person knows his conduct was wrong or unlawful, everyday citizens can be held criminally liable for a conduct that no reasonable person would know was wrong.

Critics of my legislative efforts to bring clarity to mens rea requirements claim the effort is a ploy to get corporations and white-

collar defendants off the hook. But stronger mens rea requirements protect the liberty of all defendants in the criminal justice system, the vast majority of whom are not corporations or white-collar defendants.

You have written about the importance of mens rea requirements, including in cases involving unsympathetic defendants like an armed robber or a convicted murderer. Why, in your view, are mens rea requirements so important?

Judge KAVANAUGH. Mens rea requirements are important because, Senator, under the Due Process Clause and the precedents of the Supreme Court, it is not right to convict someone based on a fact they did not know. It is just an elemental point of due process.

Justice Jackson described this principle in his famous *Morissette* decision that he wrote. It is elementary as the—he said, as the school child’s “I did not mean to. I did not know.” And if someone truly did not know a fact that they—that is relevant to their conviction, to nonetheless convict them is contrary to due process.

I have seen cases where a mandatory minimum sentence was elevated from 10 years to 30 years, a 30-year mandatory minimum based on a fact that the defendant did not know. I dissented in that case, in an en banc case joined by Judge Tatel, who was an appointee of President Clinton to our court, saying that—and I wrote a very lengthy dissent about the history of mens rea and just how much of a violation of due process I thought had occurred in that case. That was not a sympathetic defendant, given what he had been convicted of, but I thought it was a complete violation of due process and principles of mens rea that were longstanding from *Morissette* to give him a 30-year mandatory minimum for a fact he did not know.

I have also wrote—or joined an opinion and wrote a separate opinion reversing a murder conviction of someone where the jury instructions were unclear about the mental state of the murderer. It was a question of manslaughter versus second-degree murder. That would have had a huge difference in the defendant’s sentence, and I wrote an opinion saying this was not an especially sympathetic case, given the facts, but the jury instructions were flawed on the issue of the mental state. And my exact line was, “I am unwilling to sweep that under the rug.” And that is how I felt about that case. There was a dissent in that case, but I was in the majority reversing the murder conviction in that case.

No matter who you are, in my court, if you have the right argument on the law, I am going to rule in your favor. And mens rea is foundational to due process. I have written that repeatedly, and I share your concern about mens rea reform, Senator Hatch.

Senator HATCH. Well, thank you.

I have one last question. Some people seem to think that religious people should not work in Government because they swear allegiance to their church, not their country necessarily. I have faithfully served this country for over 40 years, and I am a—I believe I am a religious person.

Now religion is also a big part of your life. You went to Catholic school. Your children go to Catholic school. And you regularly attend church and serve at a church-supported soup kitchen. I know

that religious faith is a personal subject, but I would like to hear from you how you—how your private beliefs affect your public decisions. Can you be devout in your faith and still uphold the law?

Judge KAVANAUGH. Senator, my religious beliefs have no relevance to my judging. I judge based on the Constitution and laws of the United States. I take an oath to do that. For 12 years, I have lived up to that oath.

At the same time, of course, as you point out, I am religious, and I am a Catholic. And I grew up attending Catholic schools. And the Constitution of the United States foresaw that religious people or people who are not religious are all equally American.

As I have said in one of my opinions, the *Newdow* opinion, no matter what religion you are or no religion at all, we are all equally American, and the Constitution of the United States also says in Article VI, no religious test shall ever be required as a qualification to any office or public trust under the United States.

That was an important provision to have in the founding Constitution to ensure that there was not discrimination against people who had a religion or who people who did not have a religion. It is a foundation of our country. We are all equally American.

Senator HATCH. Thank you. Thank you, Mr. Chairman.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

And as I mentioned to you earlier, I have a number of letters that I ask consent to be placed in the record, as well as emails that were declassified, I think some at 3 this morning, that they be placed in the record.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Senator LEAHY. Thank you.

And I know there was a claim this morning, the Committee was following my precedent, Judge Kavanaugh. Not so. For Justice Kagan, we had 99 percent of her documents for her time at the White House, and, of course, we do not have—we have less than 10 percent of yours. And there were 860 documents designated as “committee confidential” by the nonpartisan National Archives that was discussed with both the Democrats and Republicans on the Committee. Nobody objected to that.

But let us go to follow up on our questions yesterday. Now we discussed the fact that while you worked on nominations in the Bush White House, you received stolen material from a Republican Senate staffer named Manny Miranda. I thought it was a digital Watergate. He stole 4,670 computer files from six Democratic Senators.

And he was doing this in an effort to confirm some of President George W. Bush’s most controversial judicial nominees. They were some of the most contentious fights of the day, and this Republican stole 4,670 computer files.

Now in 2004 and 2006, you testified, and a number of Senators, both Republicans and Democrats, asked you, and you said you had never received any stolen materials. That does not appear to be accurate.

You also testified that you knew nothing about the scandal until it was public, and if you had suspected anything untoward, you

would have reported it. You also testified to Senator Hatch that you never received any document that even appeared to you to have been drafted or prepared by Democratic staff.

Now I also asked you yesterday whether Mr. Miranda asked to meet privately offsite to hand you documents related to Senators Biden and Feinstein. I also asked about him sending you “intel” with extraordinarily detailed specifics about what I was going to ask a highly controversial nominee just days later, something I never said publicly. I also asked about your receiving a draft, a nonpublic letter of mine, before any mention of it was made public.

You testified you did not recall anything specific, but you thought that sharing information between staffs was common. So let me ask you this. Has anyone told you what any Democratic Senators have been advised to do by our staff at this hearing?

Judge KAVANAUGH. I think there has been a lot of—

[Disturbance in the hearing room.]

Judge KAVANAUGH. There has been a lot of discussion about what individual Senators might be interested in, and when I met—

[Disturbance in the hearing room.]

Senator LEAHY. I really want to hear what you have to say, Judge, not what protestors have to say. Please, go ahead.

Have you ever been advised—have you been told what any Democratic Senator has been advised to do by our staff at this hearing?

Judge KAVANAUGH. Right. So when I met individually with the 65 Senators, including almost every Member of the Committee, a lot of the Senators, a lot of you in the meetings told me issues you were interested in. I think your staff was probably talking to—

Senator LEAHY. But has anybody said to you, for example, Senator Leahy’s staff is asking him to do this at the hearing tomorrow?

Judge KAVANAUGH. Well, I think you yourself told me what you were going to ask. So I—

Senator LEAHY. No, I tried to give you a good heads-up, and I appreciate the meeting. But has anybody else told you this is what Leahy’s staff is asking him to ask at the hearing tomorrow?

Judge KAVANAUGH. Again, I think this might be a different kind of process because you all were very transparent when I met with you. I am looking around and saying here is what I am focused on and here is what I am going to ask you at the hearing, and it has turned out you were telling—you were accurately telling me your concerns for that—

Senator LEAHY. And you are saying that is normal, but did anybody hand you anything marked “Highly confidential” about any one of these Senators?

Judge KAVANAUGH. For this? No. I am not remembering anything like that, but you all did talk about the issues. In other words, there are no surprises. Well, there are not no surprises. But you know, you gave me basic concerns and issues you wanted to raise.

Senator LEAHY. I want to make sure we are clear on this. Nobody handed you something marked, “Highly confidential,” but that is the material you received from Manny Miranda. For example, on July 18, 2002, days before an extremely controversial hearing for

Fifth Circuit nominee Priscilla Owen, Mr. Miranda sent you an email with the subject line, “Highly confidential,” and informed you that Senator Biden’s staff was asking him not to attend the meeting that day.

On March 18, 2003, Mr. Miranda sent you several pages of talking points that were stolen verbatim, stolen verbatim from Democratic files. The talking points revealed arguments Democrats were making on another controversial nominee, Miguel Estrada. The subject line of the email stated it was not for distribution, meaning Mr. Miranda was asking you not to share the information.

This has now been, as of 3 this morning, made public. So yesterday, when I asked you about these specific events, you said you did not have any recollection. So I am not going to ask if you remember receiving this email, I am going to ask you this.

Why would you ever be asked to keep secret Democratic talking points if they were legitimately obtained?

Judge KAVANAUGH. I am looking at these, Senator, and it says, for example, it looks like—it looks like that Biden’s staff is asking him not to attend the hearing. I do not know why that—

Senator LEAHY. But look how you received it.

Judge KAVANAUGH. I know. Highly—I do not know why that is even confidential because it—

Senator LEAHY. Whether it is or not, would you consider that somewhat unusual to be receiving from a Republican staff member something marked, “Highly confidential,” telling him what he has found out that a Democrat is going to do?

Judge KAVANAUGH. Well, as I explained yesterday, Senator, my understanding of this process is that the staffs do talk with one another, that they are not camps with no communication, and that was my experience when I worked in the White House. And so this, it looks like Biden’s staff is asking him not to attend the hearing would have been pretty standard kind of information that would be—

Senator LEAHY. Well, not really. You read this. I would be amazed if somebody handed me a memo saying this is a confidential memo that Senator Grassley’s staff has prepared for him. I know I would not read it. I would be on the phone immediately to Senator Grassley to say I am bringing something over that just arrived to me for you to take a look at it.

But you received on July 28, 2002, an email from Manny Miranda that said my staff distributed a confidential letter to Democratic counsels, not to Republicans. Now Mr. Miranda said I received that letter in the strictest confidence. You were asked explicitly by Mr. Miranda to take no action on the email without his, his further instructions. You never asked him how he obtained the letter sent in strict confidence to me.

And then July 30, 2002, you received an email from Miranda saying that he had 100 percent info that I was convening a meeting about a controversial nominee, and then further, on August 13, 2002, email he obviously had taken from my internal emails what I was going to do.

Did any of this raise a red flag in your mind?

Judge KAVANAUGH. It did not, Senator, because it all seemed consistent with the usual kinds of discussions that happen. And

sometimes, people do say things of here is what my boss is thinking, but do not share it around. I mean, I must have had, you know, so many conversations in the course of my life like that where someone is saying like that about something, in other words, trying to give you a heads up on something. And that just seems standard Senate staff—so nothing—the direct answer to your question is, for example, it looks like Biden’s staff is asking him not to attend the hearing. That would not have raised anything at all for me other than someone was——

Senator LEAHY. Not even where he came from? On June 5, 2003, you received an email from a Republican Senate staffer with subject line “spying.” That is not overly subtle. This staffer appears in over 1,000 documents we received together with both you and Mr. Miranda. She says, she “has a mole for us,” and so forth. None of this raised a red flag with you?

Judge KAVANAUGH. It did not, Senator. Again, people have friends across the aisle who they talk to. At least this was my experience back then. Maybe it has changed. And there was a lot of bipartisanship on the Committee. There was a lot of bipartisanship among the staffs. There were a lot of friendships and relationships where people would talk to, oh, I have got a friend on Senator Kennedy’s—Ted Kennedy’s staff or I have a friend on Senator Hatch’s staff or I have a friend on Senator Spector’s staff. That kind of conversation and information-sharing was common, so it did not raise the——

Senator LEAHY. Well——

Judge KAVANAUGH. Flags.

Senator LEAHY [continuing]. Judge, I was born at night but not last night, and if I had something that somebody said we have stolen this or do not tell anybody we have this, I think that would raise some red flags. Now, we only have a fraction of your record, and I do thank the Chairman for opening these up at 3 this morning. But as you know, the President asserted executive privilege, the first time we have had to face this up here on a nominee from either Republicans or Democrats, of 102,000 pages of material, 102,000 from just your time in the White House. That includes all judicial nominations.

Can you confirm for me today that that 102,000 pages, there are no emails from Mr. Miranda marked, “Highly confidential,” or “Do not share,” or “Take no action on this,” describing what he has found out the Democrats are thinking?

Judge KAVANAUGH. Senator, I am not involved in the documents process, so I do not know what is in them.

Senator LEAHY. Well, that is convenient. But we do not know what is in them either because we have never had so much withheld before. We do not know what is in all the documents. They are still being gone through by the archives because this is being rushed through, and we do not get a chance to see them. That is not fair to us, and, frankly, Judge, it is not fair to you. You have probably been told you have the votes to be confirmed so you do not have to care, but I care. I care about the integrity of the Supreme Court. I care about who is on there. I think you should care what is in that, just as we should care what is in it.

There are even more documents than I had time to discuss today. I find it impossible to reconcile what you are regularly being told, your testimony that you received nothing stolen and no reason to suspect anything was stolen when, frankly, as we now know, Republican staffer Manny Miranda stole things. And some of the things he stole went directly to you.

Let me ask you another one. You testified in 2004 that, aside from participating in a mock court argument, you did not work on the nomination of Judge William Pryor. Now, he was a controversial nominee, called *Roe v. Wade*, the “worst abomination” in the history of constitutional law. He argued that constitutional right to same-sex intimacy would logically extend to activities like necrophilia, bestiality, pedophilia. You said you did not work on his nomination personally, but you did participate in the Pryor working group, did you not?

Judge KAVANAUGH. We all were met—just so you know the process, there was something called the White House—I think, Judicial Selection Committee, and Judge Gonzales, the Counsel to the President, chaired that committee. And that started immediately after President Bush came into office in 2001. And so we would meet with memos, and individual members of the staff would be assigned to different regions—

Senator LEAHY. Did you interview William Pryor?

Judge KAVANAUGH. I do not believe so. It is possible, but I do not believe so. But if I did, it would have been part of the general process where people came in.

Senator LEAHY. I put in the record Exhibit C, which said you did interview him. Did you?

Judge KAVANAUGH. It is possible. We interviewed hundreds of nominees—

Senator LEAHY. I understand.

Judge KAVANAUGH. As I said, Senator, and we met every week for several years to go over nominees. And we worked closely with the home-State Senators. And I had various States for district court. I had Illinois. I had California I worked on with Senator Feinstein and Senator Boxer’s staff; Maryland, Senator Sarbanes and Senator Mikulski. But then we would sit in sometimes on interviews of other people who came in, and then we would meet and go over the memos. Then, we would meet with the President. We met every week with the President before September 11. After September 11, those meetings became less frequent because—

Senator LEAHY. You had recommended him internally for the Eleventh Circuit seat, had you not?

Judge KAVANAUGH. Well, I have no reason that I would not have recommended him because he was a highly qualified Attorney General of Alabama, and Senator Sessions, of course, knew him well and he was well-respected and—

Senator LEAHY. The only reason I ask was that one of the emails that we have up here says, “Brett, at your request”—at your request—“I asked Matt to speak with Pryor about his interest.”

Judge KAVANAUGH. Well—

Senator LEAHY. I am not asking these questions to get you in a bind, Judge. I am asking them because it is so easy on these hearings to say I do not remember, and oftentimes, that is the case, but

you mentioned Mr. Gonzales. He had difficult remembering when he came here. He had one hearing where—so that he would not have that problem, I gave him I think 35, 45 of the questions ahead of time. On every one of them, he said I do not remember, I do not recall, and then every question asked—almost every question asked by both Republicans and Democrats he said I do not remember, I do not remember. Shortly after that, he went to private practice.

I think it is so difficult that you do not remember the things done by somebody who I think on both sides of the aisle we would agree is one of the most egregious breaches of Committee confidentiality when Manny Miranda stole material from here, stole it to send it to you and others at the White House. And you have no recollection of that?

Judge KAVANAUGH. I obviously recall the emails—or have seen the emails, but your question, your larger question was did that raise a red flag, and I have answered that, “no.”

Senator LEAHY. Well, when you were in the White House, was part of your job to coach President Bush’s judicial nominees how to answer Democrats’ questions about *Roe v. Wade*?

Judge KAVANAUGH. Part of our job would have been to prepare nominees more generally, and it was common for Senators to ask that question then, as it is now, and so I assume that we would have been involved in going through mock sessions. I know we were involved in going through mock sessions, which is very standard for Democratic—

Senator LEAHY. Well, you have been going through some mock sessions with at least one Republican Senator from this Committee, and other Republican Senators, and I am not saying that as a “gotcha” thing. You have every right to do that. You did advise her exactly how she should respond to that, according to one of the emails.

And my last question: Do you agree that a plastic firearm created with a 3-D printer so that—it would not have been in the minds of our Founding Fathers in the 18th century, would you agree that that could be regulated or banned without raising any Second Amendment questions?

Judge KAVANAUGH. I think there might be litigation coming on that, Senator, so consistent with judicial independence principles, I should not comment on a potential case like that so—thank you.

Senator LEAHY. I had actually written out here your answer ahead of time, and I just wrote it so that you did not see what I wrote.

Thank you very much, Mr. Chairman.

Chairman GRASSLEY. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I would like to introduce into the record an op-ed from the L.A. Times editorial board entitled “Can the Supreme Court Confirmation Process Ever Be Repaired?”; a bipartisan letter from 23 of Judge Kavanaugh’s classmates at Yale; a letter signed by hundreds of Yale students, alumni, and faculty; a letter from Georgia’s Secretary of State Brian Kemp; an op-ed in The Clarion-Ledger by Mississippi Governor Phil Bryant. So I would ask that that be allowed. Just say—

Chairman GRASSLEY. Without objection——

Senator GRAHAM [continuing]. Without objection.

Chairman GRASSLEY [continuing]. So ordered.

[The information appears as submissions for the record.]

Senator GRAHAM. That is good. Okay. All right. Thank you, Judge. There are several things I want to go over with you. One, I want to compliment Senator Leahy in this regard, that he worked with Senator Grassley to get what had been previously committee confidential released to the public, and sort of, that is the way it works around here. You do not always get what you want, but you try to work with your colleagues, and many times, you can succeed.

From the public's point of view, it has got to work this way. You just cannot do everything you want in a legislative body. There are rules, and it is frustrating to be told no on something you are passionate about. But I am often asked—people wonder, are these hearings turning into a circus? And I want to defend circuses.

[Laughter.]

Senator GRAHAM. Circuses are entertaining and you can take your children to them.

[Laughter.]

Senator GRAHAM. This hearing is neither entertaining, nor appropriate for young people.

Now, some of my colleagues, who I respect greatly, are trying to make a point. I do not know what that point is. But I do know this, if you want to be President, which I can understand that, it is hard. And what you do will be the example others will follow.

Back to the subject matter, the *Morrison* case, was that about separation of powers?

Judge KAVANAUGH. That was a separation of powers case.

Senator GRAHAM. Okay. It was about a congressional statute and the authority of the executive branch and how they interacted, is that correct?

Judge KAVANAUGH. That is correct, and a very specific statutory scheme that was unprecedented, had the judiciary involved in appointing the counsel.

Senator GRAHAM. And apparently, Kagan and Scalia agreed——

Judge KAVANAUGH. Yes.

Senator GRAHAM. Kagan agreed with Scalia's dissent.

Judge KAVANAUGH. She has called it one of the greatest ever written, and she has added it gets better every year.

Senator GRAHAM. Well, I do not want to get in the habit of saying listen to Elena Kagan, but I will here because she is a fine person.

The situation we have before us about Mr. Mueller, that is not a separation of powers issue, is it? Are these not different facts, that Mr. Mueller was appointed through Department of Justice regulations.

Judge KAVANAUGH. Senator, I do not want to talk specifically about current events, but I will just refer back to what I have written previously about Special Counsel——

Senator GRAHAM. I am not asking you——

Judge KAVANAUGH. Generally are——

Senator GRAHAM [continuing]. How to decide a case. I am just asking you, do you read the paper, do you watch television? The special counsel statute in question does not exist anymore, does it?

Judge KAVANAUGH. The independent counsel statute—

Senator GRAHAM. Yes, independent counsel statute—

Judge KAVANAUGH. Does not exist anymore—

Senator GRAHAM. Okay.

Judge KAVANAUGH. Since 1999.

Senator GRAHAM. Okay.

Judge KAVANAUGH. The traditional special counsel system I have written about is the ordinary way that outside investigations—

Senator GRAHAM. But is that an executive branch function?

Judge KAVANAUGH. That is ordinarily appointed by the Attorney General and is—

Senator GRAHAM. Who is a member of what?

Judge KAVANAUGH. The executive branch.

Senator GRAHAM. So last time I checked, that is not a separation of powers issue.

Judge KAVANAUGH. That, traditionally, as I have written, has been an executive branch—

Senator GRAHAM. Okay.

Judge KAVANAUGH. Now, the question is if someone is appointed as special counsel by Department of Justice regulations, who has authority over implementing those regulations and overseeing those regulations, all I can say is that that is different legally and factually than the *Morrison* situation where you had a statute.

Let us talk a little bit about the law regarding the President. *Clinton v. Jones* tells us—see if I am correct—that you can be President of the United States, you can still be sued for conduct before you were a President, and when you invoke executive privilege, the Court has said no, wait a minute, you have to show up at a deposition because it happened before you were President. Is that correct?

Judge KAVANAUGH. Yes, in a civil suit was the *Clinton v. Jones* case—

Senator GRAHAM. Yes.

Judge KAVANAUGH. Involving allegations that—or a suit that involved activity before President Clinton became President.

Senator GRAHAM. So it is pretty well understood through Supreme Court precedent that if you are the President of the United States and you engaged in conduct that allowed you to be sued before you got to be President, you cannot avoid your day in court on the civil side.

The *Nixon* holding said what?

Judge KAVANAUGH. The *Nixon* holding said that in the context of the specific regulations there, that a criminal trial subpoena to the President for information—in that case the tapes—could be enforced, notwithstanding the executive privilege that was recognized in that case as rooted in Article II of the Constitution.

Senator GRAHAM. So that is the law of the land as of this moment?

Judge KAVANAUGH. *United States v. Nixon* is the law of the land.

Senator GRAHAM. Okay. Now, whether or not a President can be indicted while in office has been a discussion that has gone on for a very long time. Is that true in the legal world?

Judge KAVANAUGH. That is correct. The Department of Justice for the last 45 years has taken the consistent position through Republican and Democratic administrations that a sitting President may not be indicted while in office. The most thorough opinion on that is written by Randy Moss, who was head of President Clinton's Office of Legal Counsel in 2000. He is now a district judge, appointed by President Obama on the district court in DC.

Senator GRAHAM. And I think you have written on this topic as well, have you not?

Judge KAVANAUGH. I have not written on the constitutionality.

Senator GRAHAM. You are talking about whether or not it would be wise to do this.

Judge KAVANAUGH. I have made my thoughts known for Congress to examine—

Senator GRAHAM. Right.

Judge KAVANAUGH. Because in the wake of September 11, I thought one of the things Congress could look at is how to make—

Senator GRAHAM. Yes.

Judge KAVANAUGH. The Presidency more effective.

Senator GRAHAM. I just want my Democratic colleagues—to remind you that when President Clinton was being investigated, you took the position that he is not above the law, but in terms of indicting a sitting President, it would be better for the country to wait. And the person who echoed that the most or at least effectively I thought, from his point of view, was Joe Biden. So there is nothing new here, folks. When it is a Democratic President, they adopt the positions that they are arguing against now, but that is nothing new in politics. I am sure we do the same thing.

So this man, Judge Kavanaugh, is not doing anything wrong by talking about this issue the way he talks about it. What we are doing wrong is blending concepts to justify a vote that is going to be inevitable. You do not have to play these games to vote “no.” Just say you do not agree with his philosophy. You do not think he is qualified. But the thing that I hate the most is to take concepts and turn them around upside down to make people believe there is something wrong with you. There is nothing wrong with you. The fault lies on our side. Most Americans after this hearing will have a dimmer view of the Senate. Rightly so.

I do not want anybody to believe that you stole anything. Did you steal anything from anybody while you were working at the White House Counsel's.

Judge KAVANAUGH. No.

Senator GRAHAM. Did you know that anybody stole anything, or did you encourage them to steal anything?

Judge KAVANAUGH. No.

Senator GRAHAM. Did you use anything knowingly that was stolen?

Judge KAVANAUGH. No.

Senator GRAHAM. So you can talk about Mr. Miranda, and he deserves all the scorn you can heap on him, but I do not want the

public to believe that you did anything wrong because I do not believe you did. So it is okay to vote “no,” but it is not okay to take legal concepts and flip them upside down and act like we are doing something wrong on the Republican side when you had the exact same position when it was your turn.

Roe v. Wade, you have heard of that case, right?

Judge KAVANAUGH. I have, Senator.

Senator GRAHAM. Okay. Now, there are a lot of people like it, lot of people do not. It is an emotional debate in the country. Is there anything in the Constitution about a right to abortion? Is anything written in the document?

Judge KAVANAUGH. Senator, the Supreme Court has recognized the right to abortion since the 1973 *Roe v. Wade* case. It has reaffirmed it many times.

Senator GRAHAM. But my question is did they find a phrase in the Constitution that said, that the State cannot interfere with a woman’s right to choose until medical viability occurs? Is that in the Constitution?

Judge KAVANAUGH. The Supreme Court applying the Liberty—

Senator GRAHAM. It is a pretty simple, “No, it is not, Senator Graham.”

Judge KAVANAUGH. Well, I want to just be—

Senator GRAHAM. Those words.

Judge KAVANAUGH. I want to be very careful because this is—

Senator GRAHAM. Okay.

Judge KAVANAUGH. A topic on which—

Senator GRAHAM. No, if you will just follow me, I will let you talk but the point is, will you tell me, “yes” or “no,” is there anything in the document itself talking about limiting the State’s ability to protect the unborn before viability? Is there any phrase in the Constitution about abortion?

Judge KAVANAUGH. The Supreme Court has found that under the Liberty Clause—but you are right that specific words—

Senator GRAHAM. Well, is there anything in the Liberty Clause talking about abortion?

Judge KAVANAUGH. The Liberty Clause refers to liberty but—

Senator GRAHAM. Okay. Well, the last time I checked—

Judge KAVANAUGH. Does not have specific—

Senator GRAHAM [continuing]. Liberty—

Judge KAVANAUGH. Yes.

Senator GRAHAM [continuing]. Did not equate to abortion. The Supreme Court said it did. But here is the point: What are the limits on this concept? You have five, six, seven, eight, or nine judges. What are the limits on the ability of the Court to find a penumbra of rights that apply to a particular situation? What are the checks and balances of people in your business, if you can find five people who agree with you, to confer a right, whether the public likes it or not, based on this concept of a penumbra of rights? What are the outer limits to this?

Judge KAVANAUGH. The Supreme Court, in the *Glucksberg* case, which is in the late 1990s—and Justice Kagan talked about this at her hearing—is the test that the Supreme Court uses to find unenumerated rights under the Liberty Clause of the Due Process Clause of the Fourteenth Amendment, and that refers to rights

rooted in the history and tradition of the country so as to prevent—

Senator GRAHAM. So let me ask you this. Is there any right rooted in the history and traditions of the country where legislative bodies could not intercede on behalf of the unborn before medical viability? Is that part of our history?

Judge KAVANAUGH. The Supreme Court precedent has recognized the right to abortion. I am—

Senator GRAHAM. But I am just saying what part of the history of—I do not think our Founding Fathers—people mentioned our Founding Fathers. I do not remember that being part of American history, so how did the Court determine that it was?

Judge KAVANAUGH. The Court applied the precedent that existed and found in 1973 that under the Liberty Clause—

Senator GRAHAM. Yes, but before 1973—I mean, when you talk about the history of the United States, the Court has found that part of our history is for the legislative bodies not to have a say about protecting the unborn until medical viability. I do not—I have not—whether you agree with that or not, I do not think that is part of our history. So, fill in the blank. What are the limits of people in your business applying that concept to almost anything that you think to be liberty?

Judge KAVANAUGH. And that is the concern that some have expressed about the concept of unenumerated rights.

Senator GRAHAM. Well, here is the concern I have. You got one word that has opened up the ability for five people to tell everybody elected in the country you cannot go there, that this is an “off limits” in the democratic process. Whether you agree with *Roe v. Wade* or not, just think what could happen, down the road, if five people determine the word liberty means “X.” The only real check and balance is a constitutional amendment to change the ruling. Do you agree with that?

Judge KAVANAUGH. Senator, I am not going to comment on potential constitutional amendments or what—

Senator GRAHAM. But—okay. If we pass a statute tomorrow in Congress saying that the Congress can regulate abortions before medical viability, would that not fly in the face of *Roe v. Wade*?

Judge KAVANAUGH. So the Supreme Court has said that a woman has a constitutional right to—

Senator GRAHAM. Does that not trump a statute?

Judge KAVANAUGH. The Supreme Court precedent—

Senator GRAHAM. So all of us could vote because five people have said liberty means right to—the State has no interest here, compelling interest before medical viability, that we could pass all the laws we want, it does not matter because they fall. The only way we can change that is a constitutional amendment process that requires two-thirds of the House, two-thirds of the Senate, and three-fourths of the State. Is that a pretty correct legal analysis?

Judge KAVANAUGH. When the Supreme Court has issued a constitutional ruling—

Senator GRAHAM. Then you can always change it by constitutional amendment?

Judge KAVANAUGH. That is the—

Senator GRAHAM. So here is the point: Whether you agree with *Roe v. Wade* or not, the reason some legal scholars object to this concept is it is breathtakingly unlimited. Whatever five people believe at any given time in history in terms of the word liberty, they can rewrite our history and come up with a new history. And I think the best way for democracies to make history, is to have the Court interpret the Constitution, be a check and balance on us, but not take one word and create a concept that is breathtaking in terms of its application to restrict the legislative process.

Now, whether you agree with me or not, I think there is a genuine debate. And you would agree with me if it was something you liked or you were supporting that got shut out, or you opposed you could not do. So I hope that one day the Court will sit down and think long and hard about the path they have charted, and not just about abortion, whether or not it is right for people in your business on any given day based on any given case of controversy to say that the word liberty, looking at the history of the country and the penumbra of rights, means "X," and it shuts out all of us who have gone to the ballot box and gone through the test of being elected. All I ask is that you think about it.

Also, I want to ask you about something else to think about. You said you were in the White House on 9/11. Is that correct?

Judge KAVANAUGH. That is correct, Senator.

Senator GRAHAM. Did you believe America was under attack?

Judge KAVANAUGH. Yes. It was under attack.

Senator GRAHAM. Right. Do you believe that if the terrorists could strike any city in the world and they had—like you get one shot at the world, based on your time in the White House, do you believe they would pick an American city probably over any other city?

Judge KAVANAUGH. Well, it certainly seemed that New York and Washington, DC, were the two targets.

Senator GRAHAM. The only reason I mention that, to my good friends—and they are—who believe that America is not part of the battlefield, it sure was on 9/11. The law. If an American citizen goes to Afghanistan and takes up the fight against our forces and they are captured in Afghanistan, the current law is you can be held as an enemy combatant in spite of your citizenship. Is that correct? Is that the *Hamdi* decision?

Judge KAVANAUGH. That is what the Supreme Court said in the *Hamdi* decision with—

Senator GRAHAM. Okay.

Judge KAVANAUGH. Appropriate due process findings.

Senator GRAHAM. Absolutely, appropriate due process findings. Here is what I want people in your business to think about. Are you aware of the fact that the radical Islamic groups are trying to recruit Americans to their cause, that they are over the internet trying to get Americans to take up jihad?

Judge KAVANAUGH. Yes.

Senator GRAHAM. The likelihood of an American citizen joining their cause is real because it has happened in the past. The likelihood of it happening in the future I think is highly likely. If an American citizen attacking the embassy in Kabul can be held as an American citizen, here is the question: Can an American citizen,

collaborating with other terrorists who are not American citizens, be held as an enemy combatant for attacking the capital? And if they cannot, you are incentivizing the enemy to find an American citizen because they have a privilege that no other terrorist would have.

So you said something that was very compelling to me, that you apply the law and you have to understand how it affects people, right?

Judge KAVANAUGH. Yes, sir.

Senator GRAHAM. I hope you will understand that this war is not over, that the war is coming back to our shores. It is just a matter of time before they hit us again because we have to be right all the time and they have to be right one time. I hope we do not create a process where if you can come to America, you get a special deal. It makes us harder for us to deal with you and find out what you know. We treat you as a common criminal versus the warrior you have become. That is just my parting thought to you. And you will decide the way you think is best for the country.

Is there anything you want to say about this process that would help us make it better? Because you are going to get confirmed. I worry about the people coming after you. Every time we have one of these hearings, it gets worse and worse and worse. You have sat there patiently for a couple of days. My colleagues have asked you tough questions, sometimes unfair questions. Your time is about over. You are going to make it. And you would probably be smart not to answer at all, but I am going to give you a chance to tell us what could we do better, if anything?

Judge KAVANAUGH. Senator, I am just going to thank all the Senators on the Committee and all the Senators I met with who are not on the Committee for their time and their care. And, as I said, each Senator is committed to the public service and the public good in my opinion, and I appreciate all the time of the Senators. And I am on the sunrise side of the mountain and an optimist about the future, Senator.

Chairman GRASSLEY. Before we break, I want to bring up some information because I was wondering how long it would take the National Archives to get the material that we needed because you have heard several times that the Archives, that is their responsibility. The National Archives has 13 archivists who handle George W. Bush's Presidential records. They can only review about 1,000 pages per week. We could not have gotten these documents for 37 weeks if we did not get President Bush's team to expedite the review process for the benefit of all Members of the Committee. We received all the documents we would have received from the archivists, just at a faster time.

We will now take 15 minutes and resume at 12:22.

[Whereupon the Committee was recessed and reconvened.]

Chairman GRASSLEY. Tell me when you are ready, Judge.

Judge KAVANAUGH. I am ready.

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Thanks, Mr. Chairman.

Let me say at the outset, Mr. Chairman, thank you for the way you have presided over this Committee. It has been a challenge for the last several days, but you and I have been through battles in

the past, both as allies and as enemies, and you have always shown fairness, and I appreciate the fairness you have shown during the course of this hearing.

I also want to say a word about the protesters who have interrupted the hearing from time to time. As I said at the outset, this is one of the costs of democracy, and it is one which the Senate Judiciary Committee, which has been constructed for the purpose of guarding our Constitution, should value even when it is inconvenient. I could go into a long riff here but I will not, in the interests of time. I do not know who organized these protests or why they did it, but thank goodness in the United States of America, where we venerate free speech, these things can happen.

I want to thank the men and women of the Capitol Police and those who have been in charge of our security during this period of time, as well.

I would like to also ask for two things to be entered into the record. First is, statements in opposition to the Kavanaugh nomination from several groups.

Senator CORNYN [presiding]. Without objection.

Senator DURBIN. Thank you very much.

[The information appears as submissions for the record.]

Senator DURBIN. And second, Senator Grassley closed the earlier, last session with some comment. I will have to read it in its entirety to understand, but I think he said, or someone said it would take 37 weeks for the National Archives to go through Judge Kavanaugh's record.

I would like to enter into the record a letter from August 2nd, 2018, from Gary Stern, General Counsel to the National Archives, which concludes with the following statement: "By the end of October 2018, we would have completed the remaining 600,000 pages that we should be considering and unfortunately cannot."

So I would ask consent to enter that letter into the official record.

Senator CORNYN. Without objection.

Senator DURBIN. Thank you very much.

[The information appears as a submission for the record.]

Senator DURBIN. Judge Kavanaugh, I remember when I got the results from my bar exam I thought to myself, well, that will be the last time I will ever have to sit down and take an exam. So at the end of this day, this may be your last formal exam in terms of your legal career, and I am sure there is a sense of expectation, hopefulness, and relief in that.

I want to thank your wife for being here and for bringing those beautiful daughters. I hope someday they will understand what happened to their father in a few days here, but thank you so much for being part of this hearing.

Judge, when I started this, I said this is not just about filling a key vacancy on the Supreme Court, a deciding vote on the Court, a vote which may decide life and death issues on important cases. It is more than the question of release of documents. It really goes to the heart of where we are in America at this moment. You have been nominated to be a Justice on the United States Supreme Court by President Donald Trump. We have to take your nomination in the context of this moment in history.

We are at a moment where the President has shown contempt for the Federal judiciary unlike any President we can recall. He has shown disrespect for the rule of law over and over again. He has repeatedly ridiculed the Attorney General of the United States, whom he chose. He has called for blatant partisanship in the prosecution of our laws. He is a President who is the subject of an active criminal investigation, an investigation which he has apparently sought to obstruct repeatedly. He is a President who has been characterized in this hearing publicly, on the record, as an unindicted co-conspirator. And in the last 2 days, during the course of this hearing, there have been two incredible events, the release of a book and an article in *The New York Times* which remind us again what a serious moment we face in the history of the United States.

And that is why your nomination is different than any other. I cannot recall any that have ever been brought before us in this context. I cannot recall so many people across the United States following this as carefully—perhaps Clarence Thomas. At that time, everybody in America was tuned in.

But it is in the context of the Trump Presidency that we ask you these questions, in anticipation that you may face issues involving this President which no other Supreme Court has been asked to face.

And that is why I want to address your view of the power of this President, the authority of this President, because it is an important contemporary question which, of course, has application for beyond his Presidency.

You have quoted me several times—thank you—yesterday regarding the independent counsel statute. As our Republican colleagues are fond of reminding us, judges are not legislators. So, to state the obvious, my opposition or any legislator's opposition to re-authorizing a statute is very different from a judge's opinion on whether a statute is unconstitutional.

To get to the heart of the matter, the reason why we continue to return to the *Morrison v. Olson* decision is because of its significance in light of the Trump Presidency. The reason we are so interested in your view that that case was wrongly decided has little to do with the statute that was in question. It has everything to do with your views on the power of the Executive and what that would mean for this President and future Presidents if you join the Supreme Court.

Justice Scalia's *Morrison v. Olson* sole dissent embraces the so-called unitary executive theory which grants sweeping powers to the President of the United States. Scalia said, and I quote, "We should say here that the President's constitutionally assigned duties include complete control over investigation and prosecution of violation of law, and that the inexorable command of Article II is clear and definite. The executive power must be vested in the President of the United States."

In this age of President Donald Trump, this expansive view of Presidential power takes on added significance. Earlier this year the Senate Judiciary Committee reported a bipartisan bill to protect the independence of the special counsel, Bob Mueller. Several Republican Senators who are here today cited Scalia's dissent to

justify their opposition to a bill protecting the special counsel, with one even saying, and I quote, “Many of us think we are bound by Scalia’s dissent.” At the time, I joked and said, instead of dealing with stare decisis, we are dealing with Scalia decisis.

Given your views on *Morrison v. Olson*, we are obviously worried that you will feel bound by this dissent by Antonin Scalia if President Trump decides to attempt to fire the special counsel, Bob Mueller.

It does not stop there. You cited Scalia’s dissent in the case involving the Consumer Financial Protection Bureau, where you gutted that agency; and in the 2011 *Seven-Sky* case, you dissented from a decision upholding the Affordable Care Act and made a breathtaking claim of Presidential power which has been repeated over and over again, and you said, “Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.” Your words.

Of course, the unitary executive theory was the basis for President Bush’s December 30th, 2005, signing statement claiming the authority to override the McCain Torture Amendment. Yesterday, I asked you what comments you made on the signing statement as President Bush’s staff secretary. Senator Feinstein asked a similar question this morning. What you told me was, “I can’t recall what I said. I do recall there was a good deal of internal debate about that signing statement, as you can imagine. I do remember it would be controversial internally.” It is hard to imagine you cannot remember that controversial issue.

Given our concerns about your views on Executive power, it is important for you at this moment, please, to clarify for us the power of the Presidency in this age of Donald Trump.

Judge KAVANAUGH. Senator, thank you. First, thank you for your comments about my wife and daughters. My daughters will return this afternoon for a return engagement so they will experience democracy once again in action, and I appreciate that.

On *Morrison v. Olson*, a couple of things at the outset. First, that case did not involve the special counsel system. I have written repeatedly that the traditional special counsel system, which we have now and have had historically, is a distinct system appointed by the Attorney General. *Morrison* has nothing to do with that. That dealt with the old independent counsel statute, as you said, which expired in 1999 under overwhelming consensus that that statute was inappropriate, unrestrained, unaccountable, as you said.

Second, *Morrison*, Justice Scalia’s dissent, that does not affect the precedent of *Humphrey’s Executor*. *Humphrey’s Executor* is the Supreme Court precedent that allows independent agencies to exist. Those independent regulatory agencies continue to exist, of course. So both on the independent agency side, those are unaffected; on the special counsel side, that is unaffected.

You mentioned the *CFPB* case. My decision in that case would have allowed that agency to continue operating and performing its important functions for American consumers. The only correction would have been in the structure, because it was a novel structure

that was unlike every other independent agency that had been created previously.

As to the concept of prosecutorial discretion that is referred to in the 2011 case, that is a traditional concept of prosecutorial discretion that is recognized in the executive branch. The limits of it are uncertain. That has arisen in the immigration context with President Obama. There are debates about what the limits are. Those are not finally determined. But the basic concept of prosecutorial discretion is all I was referring to there.

I have made clear in my writings that a court order that requires a President to do something, or prohibits a President from doing something under the Constitution or laws of the United States is the final word in our system, our separation of powers system. That is *Cooper v. Aaron*. That is *Marbury v. Madison*. That is *United States v. Richard Nixon*. That is an important principle.

And finally, I would say that the question of who controls the Executive power within the executive branch, the vertical question—you have the President at the top, you have independent agencies which exist consistent with precedent—is distinct from the question of what is the scope of the Executive power vis-a-vis Congress.

On that latter question, the scope of Executive power vis-a-vis Congress, I have made clear in the context of national security, the *Youngstown* framework; in the context of administrative law, my cases questioning unilateral executive rewriting of the law; in the criminal law where I have reversed convictions; that I am one not afraid at all, through my record of 12 years, to invalidate Executive power when it violates the law.

Senator DURBIN. Judge, let me ask you this, because you have referred to the *Youngstown* case in the context of a war and a decision by a President that was immensely unpopular.

Judge KAVANAUGH. Yes.

Senator DURBIN. Or it might have been popular, I should say, and the decision of the Supreme Court, which could have been very unpopular at that moment in history.

What I am trying to ask you is, in historic context, do you understand where we are as a Nation now, when books are being written about how democracy dies, when fear of authoritarian rule and the expansion of the executive branch is rampant in this country, with illustrations that are found around the world, why we are asking you over and over again to give us some reassurance about your commitment to the democratic institutions of this country in the face of a President who seems prepared to cast them aside, whether it is voter suppression, the role of the media? Case after case, we hear this President willing to walk away from the rule of law in this country. That is the historic context which this is in, not a particular case but a particular moment in history.

Judge KAVANAUGH. Sir, my 12-year record shows, and my statements to the Committee show, and all my teaching and articles show—

[Disturbance in the hearing room.]

Judge KAVANAUGH. Show my commitment to the independence of the judiciary as the crown jewel of our constitutional republic. My citing of Justice Kennedy, for whom I worked, who left us a legacy of liberty but also a legacy of adherence to the rule of law in the

United States of America, no one is above the law in the United States. That is a foundational principle that I have talked about, coming from Federalist 69, coming from the structure of the Constitution. We are all equal before the law in the United States of America.

And I have made clear my deep faith in the judiciary. The judiciary has been the final guarantor of the rule of law. As I said in my opening, the Supreme Court is the last line of defense for the separation of powers and for the rights and liberties guaranteed by the Constitution and laws of the United States.

Senator DURBIN. You see, that is why the unitary theory of the executive is so worrisome. What you have said is what I want to hear from a co-equal and very important branch of our Government. But what you have said in relation to *Morrison* suggests the President has the last word.

Judge KAVANAUGH. I have not said that, Senator, and I will reiterate something I said a minute ago, coming from *Cooper v. Aaron*, coming from *Marbury*. When a court order requires a President to do something or prohibits a President from doing something under the Constitution or laws of the United States, under our constitutional system, that is the final word.

Senator DURBIN. Let me ask you one last time a question you knew I would ask about your testimony in 2006. I am just struggling with the fact that when I ask you about this issue of detention, interrogation, and torture, you gave such a simple declarative answer to me and said that I was not involved and am not involved in the questions about the rules governing detention of combatants.

We have found at least three specific examples where you were, three: your discussions about the access to counsel for detainees; your involvement in the *Hamdi* and *Padilla* cases, and your involvement with President Bush's signing statement on the McCain Torture Amendment.

Judge Kavanaugh, you say that words matter. You claim to be a textualist when you interpret other people's words, but you do not want to be held accountable for the plain meaning of your own words. Why is it so difficult for you to acknowledge your response to the question and acknowledge that at least your answer was misleading, if not wrong?

Judge KAVANAUGH. Senator, you had a concern at the time of the 2006 hearing, which was understandable, whether I had been involved in crafting the detention policies, the interrogation policies that were so controversial, that the legal memos had been written in the Department of Justice that were very controversial. As you know, and as the Committee knew then, two judicial nominees to the courts of appeals had been involved in working on some of the memos related to that program. Senator Feinstein led the Intelligence Committee investigation of that matter, produced a massive report, a large, unclassified report, and apparently an even larger classified report. The Justice Department Office of Professional Responsibility produced a long report about all the lawyers who were involved. I was not involved in crafting those policies.

Senator DURBIN. Do you deny being involved in the three specific areas involving detention and interrogation which I have just read to you? Do you say that you had nothing to do with the *Hamdi* and

Padilla cases, that you were not involved in the conversation about access to counsel for detainees, that you were not involved in President Bush's decision on the signing statement on the McCain Torture Amendment? Are you saying that none of those things occurred?

Judge KAVANAUGH. Senator, what I have made clear is I understood your question then, and I still understand it now, and I understood my answer then, and I still understand it now to be about those legal memos. I was not read into that program. I was not involved. My name does not appear in Senator Feinstein's report, which is—

Senator DURBIN. That is not the question I asked. Do you deny the three specific instances where you were involved in questions involving detention and interrogation?

Judge KAVANAUGH. That was the question that I saw that you asked at the time of that hearing, and my answer was then and is now, as Senator Feinstein's report shows, and as the Professional Responsibility report shows, I was not read into that program.

Senator DURBIN. That was not—I did not ask you about that program. I asked you about the three specific instances.

Judge KAVANAUGH. The current question—

Senator DURBIN. You keep answering, oh, I was not—Feinstein is my defense, she came to my rescue. She was talking about something else. I have asked you about three specific instances where we have written proof and sworn testimony from you now that you were involved in these three things, and all of them relate to detention and interrogation, which you gave me your assurance you were not involved in.

Judge KAVANAUGH. Senator, I am going to distinguish two things. One is what you were asking me in 2006, and my testimony then was accurate and was the truth. What you are asking me now is, for example, on the signing statement, as we discussed in your office, I made clear that, of course, as staff secretary, everything that went to the President for a 3-year period, with a few covert exceptions, would have crossed my desk on the way from the counsel's office or the policy advisor or wherever it was going, and would have made its way to the President's desk, and that includes that signing statement. So—

Senator DURBIN. Well, let me just close. I do not think the staff secretary to the United States President is a file clerk. What you have explained to us over and over again, this was a formative moment in your public career. You were giving constitutional issue advice, as well as making substantive changes in drafts that were headed for the President's desk, and one of them involved John McCain's Torture Amendment. And that, to me, is involved directly on detention and interrogation. And I think, unfortunately, your answer does not reflect that.

Chairman GRASSLEY [presiding]. If you want to speak to that, then we will go to Senator Lee.

Judge KAVANAUGH. I just wanted to close, Mr. Chairman, by thanking Senator Durbin. And in response to his questions about the judiciary, the role of the judiciary, he gave me a book when we met, a biography of Frank Johnson. And that Friday night, after a lot of Senate meetings and a lot of practice sessions, I went home,

read the whole thing, and I appreciate it. It is a good model of judicial independence. It is a great story about someone who was a judge in the south in the civil rights era who stood firm for the rule of law, and so a good model, and I thank Senator Durbin for giving me the book.

Senator DURBIN. Well, I thank you.

Chairman GRASSLEY. Senator.

Senator DURBIN. If I could just say one word, thank you, Judge Kavanaugh. That night, obviously, the Nationals were not playing.

Judge KAVANAUGH. Yes.

[Laughter.]

Chairman GRASSLEY. Senator Lee.

Senator LEE. Thank you, Mr. Chairman.

Thank you again, Judge Kavanaugh, for your willingness to answer our questions.

I want to follow up a little bit on this last line of questioning from Senator Durbin. Senator Durbin and I actually, notwithstanding the fact that we come from different parts of the country, have different political ideologies, come from different political parties, we share many views in common, and this is one area, indefinite detention, where he and I are concerned about the Government not overreaching. Only, as I look at this, I think this cuts in your favor, not against you. Tell me if I am missing something.

In the first place, what you were asked about was whether or not you were involved in crafting the policies that would govern detention of enemy combatants. Is that right?

Judge KAVANAUGH. That is correct.

Senator LEE. And that was a classified program, classified at a very high level, presumably compartmentalized such that you would have had to have been read into that program in order to participate in that process. Is that right?

Judge KAVANAUGH. I believe that is correct. Read in, I was not necessarily using the formal sense of that, but what I meant is I was not part of that program.

Senator LEE. Okay, but that is a binary issue. You were either involved in the development of that policy or you were not.

Judge KAVANAUGH. That is correct.

Senator LEE. And you were not.

Judge KAVANAUGH. That is correct.

Senator LEE. And Tim Flannigan, who was I believe at the time the White House Counsel—

Judge KAVANAUGH. He was the Deputy Counsel.

Senator LEE [continuing]. The Deputy Counsel, has confirmed that you were not involved in that.

Judge KAVANAUGH. That is correct.

Senator LEE. We have your word and the word of the then-Deputy White House Counsel.

Then there is a separate issue, I guess one could argue a related issue, but a separate—

[Disturbance in the hearing room.]

Senator LEE. I assume that will not be counted against me there.

Chairman GRASSLEY. Yes, it will. It will be counted.

Senator LEE. Oh, okay. Well, then I will have to speak more quickly.

When we talk about being read into, that is a colloquial term that we sometimes refer to. It is government-speak that talks about being cleared to discuss certain classified matters. In any event, you were not brought into the development of this policy.

Judge KAVANAUGH. That is correct.

Senator LEE. Second, there was a separate, arguably related but a distinct issue involving a meeting where you were asked for your opinion about how Justice Kennedy might react to certain legal arguments that people in the administration were pushing. Is that right?

Judge KAVANAUGH. That is correct.

Senator LEE. And you answered that question.

Judge KAVANAUGH. I said that indefinite detention of an American citizen without access to a lawyer, which at the time was what was happening in that particular case, would never fly with Justice Kennedy.

Senator LEE. And I happen to agree with you on that, and it seems like a fairly unremarkable proposition to me.

I do not think anyone disputes that that argument had problems with it, that that argument would not fly with Justice Kennedy, and I therefore have difficulty seeing how this cuts against you. As someone who believes in civil liberties and who shares many of the same concerns that have been discussed by many of my Democratic colleagues, I think the advice you offered here was accurate. I think it was good advice. It certainly is not inconsistent with the statement you provided, which was that you were not involved in the development of the policy governing the program.

Sometimes as lawyers we are called upon to offer litigation strategy. Sometimes we are called upon to handle litigation. Other times as lawyers, particularly in the Government, we might be called upon to develop a policy. Here, you were involved in neither handling the litigation directly nor in developing the policy. You went to a meeting, somebody asked that question, you gave them your answer.

Judge KAVANAUGH. That is correct, and it was about something entirely separate from that policy or the legal memos.

Senator LEE. Separate and distinct from that policy. It was about a litigating position that dealt sort of in the same universe but not with that policy.

Judge KAVANAUGH. That is correct.

Senator LEE. I therefore have great difficulty in seeing that you did anything but the right thing and that you answered this question in any way other than with the truth, the whole truth, and nothing but the truth.

Let me turn next, while we are talking about colleagues with whom I often agree and with whom I often work across the aisle, Senator Booker is a good friend of mine. He is a colleague. He and I work together on a lot of issues. He raised an issue last night that I wanted to touch on with you.

He raised an issue related to some emails. I was concerned at the time that you did not have the emails in front of you, and I think that is very important for any witness in any proceeding to be given access to the documents, documents that in this case were prepared some 18 years ago. You as a lawyer have no doubt been

involved in the creation of many hundreds of thousands, possibly millions of documents. So to ask you to recall from memory something you wrote 18 years ago is going to be difficult.

In any event, these emails deal with an issue involving some questions surrounding a Supreme Court case called *Adarand Constructors v. Mineta*. So let us refer to a document, Document 00289596. As I understand it, you were being asked in this instance to provide some advice on what might happen if a particular argument were presented to the Supreme Court on the merits. You looked at some Department of Transportation contracting regulations, and as I understand it—correct me if I am wrong—if I have understood it correctly, the Government was considering making a series of arguments before the Supreme Court, and you did what a lawyer should do when advancing an argument to the Court, you counted to five. You identified five Supreme Court Justices who you believed would not accept the Government's argument in defense of those DOT regulations. Is that right?

Judge KAVANAUGH. That is correct, under the precedent that existed at the time. The *Croson* precedent I think was the most relevant precedent.

Senator LEE. And yet at the time, the Supreme Court of the United States had already granted review of the case, granted certiorari, meaning that the Supreme Court, unlike most appellate courts, is in charge, with very, very few exceptions remaining today, of its own docket. It decides which of the 10,000 or so cases that want to go to the Supreme Court each year will in fact be reviewed by the Court. The Court had already granted certiorari, granted a review in that case. Is that right?

Judge KAVANAUGH. That is correct, I believe.

Senator LEE. So, as I read these emails, I read your argument as saying, okay, number one, you cannot count to five here because I am identifying—I am Brett Kavanaugh and have identified that there are grave doubts as to whether Chief Justice Rehnquist, Justice Scalia, Justice Thomas, Justice Kennedy, or Justice O'Connor can embrace these arguments in defense of these Department of Transportation regulations. But the Court has already granted certiorari, so what to do?

As I understand the emails—and correct me if I am wrong—you recommended a course of action that would allow the Government to make its case, but to make its case in a way that would allow the Court to decide that perhaps it should not have granted review in the case. Am I correct so far?

Judge KAVANAUGH. That is correct, Senator.

Senator LEE. And what is that called when the Court decides that it should not have granted a case?

Judge KAVANAUGH. Dismissing as improvidently granted, or colloquially known as digged.

Senator LEE. As a dig.

Judge KAVANAUGH. Yes.

Senator LEE. So you came up with a strategy for the purpose of encouraging the Court to dig a case that it had previously granted because you believed the Government was going to lose and the regulations at issue were going to be invalidated, and you did not

want the Government to have to endure that. Did they accept your arguments?

Judge KAVANAUGH. The Supreme Court did, yes.

Senator LEE. So the Government, the Bush administration, the Solicitor General's Office followed your advice and wrote the arguments as you had prescribed, thus prompting a dig. And as a result, the regulations stood. Is that not right?

Judge KAVANAUGH. I believe that is so, Senator.

Senator LEE. They stood where they otherwise would have fallen.

Judge KAVANAUGH. That is right.

Senator LEE. Okay. So, here again, I have a hard time seeing this as anything other than something that helps you, that helps you not just with Republicans but that helps you with Democrats. You saw a problem with an argument the Government was making, you identified that problem, you offered a remedy, that remedy was embraced by the Solicitor General's Office and the Department of Justice, and the Court did exactly as you wanted it to do, and as a result the regulation stood. The regulation that Senator Booker is concerned about, was wanting to make sure was not under attack unfairly was, in fact, preserved. I have a hard time seeing why that should not want to make him vote more for you. In fact, I think Senator Booker really should vote for you. I will have that conversation with him later.

Okay. One additional response to last night's round of questions. Last night, at the end of a grueling day, my friend and colleague, Senator Harris from California, asked you whether you had ever spoken to anyone at the law firm of Kasowitz, Benson and Torres about the Mueller investigation. She even implored you to be sure about your answer, which I suppose is good advice in any context, but it can perhaps sound somewhat ominous.

The issue with this question is that Kasowitz, if I understand it correctly, is a law firm that includes 350 lawyers in nine U.S. cities. I am guessing that not even Mr. Kasowitz himself, who started the firm, can even name every single attorney. Could you name every attorney that works at that firm?

Judge KAVANAUGH. No.

Senator LEE. As you sit here, can you rule out the possibility that you may have close friends, former law clerks, former law school classmates who might work or who might have worked at that firm at some point?

Judge KAVANAUGH. I do not know who works at that firm other than a few people I am aware of just from the public. I gather Senator Lieberman works at the firm. I did not know that last night.

Senator LEE. That is correct. I did not, either, but I found that out last night. Can you name the nine cities where this firm has offices?

Judge KAVANAUGH. No.

Senator LEE. So my colleague's question may be a very direct question, but it is something that I think in this circumstance is unfair, if you cannot identify the people that she has in mind, or you do not even know who works there.

So let me ask you something that may get at her underlying concern but in a way that I think is fair, because I think each of my colleagues, when they have concerns, when they have questions,

they deserve to be able to have their concerns addressed. So let me ask you in a way that I think is fair.

Have you made any promises or any guarantees to anyone about how you would vote on any case that might come before you if you are confirmed to the Supreme Court of the United States?

Judge KAVANAUGH. No.

Senator LEE. Have you had any improper conversation with anyone about the Mueller investigation?

Judge KAVANAUGH. No.

Senator LEE. Let's talk a little bit about Executive power. Is the President of the United States absolutely immune from any and all legal action, whether civil or criminal?

Senator LEE. Senator, the foundation of our Constitution was that, as Hamilton explained in Federalist 69, the Presidency would not be a monarchy, and it specified all the ways that under the Constitution the President is not above the law, no one is above the law in the United States of America. The President is subject to the law. The Supreme Court precedent in cases such as *Clinton v. Jones*, *United States v. Richard Nixon* establishes those principles. Cases like *Youngstown* established it in the official capacity, and *Marbury v. Madison* in official capacity.

So the President has authority under the Constitution, the Executive power under the Constitution. The President, as established by the Framers of the Constitution, is not above the law. No one is above the law in the United States of America.

Senator LEE. As a practical matter, who investigates the President?

Judge KAVANAUGH. As a practical matter, traditionally, as I have written about in the Georgetown Law Journal article and written about elsewhere, when there is an allegation of wrongdoing by someone in the executive branch as to whom there might be a conflict of interest if an ordinary Justice Department process took place, there has been traditionally the appointment by the Attorney General of a special counsel. That has gone back for 100 years or so of that kind of outside counsel appointed. Of course, we saw that in Watergate, but we have seen it lots of other times where special counsels have been appointed for particular matters where there is otherwise a conflict of interest or perceived conflict of interest of some kind.

Senator LEE. Now, I have had colleagues who have worried about your view that *Morrison* was wrongly decided. Your view, just to be clear, is that *Morrison* applies only in a special context no longer relevant here. Is that right?

Judge KAVANAUGH. That is correct.

Senator LEE. What context is that?

Judge KAVANAUGH. That is the context of the old independent counsel statute, which is distinct from the special counsel system. The old independent counsel statute had a lot of features to it, and that statute was viewed by the Congress when it reconsidered it in 1999 as being unrestrained, unaccountable, impermissible, and the statute was not renewed, and the *Morrison* case was thus a one-off case, as I see it, about a one-off statute that no longer exists.

Senator LEE. And that is why you can talk about it.

Judge KAVANAUGH. That is why Justice Kagan can talk about it, and that is why I also have talked about it.

Senator LEE. These are the vestigial remains of a once-existing but no longer—it is a dinosaur in legal terms.

What about your opinion in *PHH*? Now, *PHH* is really limited to independent agencies, right?

Judge KAVANAUGH. That is right. The governing precedent on independent agencies—so think the Federal Energy Regulatory Commission or the Federal Communications Commission or the Securities and Exchange Commission, a whole range of independent agencies governed by *Humphrey's Executor*, the 1935 precedent of the Supreme Court which established that those are permissible. They have ordinarily, traditionally been multi-member bodies, and that was a problem I thought in the *Consumer Financial Protection Bureau* case, that it was only a single-director independent agency, but the remedy would still have allowed that agency to continue operating and performing its consumer functions and protecting consumers from improper behavior.

Senator LEE. What is the biggest single difference between the independent counsel statute, which is now a dinosaur, and the special counsel regulations, which are still in effect?

Judge KAVANAUGH. Well, there are a whole host of differences. The appointment mechanism was different, the removal mechanism was different, the jurisdictional mechanism was different, how Justice Department policies applied was different. There were so many different features of that old independent counsel statute that combined to convince Congress that that statute was a mistake, worse than a mistake really, and also showed why the statute was inconsistent with our constitutional traditions.

Senator LEE. And the reason for that is because when you create an entity within the Federal Government, within the executive branch, it is not accountable to anyone. It sounds appetizing. It sounds appealing to some at the outset to say, well, we are insulating it from political forces, but what that really means is it is not accountable to anyone. It is not accountable to anyone who is, in turn, elected. Was that not really the problem Justice Scalia was pointing out in *Morrison*?

Judge KAVANAUGH. That is what he pointed out. It is what Senator Durbin and many others on this Committee and elsewhere pointed out after experience with the statute for some years, and then seeing how it operated in practice. I think there was overwhelming bipartisan agreement that the statute did not operate in a good way and that the flaws in the statute's operation stemmed from some of these features of its design that you just discussed, which distinguished it from the traditional special counsel system that we had had, and then starting in 1999 have had since 1999 to the present.

Senator LEE. What were we dealing with in Watergate, a special counsel or an independent counsel?

Judge KAVANAUGH. It was the traditional special counsel at the time. We have had historically the kind that we now have and have had since 1999, the traditional special counsel system.

Senator LEE. So he was appointed by regulation, not by statute. Nixon fired him, and Nixon fired Archibald Cox, and we all know

how that turned out. I am not going to ask you to respond to this but it seems to me that this remains an effective tool. It is not as though the absence of the independent counsel statute renders the President completely immune, because that simply is not the case.

You have never taken a position on the immunity question, on the question of whether the President is immune from prosecution.

Judge KAVANAUGH. Well, just to be technically accurate, the question is deferral, not immunity. So the constitutionality of indicting a sitting President, I have never taken any position on that. The Justice Department for 45 years has taken the position that a sitting President may not be indicted while in office, and that is the Justice Department's longstanding position under Presidents of both parties. But I have not taken a position on the constitutionality of that.

Senator LEE. And among academics and practitioners of every ideological stripe that I know of, that is where the dispute is, not whether there is absolute immunity so much as the timing of it.

Judge KAVANAUGH. It is all about the timing. It is not an immunity question. Correct, Senator.

Senator LEE. There are people on both ends of the ideological spectrum who take different positions on that.

Chairman GRASSLEY. Let me—we are going to—

[Disturbance in the hearing room.]

Chairman GRASSLEY. Before I give the schedule, because we are soon going to break for lunch, I have had another request for documents. So I would like to give you an update on that.

After two deadlines that only Senator Klobuchar honored, my staff stayed up all night pushing the Department of Justice and the former President to make public every committee confidential document the Minority has requested, including a request after midnight. Senator Leahy made a request today, and we have pushed the Department of Justice and the former President—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. To honor this request. They have agreed—

[Disturbance in the hearing room.]

Chairman GRASSLEY [continuing]. And will be producing the documents imminently. And so, like with Justice Gorsuch's confirmation, the process that I set up works when it is followed.

We will now take a 30-minute lunch break.

Senator CORNYN. Mr. Chairman, may I ask a brief question about that?

[Disturbance in the hearing room.]

Chairman GRASSLEY. Yes.

[Disturbance in the hearing room.]

Senator WHITEHOUSE. I have a question about that, too.

[Disturbance in the hearing room.]

Senator CORNYN. I could not hear everything you said, so I just want to clarify. It is my understanding that every document requested by any Senator that had previously been designated as "committee confidential" has now been vetted and made available to that Senator, or will be shortly.

Chairman GRASSLEY. Yes, including what Senator Leahy asked for today.

Before I read the schedule—oh, I am sorry. I did not mean to interrupt.

Senator CORNYN. No, I was just going to make the point that there is nothing that a Senator has requested that has not been made available to them and then been properly vetted with the Department of Justice and now is available to the public.

Chairman GRASSLEY. And before I make the announcement—

Senator WHITEHOUSE. On the schedule, Mr. Chairman?

Chairman GRASSLEY. Yes, you will be—go ahead.

Senator WHITEHOUSE. I think I am the lead-off batter when we return?

Chairman GRASSLEY. Yes, yes.

Senator WHITEHOUSE. I am told that we have a vote that is scheduled to begin at 1:45. They often do not begin exactly at 1:45. Could you please build in time so we can vote and come back here?

Chairman GRASSLEY. Well, do not go yet. We are going to accommodate you from this respect. We are going to take a 30-minute lunch break. It might be longer than that, so be alert, Judge.

There are two votes, but I am hoping you will vote first, come back, do your questioning, and then go back and vote on the second one, and I should probably come back with you unless I get some other Republican to come back, and I will do the same thing. Then we will proceed that way through the two votes.

Adjourned.

[Whereupon the Committee was recessed and reconvened.]

Senator TILLIS [presiding]. The Committee will come to order.

Senator Whitehouse.

Senator WHITEHOUSE. Welcome back, Judge Kavanaugh. Let me know when you are good.

Judge KAVANAUGH. I am ready. Thank you.

Senator WHITEHOUSE. Thank you. Judge Kavanaugh, journalists go to jail to protect sources, unless and until the source releases the journalist from their obligation of confidentiality. Will you now release from that obligation any journalist that you spoke with during and about the Starr investigation?

Judge KAVANAUGH. I am not sure I am understanding the question.

Senator WHITEHOUSE. There were journalists you spoke with during and about the Starr investigation. They are not disclosing what you spoke with them about because you are an undisclosed source. If you say do not worry, that is over, say whatever happened, then they are freed of that obligation, and we can find out about what you said to the journalists during and about the Starr investigation. Will you do that?

Judge KAVANAUGH. Senator, I spoke to reporters at that time at the direction and authorization—

Senator WHITEHOUSE. I know, but that is not what—that is the basis of my question. If you had not done that, I would not be asking this. You do not tell me that. The question is, will you release those reporters from whatever source confidentiality protection they feel you are owed? It is up to you to do that.

Judge KAVANAUGH. I spoke to reporters at the direction and authorization of Judge—

Senator WHITEHOUSE. You have just recited the exact same words that you answered me with beforehand. Will you release them—

Judge KAVANAUGH. Because that is relevant to the answer to the question if I could continue?

Senator WHITEHOUSE. What I would really get is an answer to the actual question I asked rather than a disquisition on the general topic area that I asked. This is a very simple thing. You either will or will not, or if you wish, this is—you are welcome to say, look, I would like to take that under advisement and I will get back to you after some reflection and consultation.

But our situation right now is that reporters may very well have information about what you told them during the Starr Clinton investigation that they are unwilling to divulge now because you were a confidential source. Can you release them from that by simply saying here publicly, look, anybody I talked to, say what I said. It is not a problem. I do not need confidentiality any longer.

Judge KAVANAUGH. Right. Senator, and if I could just 30 seconds on this, if that is okay.

Senator WHITEHOUSE. If it is 30 responsive seconds, I am all for that. Go for it.

Judge KAVANAUGH. Okay. I spoke to the reporters at the direction and authorization of Judge Starr, and, therefore, Judge Starr would be the one who would be part of that process. I was not acting on my own, so.

Senator WHITEHOUSE. No. No. Nope, that is not the way that reporters look at it. They look at it as you were the source. You were the one to whom they owe the obligation of confidentiality. Starr's name has not come up.

Judge KAVANAUGH. But I was in turn acting as part of that office, and, therefore, I guess the answer—

Senator WHITEHOUSE. But it is yours to divulge.

Judge KAVANAUGH. The answer to your question is because I cannot do that or do not think I should do that as a matter of appropriateness given that I was working for someone else who was running the office. I talked, of course, on the record and publicly—

Senator WHITEHOUSE. Okay, that answers it. You are unwilling to do it. I will move on. You have said today you have never taken a position on the constitutionality of indicting the President. Let me ask you, has there ever been any statutory law on Presidential immunity from an indictment or from due process of law?

Judge KAVANAUGH. There has been Justice Department law.

Senator WHITEHOUSE. Statutory law is the question. Has there ever been a statute that limited the—or protected the President against indictment or due process of law?

Judge KAVANAUGH. This has been Justice Department law, but not—I do not believe there has been statutory law.

Senator WHITEHOUSE. The Justice Department is not a law-making body, is it?

Judge KAVANAUGH. Oh, I think it does—I guess, the term all encompasses regulations, so, yes.

Senator WHITEHOUSE. Directive to the Department's own employees, correct? The OLC opinion is what you are talking about.

Judge KAVANAUGH. Well, that is encompassed, as I think about it, within the concept of law.

Senator WHITEHOUSE. Well, if you are going to the general concept of law perhaps, but there is no law that Congress has ever passed that protects a President from either indictment or due process of law, correct?

Judge KAVANAUGH. Congress has never passed something. The Justice Department—

Senator WHITEHOUSE. Has an opinion about it. I understand that.

Judge KAVANAUGH. Which is binding on everyone—

Senator WHITEHOUSE. On the Justice Department.

Judge KAVANAUGH. Mm-hmm.

Senator WHITEHOUSE. So, if, as a matter of law, a sitting President cannot be indicted, that must be constitutional law since there is no statutory law as a proposition of logic. Is that not correct?

Judge KAVANAUGH. That is not correct as I see it because if the Justice Department has law that binds that Justice Department, that is another source of law as well.

Senator WHITEHOUSE. Okay. So, let us go back to Georgetown Law Journal, 1998, and a conference you attended. And you spoke at it, and the panel that you were on was asked the question who on the panel believes as a matter of law that a sitting President cannot be indicted during the term of his office, and your hand shot up, and I think you have probably seen the film clip of that because it has been posted already. Did you mean as a matter of law the OLC guidance when you said that?

Judge KAVANAUGH. I know that right before the passage you read, I said there is a lurking constitutional question.

Senator WHITEHOUSE. Bingo.

Judge KAVANAUGH. The fact that I said that suggests that I did not have a position on the constitutional issue.

Senator WHITEHOUSE. Although you shot your hand up when you said—when the question as a matter of law a sitting President cannot be indicted came up. And it seems to me there are really only two kinds of law, unless you are really stretching the envelope here. One is laws that Congress passes, and the other is laws that are founded in the Constitution. An internal policy directive within the Department of Justice, I think it is a real stretch to call that law.

Judge KAVANAUGH. I appreciate that, Senator, but it has been a longstanding Justice Department position.

Senator WHITEHOUSE. Policy, yes.

Judge KAVANAUGH. And right before—

Senator WHITEHOUSE. And is that what you meant when you put your hand up, do you know?

Judge KAVANAUGH. That was 20 years ago, I do not know. I do know right before I said that that I said—

Senator WHITEHOUSE. Here is why it is important, is because you have been telling us, “I have never taken a position to say this was a constitutional principle. I have never taken a position on the Constitution on that question. I did not take a position on constitutionality period. I have never taken a position on constitutionality of indictment.” Those were all things you have said during the

course of this hearing, and it looks to me like that is a bit of a conversion.

Judge KAVANAUGH. Well, right before that, though, Senator, to be fair to me, I did say there is a lurking constitutional question, which implies—

Senator WHITEHOUSE. Yes, and—

Judge KAVANAUGH. And I—

Senator WHITEHOUSE. And then you were asked to answer that question by putting your hand up, and you put your hand up saying, “I.”

Judge KAVANAUGH. The question was—

Senator WHITEHOUSE. So, it seems to me you answered your question by putting that hand up the way you did.

Judge KAVANAUGH. But the question was not the Constitution. The question was law, and there was Justice Department position had been—

Senator WHITEHOUSE. So, that is what I am saying you are saying is you are saying that what you meant was the OLC policy position when you answered a question about law.

Judge KAVANAUGH. What I said is—I do not know what I was thinking in a panel 20 years ago, but I do know having looked at it that the question was about law, that the Justice Department position has been consistent for 45 years.

Senator WHITEHOUSE. As a matter of constitutional law, right? The Justice Department position reflects a view of constitutional law.

Judge KAVANAUGH. But it is an interpretation binding on everyone in the Justice Department, as I understand it, and—

Senator WHITEHOUSE. Because they are employees of the Department of Justice in the same way that you cannot steal the computer or you cannot, you know, bring a pet into your office, whatever other rules there might be.

Judge KAVANAUGH. Well, I think internal regulations are still law.

Senator WHITEHOUSE. Okay. As long as it is your position that that was what you meant by a matter of law.

Judge KAVANAUGH. Well, just to be clear, I said I do not know what I meant—

Senator WHITEHOUSE. You answered the question.

Judge KAVANAUGH. But when I look at it now, that is what I—that is what I think.

Senator WHITEHOUSE. So, let us go on to recusal, and let me—there is a case that is somewhat on point on all of this. It is the *Caperton* case out of West Virginia. And as you will recall, it was a civil case, right?

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE. And it came to the Supreme Court because there was an objection that a judge should not sit—basically, the *nemo iudex* problem, should not sit in his own cause, so to speak, and the problem was that the—one of the litigants had received three—the judge had received \$3 million in political support from one of the litigants. Is that—the fact pattern correct?

Judge KAVANAUGH. I believe that is correct, Senator.

Senator WHITEHOUSE. Yep. And the standard that the Court came up with was whether that judge had—whether that donor, that party, had a significant and disproportionate influence—ooh, we did not spell “influence” right—in placing the judge on the case.

Judge KAVANAUGH. Right.

Senator WHITEHOUSE. Correct?

Judge KAVANAUGH. I believe so. That is my memory.

Senator WHITEHOUSE. So, and the—Justice Kennedy—

Judge KAVANAUGH. A Justice Kennedy opinion.

Senator WHITEHOUSE [continuing]. Decided that the Constitution requires—

Judge KAVANAUGH. Right.

Senator WHITEHOUSE [continuing]. Recusal. If the Constitution requires recusal of a judge who was the beneficiary of a \$3 million piece of political support to help him get into office, was it not follow perforce that the person who actually appointed the judge would be in a similar or stronger position of significant and disproportionate influence?

Judge KAVANAUGH. Senator, the question in the *Caperton* case, as I understand, was because of the amount of money, the financial interest, which is a whole separate brand.

Senator WHITEHOUSE. Correct, which would have a significant and disproportionate influence on the judge becoming a judge, right? That is what the connection was. The spending of money by the party helped make the judge the judge. In this case, if a criminal matter involving President Trump came before you, he would not have just spent \$3 million to make you a judge. He would have flat out made you the judge, 100 percent—finito, right?

Judge KAVANAUGH. Senator, the question of recusal is something that is governed by precedent, governed by rules. One of the underappreciated aspects of recusal is whenever I have had a significant question of recusal as a judge on the D.C. Circuit, I have consulted with colleagues, and so, too, they have consulted with me when they have had their own questions. So, that is part of the process. In other words—

Senator WHITEHOUSE. Is not actually the 100 percent responsibility for direct appointment more significant in terms of influence than simply making a big political contribution to a judge? That is the 100 percent responsibility, appointed, period, done.

Judge KAVANAUGH. Well, just on the—I do not mean to quibble, but on the premise of your question, the Senate obviously, it is a shared responsibility. The President and the Senate participate in a Supreme Court confirmation process—appointment process.

Senator WHITEHOUSE. Well, you were very clear yesterday in our discussion that it was the President of the United States who appointed you, and this is about that. This is about how you get to the seat, and you got appointed by the President. Would that not pertain as a significant influence—I mean, what possible greater influence could there be on who is in the seat that you are nominated to than the nomination of the President to that seat?

Judge KAVANAUGH. So, two points, if I could, Senator. First, I have said already, I do not believe it appropriate in this context to make decisions, and recusal is a decision, on a case, and so, I do not think it is appropriate.

Senator WHITEHOUSE. Okay. Well, if it is not appropriate, then let me move on with something else because—let me ask you about the question of Presidential, shall we say, “conflicts with prosecutors.” When you were in the Starr prosecution effort, you were exposed to this contest with the Clinton White House, and you described the Clinton White House as running a, and I am quoting you here, “Presidentially approved smear campaign,” was one phrase you used; “a disgraceful effort to undermine the rule of law,” was another phrase you used; and, “an episode that will forever stand as a dark chapter in American Presidential history.”

Judge KAVANAUGH. That was about something different.

Senator WHITEHOUSE. And you—“Presidentially approved smear campaign against Starr” was what the topic was. You then said in a later memo that “the President has tried to disgrace Starr and his office with a sustained propaganda campaign that would make Nixon blush, and he should be forced to account for that.” Have your views of Presidential interference or smearing of independent or special counsel changed since you made those statements?

Judge KAVANAUGH. Those comments were in a memo written, as I recall—

Senator WHITEHOUSE. Two actually. Two memos, but close enough, yes.

Judge KAVANAUGH. Well, the one that I am remembering written late at night after an emotional meeting in the office, dashed off, and some of the language in that, as I think I told you or some of the Senators in individual meetings, was heated, and I understand that. But that was what my memo at the time.

Senator WHITEHOUSE. And now?

Judge KAVANAUGH. I do not think—I think I have been clear I do not want to talk about current events because I do not think a sitting—I am a sitting judge as well as a nominee. I do not think I should talk about current events.

Senator WHITEHOUSE. How about just the guy, the guy who was outraged at being on the receiving end of a smear campaign? Does that guy still exist, or is he long gone?

Judge KAVANAUGH. Well, that is—that is what I wrote at the time, how I felt one night after a meeting we had had in August 1998, I believe, at least the memo I am remembering.

Senator WHITEHOUSE. Okay. Last topic because my time is getting short here. The hypothetical problem that I have has to do with an appellate court which makes a finding of fact, asserts a proposition of fact to be true, and upon that proposition hangs the decision that it reaches. And the question is, what happens when that proposition of fact actually in reality—you have referenced the real world so often—actually in reality turns out not to be true. What is the obligation of an appellate court if it has hung a decision on a proposition of fact, and then the proposition of fact turns out not to be true? Does it have any obligation to go back and try to clean up that discrepancy, to clean up that mess?

Judge KAVANAUGH. I think, Senator, it is probably hard to answer that question in the abstract because—

Senator WHITEHOUSE. But if I give you specifics, then you will say you cannot answer that because that would be talking about a case. So, I am kind of in a quandary here with you.

Judge KAVANAUGH. Well, I was going to give you a couple thoughts, which are I think that would be wrapped up in the question of precedent and stare decisis. And one of the things you could look at, one of the factors you could look at, how wrong was the decision and if it is based on an erroneous factual premise, that is clearly one of the factors you would—you would—

Senator WHITEHOUSE. You would look at it and whether it could be—

Judge KAVANAUGH. A mistake of history. Sometimes there have been cases where there were mistakes of history in decisions, mistakes of facts, and so forth.

Senator WHITEHOUSE. So, just quickly, the two examples that comes readily to mind, one is *Shelby County* in which the Court said in looking whether there was still any kind of institutional racism in the preclearance States that they needed to worry, nope: The “country has changed and current conditions”—to use their phrase—“are different.” First, where do you suppose the five Justices who made that decision got expertise in vestigial State racism to make that determination at all?

Judge KAVANAUGH. Senator, I cannot comment on the decision other than to say it is a precedent. I understand the point you are making about the—

Senator WHITEHOUSE. Because you do know that since then, both North Carolina was found to have targeted minority voters with “surgical precision,” which is a pretty rough phrase, and Texas got after it so frequently that a Federal court finally said, look, we think there is a penchant for discrimination here. So, if you—if you have got the five judges saying that it is over in these States and then it turns out it really is not over, that there is actually still surgical precision targeting of minority voters, and that there is a penchant for discrimination in the Texas State government, that ought to be something that might cause some reconsideration of the *Shelby* holding, ought it not?

Judge KAVANAUGH. So, three things on that, I think, Senator. One, I think the case did not strike down preclearance as opposed to saying the formula needed to be—

Senator WHITEHOUSE. De facto it did. Preclearance ended in all those States with that decision.

Judge KAVANAUGH. I agree. I understand that.

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. But the—

Senator WHITEHOUSE. So, I have got 1 minute left. Let me jump to the other example because I think it is an important one, and my time is running out. And that is *Citizens United*. *Citizens United* took on the proposition that the unlimited spending that it authorized by people capable of unlimited spending would be both transparent and independent, correct?

Judge KAVANAUGH. The Court upheld the disclosure requirements in that case, if that is the question. I am not sure—

Senator WHITEHOUSE. It actually said more than that. It said that it is the transparency and the independence of the spending that it authorized—

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE [continuing]. That were the guardians against corruption.

Judge KAVANAUGH. Right, so it was not contributions to parties or candidates, correct.

Senator WHITEHOUSE. So, the First Amendment ends where efforts to corrupt begin, correct? You do not have a First Amendment right to corrupt your Government.

Judge KAVANAUGH. The Supreme Court has relied on corruption and the appearance of corruption as part of the test, and it is—you know the story.

Senator WHITEHOUSE. Correct, and in order to fend off the argument that big money corrupts and absolute money corrupts absolutely, they said, no, because there is going to be independence and transparency. In fact, if I remember correctly, they said—well, I do not have it front of me and I am out of—oh, here we go: “The separation between candidates and independent expenditures negates the possibility of corruption.” So, if they are wrong factually about this spending being transparent, and we know that they do from what we have seen since then, and if they are wrong factually about the independence of this spending, and we know that they are from actual events that have happened since then, then that strikes a pretty hard blow against the logic of *Citizens United*, does it not?

Judge KAVANAUGH. So, *Citizens United*, as you know, is a precedent of the Supreme Court, so entitled to respect as a matter of stare decisis. But as you know, and I would just reiterate, if someone wants to challenge that decision, they—one of the things that anyone can raise about case is that it is based on a mistake in premise or a mistake in factual premises, and that is always the kind of thing that courts are open to hearing.

Senator WHITEHOUSE. My time has expired. I thank the Chairman for the indulgence of the extra minute.

Senator TILLIS. A couple of things. First, I would just note that I believe Justices Breyer and Ginsburg sat on the Supreme Court during *Clinton v. Jones* and three out of four of President Nixon’s appointees were on the Supreme Court that heard *U.S. v. Nixon*. And, Judge Kavanaugh, I have a—my colleague and friend, Senator Whitehouse, attempted to imply you would resolve the constitutional question of whether a sitting President can be indicted. Is it not that, in a contemporaneous law review article you authored, you explicitly stated—these are your words—“whether the Constitution allows indictment of a sitting President is debatable”?

Judge KAVANAUGH. That is what I said in the contemporaneous Georgetown Law Journal article. I have said that subsequently as well.

Senator TILLIS. And without objection, I would like to have that article submitted for the record.

[The information appears as a submission for the record.]

Senator TILLIS. And before I transition, if Senator Cruz will indulge, I reserved 13 minutes of my time last night, and I was wondering, there were two instances where you were not allowed to answer the question. I did not know if you wanted to make any clarifying comments on disclosing sources relative to the discussion around Judge Starr. And at one point you were saying that Senator

Whitehouse said something you said, “that is about something different.” I do not know if you remember what that was, but if you want to clarify it before we transition to Senator Cruz, I will give you a minute to do so.

Judge KAVANAUGH. I think I will just leave the record as it stands.

Senator TILLIS. All right.

Judge KAVANAUGH. That third comment that he referenced was about something—a different aspect of that investigation.

Senator TILLIS. Okay.

Senator CRUZ.

Senator CRUZ. Thank you, Mr. Chairman, and I want to note at the outset that the Senator from Rhode Island took his questioning as an opportunity to impugn the residents of North Carolina and the residents of Texas as having a penchant for bigotry, and I appreciate the compassion from the Senator from Rhode Island. I will point out—I will let you rise to the defense of your own State, but I will point out in the State of Texas, that we had just a few years back, three Statewide-elected African-American officials, all Republican, I might note, which I believe at the time was the most of any State in the Union. And I think it is the case that Rhode Island has none.

[Disturbance in the hearing room.]

Senator CRUZ. And I would note as well—

Senator WHITEHOUSE. For the record, I apologize to my colleague if he takes any umbrage about my reference to the general residents of Texas. This was a specific quote from a Federal court decision in Texas referring to the decisionmakers in that case. So, I apologize—

Senator TILLIS. Senator Cruz, you have 30 additional seconds.

Senator CRUZ. Judge Kavanaugh, yesterday you had some discussion with Senator Lee about what it means to be a textualist. And I want to go back and revisit that conversation and ask for someone at home who is watching this, why should it matter to them if a judge is a textualist. What difference does that make to somebody not involved with the Supreme Court?

Judge KAVANAUGH. Senator, it goes to the foundation of the Constitution and the system that the Framers designed with a legislative branch, an executive branch, and a judicial branch that were all separate. As was said in Federalist 78, the judiciary does not exercise will, but it exercises judgment. The policy decisions are made by the legislative branch with the President, of course, in terms of signing legislation, so the House, the Senate, and the President. The President enforces Federal law, comes to the judiciary.

When we interpret a statute, if we as judges must adhere to the text of the statute, why is that? Two reasons I think are paramount. The first is the statute as written is what was passed as a formal matter by the Congress, by both Houses of the Congress, signed by the President into law. So, as a formal matter, that is the law. So, if we are going to exercise judgment and not will, we need to adhere to the law as passed, and the law as passed is reflected in the written words that were—went through both Houses and signed by the President.

Second, in supporting that, as a practical matter, legislation is a compromise, and within the Senate, within the House, with the President as well, lots of compromises are inherent in any legislative product. Now, that is what my experience shows. That is what, I know, your experience shows as well, Senator. So, when a case comes to court, a statute comes to court, we upset the compromise that you so carefully reached and where people might have given up this for that in terms of the legislative final language. And we then insert ourselves after the fact into the process and upset the compromise if we do not stick to the actual words of the text of the statute as passed by Congress.

So, as both a formal matter of what the law is and as a practical matter of not inserting ourselves into the legislative process and upsetting the legislative process, it is critical that judges stick to the law as written, the text of the statute as passed by Congress and signed by the President.

Senator CRUZ. What in your view is the proper role, if any, for legislative history in statutory adjudication? As you know, different Justices have different views on this.

Judge KAVANAUGH. Well, I think all judges are much more skeptical of legislative history than they once were. That is the influence, as you know, Senator, largely of Justice Scalia, but really very mainstream now to be very skeptical of legislative history. And, again, two reasons support that skepticism, if not outright refusal to use it. The first is that the legislative history, and by that I mean the Committee reports or the floor statements made by individual Members on the floor of the House or Senate, are not part of the law as passed. And that is important because it would be very easy, and I have said in my articles, for Congress, if there are a paragraph or a paragraph or more in the legislative history and a Committee report that was really important, we will put it into the law. Put it into the introduction of the law, have it be part of the law that is passed. When it is a Committee report, it might have just been seen by one Committee in one House. It might not have even been seen by the other House. The President, of course, who is part of the process, might never have seen it. So, to rely on that is to upset the formal process by which law is enacted in the United States.

So, too, again, the legislative history, the Committee report, is not part of the compromise that is reached between the House and the Senate and the President, at least not ordinarily. And so, you are allowing one Committee, for example, or one Member to go down to the floor of the House or Senate, and to say something that will shape subsequent judicial interpretation and upset the careful compromise that is reflected in the text that is passed by the Senate, passed by the House, and signed by the President.

So, again, both formal and practical reasons why skepticism of legislative history is warranted, and why Justice Scalia, I think, was able to persuade Justices across the spectrum, judges across the spectrum, that legislative history is useful for understanding why something came to be, but not as a tool for upsetting or changing your interpretation of the words of the statute.

Senator CRUZ. Also, yesterday when you were talking with Senator Lee, I believe you described yourself as an originalist.

Judge KAVANAUGH. Yes.

Senator CRUZ. Can you explain what that means to you, what you mean by that, and why, again, people at home should care, why that should matter if a judge or justice is an originalist.

Judge KAVANAUGH. So, by “originalist,” it is important to be clear because there are different things people hear when they hear the term “originalist.” There was an old school of original intent, the subjective intentions of the drafters or ratifiers, and that is not really the proper approach, in my view, for similar reasons to the discussion of legislative history of the statutes.

By “originalist,” what I have meant is original public meaning or the “constitutional contextualism” is a term I have used that refers to the same concept, which is, pay attention to the words of the Constitution. The Constitution, as Article VI of the Constitution makes clear, is law. It is not aspirational principles. It is law. It is the supreme law of the land, and in that sense it is superior to statutes, but it is law-like—just like statutes are, superior law.

The Constitution itself, including the amendments, but the original Constitution, was itself a compromise, so it is law and it is a compromise reached at Philadelphia in the summer of 1787. And, of course, Madison’s notes and the history of that shows all the compromises that were reached. Probably the most famous compromise is the compromise that allows for representation according to population in the House, representation according to State in the Senate, the Connecticut compromise, as it is often referred to.

It is important for judges, again, not to upset the formal law that is written in the Constitution or to upset the compromises reached either in the original Constitution or in the amendments. Now, one key thing to add to that is precedent is part of the constitutional interpretation as well as Federalist 78 makes clear and the Judicial Power Clause of Article III also makes clear. So, a system of precedent is built into how judges interpret the Constitution and constitutional cases on an ongoing basis. So, that is part of the proper mode of constitutional interpretation and important system of precedent.

Senator CRUZ. Thank you. Let us shift back to the topic you and I discussed yesterday, which is religious liberty, which is a topic of considerable interest and importance to a great many Americans. In private practice, you wrote an amicus brief in the *Santa Fe* case for Congressmen Steve Largent and J.C. Watts. Could you describe to this Committee what that case was about and your representation there?

Judge KAVANAUGH. I will. Of course, Senator Cornyn argued the case as Attorney General for the State of Texas and did an outstanding job. I remember participating in the moot court, as the Senator recalled.

Senator CORNYN. It did not turn out too well, Judge.

[Laughter.]

Judge KAVANAUGH. You did an excellent job, Senator, as I remember being there. So, the case involved prayer before a football game, and the Supreme Court, of course, has had a number of cases on religious expression in schools, and these are always challenging cases and very fact-specific. There are two principles that the precedents have set forth. One is that school-sponsored prayer

at school events is often impermissible, either at the school day, *Engel v. Vitale*, or graduations, *Lee v. Weisman*.

At the same, when students want to express themselves in some way—tee shirt, clothing, or saying their own prayer, say, before a football game or other event, if students want to say a prayer for themselves, or there is an open forum where students are allowed to say whatever they want and one student chooses to talk about religion or say a prayer—that is generally on the free speech side of the house, freedom of religion side of the house of the Supreme Court precedent, which would protect the religious liberty of the individual in that circumstance.

The *Santa Fe* case came—I think Senator Cornyn would say—well, Senator Cornyn would say it came on the free speech, freedom of religion side of the house. The Supreme Court thought that the school was too involved, I would say, in the prayer opportunity in that case, and, thus, attributed the prayer in that case to the school. And the Supreme Court, therefore, said that the prayer in that case was impermissible.

It was a very fact-specific decision, I think, based on how some of the actual prayers had gone down in the school district there. And so, it was really in the gray area on the facts between these two principles—freedom of speech and freedom of religion for individuals on the one hand, no school-sponsored prayer on the other—and those two principles are part of the Supreme Court precedent that I think the Courts have applied for a long time now.

Senator CRUZ. So, what led you to want to take on that representation in the amicus brief?

Judge KAVANAUGH. Well, I think at that time I worked on several—I was asked to work on several cases involving religious liberty and religious speech. I also did a case in the—amicus brief in the *Good News Club* case, and that was a case where a school district allowed use of a—the gymnasium auditorium area after school for whatever group from the community wanted to use the facility. And they would allow everyone to come in, you know, Boy Scouts, the community—any community group to come in, but they did allow religious groups to come in. And that seemed to be discrimination against religion, discrimination against religious people, religious speech.

And I was asked to do an amicus brief, which made the point—I wrote that made the point that religious people, religious speakers, religious speech is entitled to its place on an equal basis in the public square, including, in this case, in the school auditorium or gymnasium. The Supreme Court agreed with that principle in that case, stating that discrimination against religion in public facilities in the nature of what was going on in that case was impermissible and a violation of freedom of speech, freedom of religion, and, therefore, unconstitutional.

Those cases are important, I think, because it is important that the—to recognize that the Constitution, the First Amendment of the Constitution as well as many statutes, of course, protect religious liberty in the United States, religious freedom in the United States. And as I have said in some of my opinions, we are all equally American, no matter what religion we are or no religion at

all, and that means religious speakers and religious speakers have a right to their place in the public square.

Senator CRUZ. Another case you were involved in as a judge is, you wrote a dissent from denial of re-hearing en banc in the *Priests for Life* case. Can you tell this Committee about that case and your opinion there?

Judge KAVANAUGH. That was a group that was being forced to provide certain kind of health coverage over their religious objection to their employees. And under the Religious Freedom Restoration Act, the question was, first, was this a substantial burden on their religious exercise, and it seemed to me quite clearly it was. It was a technical matter of filling out a form—in that case they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were, as a religious matter, objected to.

The second question was, did the Government have a compelling interest nonetheless in providing the coverage to the employees. And applying the governing Supreme Court precedent from *Hobby Lobby*, I said that the answer to that was, yes, the Government did have a compelling interest, following Justice Kennedy's opinion in *Hobby Lobby*, said the Government did have a compelling interest in ensuring access.

And then it came down to the least restrictive means prong of the Religious Freedom Restoration Act. And that prong of the act, to my mind, is an opportunity to see is there—is there a win-win in some respects. In other words, the Government interest in ensuring healthcare coverage, can that be provided without doing it on the backs of the religious objector. So, that is what the Court is looking for.

In that case, Professor Voll has written about that, and in that case it seemed to me that the Government had avenues to ensure that the coverage was provided without doing so on the backs of the religious objectors, and I so ruled, following the Supreme Court precedent in *Hobby Lobby* and in a subsequent case, *Wheaton College*, where they had an order that I followed, and it seemed to me to dictate the result that I identified in the *Priests for Life* dissent.

Another case, the Religious Freedom Restoration Act, just to reiterate, was overwhelmingly passed by Congress in the early 1990s and signed by President Clinton, and was an important addition to the protection of religious freedom in the United States to supplement the constitutional protection that exists in the Free Exercise Clause.

Senator CRUZ. Well, and I would note, much like yesterday when we discussed your pro bono representation of the synagogue, that *Priests for Life*, using the paradigm that some on the Democratic aisle have suggested of little guy versus big guy, by any measure *Priests for Life*, where the little guy against the almost all-powerful Federal Government. And in that opinion, presumably because you felt the law dictated it, you sided with the *Priests for Life* in that decision.

Judge KAVANAUGH. That is correct, Senator, and I think in a lot of the religious freedom cases that the Supreme Court has had, that has been the case. There was a prisoner, in an opinion written by Justice Alito, I believe unanimous opinion where the prisoner is

being—a Muslim prisoner was being forced to shave his beard in violation of his religious beliefs. Justice Alito, as I recall, wrote the opinion for the Supreme Court saying that was a substantial burden on his religion and was not necessary. And that is just another example of how religious liberty protects all of us no matter what our religious beliefs are, and that is an important principle—foundational principle both of the Constitution and of the Religious Freedom Restoration Act.

Senator CRUZ. Another case that you were involved in, in your career, that stood out to me personally just by being a Cuban American is that, as I understand it, in November 1999 when Elian Gonzalez came to this country as a young child. And sadly, the Federal Government ended up coming into the home he was staying, with machine guns, taking him into custody and removing him to Cuba. You worked on Elian Gonzalez's case pro bono against the INS returning him to Cuba, and if you could talk about that case a little bit to the Committee.

Judge KAVANAUGH. Yes, thank you, Senator. I was asked by another person in my firm who had gotten a call from someone in Florida whether we could on an emergency basis do, as I recall, a re-hearing en banc petition in the Eleventh Circuit, and then a cert petition in the Supreme Court on a really very short notice because he was going to be returned.

The question was really due process, what kind of hearing needed to be held before the INS returned him to Cuba. It was a question under the Refugee Act as what that required, and also a question under the Due Process Clause. And interestingly, it seemed that the INS had not—was interpreting the Refugee Act in a way that seemed a stretch of the statutory language, and it was not some kind of formal regulation. So, the question of *Chevron* deference to an informal agency position was a question in the case, and I wrote the cert petition and the en banc petition before that saying that the agency was stretching the language of the statute beyond recognition, and was doing so in a way that was entitled to no deference because it was not in any kind of formal regulation, which years later turns out to be a position the Supreme Court has agreed with in terms of administrative law.

But in that case, I got involved because I was asked to get involved on a moment's notice in a case of importance for people who needed help.

Senator CRUZ. Let me just ask one final question. You have been nominated to the highest court in the land. As you know, there is another highest court in the land. That is the basketball court atop the U.S. Supreme Court courtroom.

Judge KAVANAUGH. Yes.

Senator CRUZ. And I believe that no sitting Justice has played regularly there since Justice Thomas many years ago when he was a much younger Justice. If you are confirmed, do you intend to break that tradition and return to having a Justice play on the highest court in the land?

Judge KAVANAUGH. Well, I do, if fortunate enough to be confirmed. I will—Justice Thomas did at some point get injured, so I hope that precedent is not one that I would follow. But if I am fortunate enough to be confirmed, yes, indeed, Senator. Thank you.

Senator CRUZ. Excellent. I am very glad to hear it.

Chairman GRASSLEY. Before I call on Senator Klobuchar, there are a couple of things. One, I became aware of the fact that a lot of the committee confidential material that has been requested, some of the requests we got were already public. So, somebody is not doing very good homework if they are asking us for committee confidential stuff to be disclosed that is already available to the public.

Then I want to ask you, Judge Kavanaugh, you testified in 2004 that you were not involved in handling Judge Pryor's nomination while you were in the White House Counsel's Office. Is that right?

Judge KAVANAUGH. I believe that is—

Chairman GRASSLEY. I am talking about the handling of it.

Judge KAVANAUGH. Yes, the handling. We had one person who would be assigned to each judge. I was not the—as I recall, at least, I was not the primary person on that.

Chairman GRASSLEY. So, is it not the case that somebody else handled the nomination, and if you know who that is, I would like to give you a chance to say so, and if you do not, I want to suggest a name.

Judge KAVANAUGH. I do not remember who it was.

Chairman GRASSLEY. Could it have been Benjamin Powell?

Judge KAVANAUGH. It sure could have been, yes. He was another associate counsel.

Chairman GRASSLEY. What, if any, involvement did you have?

Judge KAVANAUGH. I do not recall specifics. We would have met at meetings. I could have attended a moot court where we did a mock hearing. I do not remember specifics, but I—it sounds—that sounds right to me that Benjamin would have been the person primarily in charge of that, handling it.

Chairman GRASSLEY. Well, I had colleagues attempting to insinuate that you were interviewed—that you interviewed Judge Pryor, the documents that we have, that he was referring, is one of your colleagues asking how the Pryor interview went. It certainly seems to me that this email is more likely to indicate that you know the people who interviewed Judge Pryor, but may have even been kept in the loop because it was something that you were interested in.

Judge KAVANAUGH. That sounds correct. I knew him, and, therefore, was interested in his process.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I am going to do some follow-ups from our discussions yesterday, Judge. I thought I would start with campaign finance. The document that the Chairman has pointed out several times was originally designated "committee confidential," that I put the request in and got made public. And on that document, you said that contributions to—limits on contributions to candidates have some constitutional problems. And I asked you about *Buckley v. Valeo*, which is notable because it did not apply strict scrutiny to campaign finance laws. You really did not answer yesterday about whether you would follow that precedent of *Buckley*, and so, I want to be more specific. Do you think that strict scrutiny is the right standard to apply to all campaign finance laws?

Judge KAVANAUGH. Well, the Supreme Court, as you say, Senator, has, since 1976 in the landmark *Buckley* case, applied a different level of scrutiny, is one way to put it, to expenditures on the one hand and contributions on the other. And that divide has persisted since then to the current day so that now contributions to parties as well as candidates are on the one side of the line, and independent expenditures or expenditures and donations to outside groups are on the other side of the line.

So, that law is precedent of the Supreme Court. That has been around for a long time and has set the basics for the campaign finance framework that we are all familiar with.

Senator KLOBUCHAR. Okay. So, do you see—but will you say it is settled law or precedent? I am trying to—

Judge KAVANAUGH. It is precedent of the Supreme Court that has been applied since 1976, and, therefore, entitled the respect under principles of stare decisis. And anyone seeking to upset that—there are people who do not like the expenditure—the freedom to—the Court’s blessing of freedom to make unlimited expenditures, of course. There are people from the other direction that do not like some of the contribution limits who do not like *Buckley v. Valeo* from that side either. So, there are people who kind of hit it from both sides.

Senator KLOBUCHAR. I understand.

Judge KAVANAUGH. But it is a precedent that has been applied repeatedly.

Senator KLOBUCHAR. And so, do you think *Brown v. Board of Education* is settled law?

Judge KAVANAUGH. I think *Brown v. Board of Education*, as I have said many times before, is the single greatest moment in Supreme Court history.

Senator KLOBUCHAR. I know, I know, I know, you said it, and I appreciate that.

Judge KAVANAUGH. And it is correct. It is correct.

Senator KLOBUCHAR. Okay. So, it is—

Judge KAVANAUGH. It is correct because it corrected a historic mistake in *Plessy v. Ferguson*.

Senator KLOBUCHAR. I understand, but is it settled law? I am trying to get at this difference between when you say some things are precedent, which is what, you know, we had an issue here because the last hearing we had, Justice Gorsuch said a bunch of things were precedent, and now he is on the Court and he has already dissented actually from Justice Roberts, and did not even want to uphold the reasonable expectation of privacy.

So, I am trying to get at the difference between when people that come before us say it is precedent versus settled law. Do you think there is a difference in those two words?

Judge KAVANAUGH. Well, here is what I know, Senator, which is for cases or issues that might come back before the Court, it is important as a matter of independence as reflected in the nominee precedent not to give a forecast or hint about that. And part of that is giving a thumbs up or thumbs down on those precedents that could be involved in that.

Senator KLOBUCHAR. Got it. But so, if *Brown v. Board of Education* is settled law and say, like, *Roe v. Wade* you just say it is

precedent. Precedent, non-precedent with *Casey*, is that a difference, because I—*Brown v. Board of Education* was—how many years ago? So, that was 64 years ago, but *Roe v. Wade* was 45 years ago. And I am trying to figure out if you are using these words in different ways when something is precedent and something is settled law.

Judge KAVANAUGH. All right. So, what I am trying to do is adhere to the line that has been drawn by the eight Justices currently sitting on the Supreme Court. And the line they have drawn is for the vast body of Supreme Court precedent, they have refused, in Justice Kagan's words, to give a thumbs up or thumbs down on that precedent. There are some historical cases where there is no prospect of that case coming back where they felt free to indicate their agreement with them.

Senator KLOBUCHAR. And so, that is *Brown v. Board of Education*.

Judge KAVANAUGH. Correct. In *Brown v. Board of Education*, I said, single greatest moment in Supreme Court history.

Senator KLOBUCHAR. But it is just that *Roe* is now 45 years old. I mean, that is the issue. Why is that not a thumbs up settled law?

Judge KAVANAUGH. Well, no—none of the currently sitting Justices of the Supreme Court have opined on that.

Senator KLOBUCHAR. Okay. I want to go back to Presidential power, and this is not a hypothetical. I am just going back to 2009, which is not that long ago, in the University of Minnesota Law Review. And that is where you said, “We should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions.” And when you and I talked about this yesterday, you said that Congress could still pursue an impeachment proceeding, right?

Judge KAVANAUGH. Yes, the impeachment mechanism.

Senator KLOBUCHAR. Your view back then because you would not comment on it, but your view when you wrote this was that—well, your view now is that Congress should still be able to pursue an impeachment.

Judge KAVANAUGH. Well, the Constitution specifies impeachment always as a tool for—in the Constitution itself.

Senator KLOBUCHAR. Okay. So, when we go back to when you wrote this, it is not a hypothetical, but when you wrote this in 2009 and you were thinking about it, did you think then, and this is what you meant, that a President should not have to be investigated. I mean, you said it, right?

Judge KAVANAUGH. The context there, I believe, Senator, was talking about civil suits, or criminal investigations, or criminal lawsuits, and it was not my position on the constitutionality. It was something for Congress to consider, and the idea was reflecting on my experience after September 11th and what we could do to make the Presidency the most effective for the American people.

Senator KLOBUCHAR. I am trying to understand in practicality when you look at the last impeachment proceedings how you would, in effect, do this if you did not have an investigation, because these other ones have used independent counsel. They have used special counsel. And if you do not have that, do you not effectively eviscerate the impeachment part of the Constitution?

Judge KAVANAUGH. Not at all, Senator. Historically, Congress has often had investigative bodies that have done the work for—

Senator KLOBUCHAR. But why would we want to foreclose our ability to use a special counsel or an independent counsel?

Judge KAVANAUGH. So, that was—that is your decision ultimately in Congress to decide. That is one view that you just articulated. And, of course, Congress has not enacted any special deferral for civil suits, so Congress is stuck with the *Jones v. Clinton* result from that case, and is stuck with, of course, the existing system of special counsels.

Senator KLOBUCHAR. But when you—to get back into where you were in 2009 when you wrote this as opposed to just using a hypothetical, so we have said several times here no one is above the law, and I said that in my opening statement. But when you said then, you mean no one is temporarily above the law. So, if a sitting President, if she was in office and there was some crime committed—murder, white-collar crime, everything—then you are saying in this article at the time that she should not be subject to criminal prosecution.

Judge KAVANAUGH. That is a—that would be an issue for Congress to consider if it wanted to pursue providing a temporary deferral. There is—there are statutes that do that for members of the military, so servicemembers serving overseas. In fact, I think President Clinton's brief in the *Clinton v. Jones* case cited that example as something where there is statutory deferral, not immunity. It is important to distinguish immunity from deferral. And not above the law, but the timing of when a particular litigation will occur. So, I would not call that above the law. I would call that a timing question.

Senator KLOBUCHAR. Okay, but there would be a long time. If a President was serving for 4 years or 8 years given—and, again, I am reading the words, “We should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions.” So, it feels to me that that was your view when you wrote that.

Judge KAVANAUGH. Well, it was an idea for Congress to consider along with many other ideas I had in there about judicial confirmations and war powers, and it was all reflecting—again, that one was reflecting on an idea Congress could consider. The whole point was to make the—you know, help the country do better based on my observations from 3—5 and a half years working in a White House where—during war. During wartime.

Senator KLOBUCHAR. Okay. I want to turn to another topic. This is a follow-up from Senator Harris' questions from last night. She asked you questions about voting rights. I am the Ranking Member of the Rules Committee, and as she noted, many States have restricted access to voting since the Supreme Court's decision in *Shelby County*, which struck down a key provision of the Voting Rights Act. And according to the Brennan Center, 23 States now have more restrictive voting laws than they did in 2010. Many of these laws have been challenged in court. Some have been overturned.

So, here is one more question on this. Should courts consider these widespread efforts to restrict voting, what has been going on

since 2010, when ruling on challenges to statutes that affect the right to vote?

Judge KAVANAUGH. I think in any particular case, Senator, you would want to see what the record established in the case was, and the record could include what is going on in that particular State, and I can imagine a factual record where that would include also potentially what is going on in other States as well.

Senator KLOBUCHAR. Thank you. Thanks. Studies by the Brennan Center and other nonpartisan organizations have found no evidence of widespread voter fraud, and a study by The Washington Post found only 31 credible instances of fraud from 2000 to 2014 out of more than 1 billion ballots cast. Do you believe there is evidence of voter fraud? Do you believe—I know you told Senator Harris that you read some election law blogs that were sitting here last night. And so, have you read one of these articles on widespread voter fraud on one of these blogs you mentioned? I am just concerned because that is out there, and I would think that would be something that could be looked at.

Judge KAVANAUGH. Well, I would certainly look at Professor Hassan's election law blog, and that is one of the ones that I have looked at. I have looked at other blogs as well, and there is discussion of this issue, and I would want—as a sitting judge, I would want to see a record before me of what is going on in a particular case. I hesitate to opine on something based on something I have read in a law review article or blog. I think you have a better sense of what is going on there. But I would want a record in a particular case to determine what the evidence in that particular case was.

Senator KLOBUCHAR. Okay. And I want to turn now to affirmative action, and Senator Booker raised these questions as well late last night. And in a 2017 speech at Notre Dame, you discussed how affirmative action represents a “longstanding exception” to the “basic equal protection right not to be treated by the Government on account of your race.” And you summarized the Court's debates on this issue and remarked, “On what basis is the Court making those decisions? Is there something in the text of the Constitution that tells us one is good enough and the other is not good enough? Not really. Again, this is common law judging to define the contours of the exception to the constitutional right.” So, what did you mean by that statement?

Judge KAVANAUGH. Well, what I meant by that is we, in many areas of constitutional law, have, say, free speech rights, but we have exceptions analyzed, usually we are just talking about under strict scrutiny, and we have talked a lot about the Second Amendment, how the regulations that co-exist with the individual Second Amendment right. And so, too, in the Fourteenth Amendment context, the equal protection context, what kinds of programs are permissible, consistent with the equal protection right. And the precedent is critical on this. The precedent has built up things over time, the *Bakke* case, of course, the most prominent in the higher education context where the Court rejected remedying past societal discrimination as a basis for an affirmative action program, but the Court accepted diversity as a compelling interest for an affirmative action program. And that rationale has remained as part of the Supreme Court's precedent in the higher education context.

So, the Court applies these principles. They build up case law over time, and that is part of the system of precedent that develops, and that is what I was referring to there, I believe.

Senator KLOBUCHAR. Okay. While at the White House, you suggested that a Federal program meant to encourage the participation of minority- and women-owned businesses in transportation contracting was unconstitutional. This was a document that was just made public by the Chair today. Although you say that your—it was your personal opinion in the document, you told Senator Booker that this was just your view as a lawyer for a client. The client was the President at the time.

The program remains in place today, and it is intended to level the playing field and increase the participation of minority- and women-owned businesses in local and State transportation projects. So, I am just trying to understand your views here. Do you believe that the use of race as a factor in Federal contracting programs violates the Fourteenth Amendment?

Judge KAVANAUGH. So, my note in that case, as I understand it and have seen it briefly, was rooted in Supreme Court precedent, the *Croson* case. And I think it even says, “See *Croson*,” in the email, and *Croson* is the Supreme Court precedent where the Court had invalidated a Richmond contracting program, as I recall. And so, that precedent made clear what conditions need to be satisfied before a racial—a contracting program of that kind could be sustained consistent with the Constitution.

And the analysis that we went through suggested that, at least as it was being applied, as I recall, the Federal program went afoul of the Supreme Court precedent specified in the *Croson* case. So, in that sense, I was providing advice about how the program would fit within the Supreme Court’s existing precedent in the *Croson* case. At least that is my best understanding. I have not gone back to re-study it, but that is my best understanding was, that it was rooted in the precedent of the Supreme Court.

Senator KLOBUCHAR. Okay. Well, maybe we can get that in writing at some point if you want to look back at it.

[The information appears as a submission for the record.]

Senator KLOBUCHAR. We have witnessed unprecedented attacks on journalists and journalism over the past several months. This should be concerning to everyone because the role of journalists is critical to our democracy. This is personal for me. My dad was a journalist his entire life, and even wrote a blog—he is now 90—for a while. You probably did not read that one, though.

[Laughter.]

Senator KLOBUCHAR. In *New York Times v. Sullivan*, the Court issued a landmark ruling in support of First Amendment protections for the press by affirming that when newspapers report on public officials, they can say what they want unless they say something untrue with “actual malice.” Under *New York Times v. Sullivan*, do you believe the First Amendment would permit public officials to sue the media under any standard less demanding than actual malice, and can you explain what that standard means to you?

Judge KAVANAUGH. Well, the Supreme Court has elaborated on and applied that standard repeatedly over time. I have, too, as a

lower court judge, so that precedent has now been applied over and over and over again. I am not aware of much effort to deviate from that standard. Interestingly, in *New York Times v. Sullivan*, the Court in the course of that opinion said that the Sedition Act of 1798 had been overturned in the court of history, which I thought was an interesting turn of phrase in *New York Times v. Sullivan*. Of course, the Sedition Act was the act that said that criticism of public officials was illegal in the United States in 1798. Never actually struck down by the Court, but *New York Times v. Sullivan* made clear that that act had been overturned in the court of history.

Senator KLOBUCHAR. Okay. I also want to talk about First Amendment protections for journalists and how journalists have been deterred from doing their jobs at times under threat of jail time. And I have raised this issue in the hearings for many of the Justice Department nominees this Congress. But it is also critical for the Court.

In *Branzburg v. Hayes*, a 5-to-4 Court did not recognize the reporter's privilege, at least in the context of criminal grand jury testimony. Since then, various circuit courts have debated the contours of the decision with most courts—

[Disturbance in the hearing room.]

Senator KLOBUCHAR. With most courts now recognizing some type of privilege, particularly in civil cases. Can you talk about the scope of that decision and whether there are instances where the Court should recognize a reporter's privilege?

Judge KAVANAUGH. In civil cases. So I did sit on a case once where we had exactly that question presented.

Senator KLOBUCHAR. I knew that.

Judge KAVANAUGH. And we had a great oral argument, and it was fascinating, and I put a lot of time into something, and then it settled before our opinion ever came out. So I never actually released my opinion on that issue and—but I know the issue well from the time I spent on that case at the time, and I know the arguments.

Senator KLOBUCHAR. You want to share them with us—

Judge KAVANAUGH. Well, I think it is—

Senator KLOBUCHAR [continuing]. In the remaining minute with me here?

Judge KAVANAUGH. It is a matter that obviously is the subject of current litigation and could come before me again. So I—as a matter of judicial independence, I cannot do so. But I will say it is a very interesting issue, a question of precedent, and the oral argument in the case, which is available publicly, was fascinating because of the issue presented as you described it.

Senator KLOBUCHAR. Okay. How would you apply the First Amendment to a reporter's decision to protect a confidential source?

Judge KAVANAUGH. So there is also important precedent on that matter that makes clear the importance of the relationships of reporters and their sources. Again, the criminal-civil divide there is something that I think has been a part of the case law in the—in the past where the criminal context has been deemed in some cases sufficiently compelling.

But that is set forth as important part of the reporter's privilege, and the relationship with confidential sources is very important, I understand, to the role of journalists in bringing sunlight to American democracy.

Senator KLOBUCHAR. Thank you.

Chairman GRASSLEY. Before we go to Senator Sasse, I would like to note that we have had some good luck in confirming this week eight Federal judges to lifetime appointments.

[Disturbance in the hearing room.]

Chairman GRASSLEY. Eight Federal judges to lifetime appointments this week. Last week, we did seven judges. Twelve were confirmed without any objection from Democrats. And so we have had a pretty good record finally of being able to show that you do not have anything to fear from lifetime appointments for Federal judges like we have heard a big issue it is today.

Go ahead.

Senator SASSE. Thank you, Mr. Chairman.

Judge, welcome back. Congratulations on your last day of interviewing in your life.

I would like to talk about precedent. You have been a law professor—how long have you been a professor?

Judge KAVANAUGH. I started in 2007 was the first year. I have taught 12 separate calendar years.

Senator SASSE. Okay. Let us pretend you are a sixth grade civics teacher for our 20 minutes together instead of a law professor. I think precedent is critically important, but I do not think the American people—it is not something that we debate in front of them much, so it is something that maybe we could benefit from having more shared understanding about.

Has the Supreme Court ever made a mistake?

Judge KAVANAUGH. The Supreme Court has made some major mistakes at times—*Dred Scott*, *Plessy v. Ferguson*, good examples.

Senator SASSE. How do you know when you have a mistake?

Judge KAVANAUGH. Sometimes you know right away, and I think in those cases, with the dissents written in those cases, those dissenters knew right away, and I think they were mistakes right away. *Plessy v. Ferguson* was wrong the day it was decided.

Senator SASSE. It was 1896, and we knew it was wrong when it happened. What was the ruling count? Do you remember the vote?

Judge KAVANAUGH. There was only one dissenter, Justice Harlan, the first Justice Harlan was the only dissenter in that case.

Senator SASSE. Okay. It is so close to McCain's event that I do not—I know we should not be joking right now, but I just want to talk about lunch. Republican Senators have lunch together three times a week, and whenever we do, if somebody's phone goes off, it was always John McCain's.

[Laughter.]

Senator SASSE. When he would get bored at lunch, he would be watching CNN, and he would not know that it came on at full volume 10. So it just felt like a ghost of lunches past.

You wrote a really important article in Catholic Law Review last year, "The 10 Principles of Good Umpiring," and it was not about you as basketball coach. It was about the job of a judge.

I am going to speed through them. So I am oversimplifying, but I think your top 10 list was if you are a judge—or if you are an umpire, you cannot be a partisan. You have got no rooting interest. You have got no fan favorites.

Number two, the rules have to exist before the game.

Number three, you have to apply the rules consistently.

Four, you cannot remake the rules based on your preferences. If your view of the game changes—Dez Bryant a couple of years ago, that catch at the goal line,

[Disturbance in the hearing room.]

Senator SASSE. It may be the case that the NFL decides in the course of a year that the targeting penalty does not work. A judge does not get to remake that rule on the fly.

Number five, you have got to have backbone or courage.

Number six, you have to be able to tune out the crowd.

Number seven, you have to have an open mind. You think you know what case is coming before you, and people may present arguments that are different than you thought.

Number eight, you need the right demeanor and temperament.

Number nine, you have to work collegially with your colleagues.

And number 10, you have to be good at explaining.

Rule number two, the rules have to exist before the game. You then go from having a kind of paragraph-by-paragraph structure, you pause and have a long 2(b), and you explain a little bit about precedent. Can you give us a 60- or 90-second view about how precedent relates to having rules of the game before the game?

Judge KAVANAUGH. Yes. Precedent is important for stability and predictability. And so to know what the rules are ahead of time is important for good judging and for good umpiring, and to do it consistently with how it has been done before I think is part of the system of precedent.

The point is when the rules are set ahead of time by the precedent or by the law, then you are not making up the rules as you go along in the heat of the moment, which will seem unfair, which will seem like you are a partisan because you are going to seem like you are favoring one side or another because of allegiance to that team or favoritism to that team rather than applying the rules ahead of time.

Which is why in sports, as you know well, Senator—because I know of your devotion to sports—there are a lot of detailed rules that are set forth about how the game is played and how referees and umpires are supposed to call the game. And that is to ensure that there is predictability, there is stability, that the players can rely on that and that it is overall fairness.

Due process is not a word used often in the refereeing context, but it really is an element of due process. Notice about what the rules are ahead of time so that everyone has confidence in the fairness of the game and that the umpiring, which is critical to the outcome of many games, is done in a fair and impartial way.

So it facilitates impartiality, integrity of the game, fairness of the game. And it is true for games, sports, and it is true—I think the analogy is very strong, frankly, and this is—why I wrote that article is because the Chief Justice of the Court had talked famously about the judge as umpire, and because I coach and play a lot of

sports and I really thought about the analogy, and I thought there are actually a lot of parallels between being a good judge and a good umpire. I am a connoisseur of umpiring.

Senator SASSE. I want to jump in here because I agree with you that the analogy is strong and tight, but I think it is imperfect, right?

Judge KAVANAUGH. Yes.

Senator SASSE. Because in a football—mind you, I was a football coach. In a football game, everything that is going to happen inside the four corners of that 120 yards with end zones is predictable in that Woody Hayes comes off the sideline in 1971 and punches a player in the face. That was new, and yet it was still nonparticipation.

There is a rule you can only have 11 players. Coach cannot play. Another 12th player cannot play. And so there was a rule that spoke to that.

But in what you are doing, it is not as defined because the cases that may originate are not as perfectly cabinable, if that is a word, as in football, what might happen. So help me understand the distinction between judging as umpiring and the fact that the Supreme Court has made decisions in the past. It is not the case that every decision the Supreme Court has ever made is right and is now a part of the permanent rulebook. You sometimes have to throw them out.

So sixth-grade level, help us understand how, from 1896 to 1954—you have repeatedly called *Brown* the greatest moment in Supreme Court history. I think it is one of the greatest moments in American history as well.

In those 58 years, the Court was wrong for that whole time, and yet the way we think about precedent, we might have our sixth-graders thinking we should always take every received decision as right. So how do you reconcile the two?

Judge KAVANAUGH. Well, with the factors the Supreme Court looks at or whether the decision is not just wrong, but grievously wrong, whether it is inconsistent with the law that has grown up around it, what the real world consequences are, including workability, and then reliance.

And one of the genius moves of Thurgood Marshall, among many genius moves he made as a lawyer, was to start litigating case by case. He knew *Plessy* was wrong the day it was decided, but he also knew as a matter of litigation strategy the way to bring about this change was to try to create a body of law that undermined the foundations of *Plessy*.

And he started litigating cases and showing case by case that separate was not really equal. And he did it in cases like *Sweatt v. Painter* and many other cases. And he built up a record over time that by the time he went to the Supreme Court to argue *Brown v. Board of Education*, he had shown its inconsistency with the law that had built up around it for those who were not otherwise as quickly onboard with the idea that *Plessy* was wrong the day it was decided. He was taking no chances.

Senator SASSE. I want to interrupt you because I want you to keep coming forward these 58 years. But just as a civics commercial, what you are describing right here, in the new documentary

“Marshall,” every mom and dad and teacher ought to show it to their kids.

I actually got to see it before it was out because Senator Harris gave me a copy, and my kids and I watched it before it was public. But everybody should watch the Marshall documentary that is going through the history of what he was doing as a long-term litigation strategy.

But continue, please.

Judge KAVANAUGH. Well, I think that by the time it got to *Brown v. Board of Education* that the foundations for overturning *Plessy* had been strengthened by showing what the real world consequences were and by building up a body of law that was inconsistent with the principle, the erroneous principles set forth in *Plessy*.

And so he had a strategic vision of how to do this, which was brilliant, and he effectuated along with a team of lawyers over time litigating case after case after case and building up factual records that would show the harm, the badge—the Supreme Court ultimately said the badge of inferiority from separate educational facilities and separate—separate facilities more generally. And that is—that is how he was able to show that the precedent, even with principles of *stare decisis* in place, should be overturned.

Senator SASSE. But so if you were on the Court during that period, that 58-year period—I want to get at some point to this distinction between precedent, super precedent, precedent on precedent, super-duper precedent. But one of the reasons you think this is because of the Harlan dissent.

So back up. And again, sixth-grade level, what is the purpose of a dissent? Why do we write them?

Judge KAVANAUGH. We write dissents because we, in a multi-member court, disagree with the decision that is being made by the majority and because we think that the issue is sufficiently important if you are on the Supreme Court that perhaps a future court will pay attention to your decision, or in a statutory case, sometimes maybe Congress will think that your interpretation of the statute was better, and maybe Congress will update the statute to reflect your review.

But the purpose of dissents in constitutional cases, I think Justice Ginsburg has said this, Justice Scalia used to say this, dissents often speak to the next generation, and it is important, therefore, in constitutional cases of importance to have those dissents. And Harlan’s dissent was a classic. It had some lines that are very memorable about the separation of the races in the Louisiana railcars, and that law had just recently been enacted. So this was an example after the Fourteenth Amendment.

After the Civil War and the Fourteenth Amendment, there was a period of positive movement, at least some positive movement, not complete by any stretch. And *Strauder v. West Virginia* reflects that in 1880, where the Supreme Court says what is this, but the law should be the same for the Black and the White.

That was a case where African Americans were being excluded from juries—all-White juries—and the Supreme Court said no to that. And, but then progress, any progress went backward, as re-

flected in the *Plessy v. Ferguson* decision, which upheld the separation of the races in that case.

And so the Harlan dissent was very important for setting forth a clear principle rooted in the text of the Constitution and rooted in the principles of the Fourteenth Amendment and subsequently vindicated, at least on paper, of course, in *Brown v. Board of Education*.

Senator SASSE. Why do you write a concurring dissent?

Judge KAVANAUGH. You can write a separate dissent or concurring opinion in the majority opinion. Sometimes you will write a concurring opinion to the majority opinion because you have a different rationale for reaching the same result. So you might have a—

Senator SASSE. So who is your audience?

Judge KAVANAUGH. Your audience, that is a good question. Sometimes it is also future courts. But oftentimes, when you are at the Supreme Court level, I think—I obviously do not know, but I think they are writing concurring opinions sometimes to influence or suggest things to lower courts about how this case, either another issue or related issue or tangential issue, should be resolved or thought about in the lower courts.

Sometimes the concurring opinion is written to the future Supreme Court that might be 5 years down the road about an issue that is related to the issue being decided by the majority opinion. There are lots of different purposes that one might have for a concurring opinion when you are on the Supreme Court, at least as I have read them over the years.

Senator SASSE. So let me give you a hypothetical. You are on the Court, and there is a 6-to-3 decision. And you are on the losing side, and so you write your dissent. And the next year there is a case that looks to you to be almost exactly the same. So you do not grant cert. You do not vote for it, but other people do. And so a case is coming back before you.

And I know you are going to tell me that you need to be open-minded, and maybe the case is really different and you were wrong when you did not grant cert. But just bracket that problem for a minute. Let us pretend, a 6-to-3 case, you lost.

Then there is a new case that comes before you. Are you supposed to have the view of the majority the next year, even though you disagreed last year, or do you write the same dissent again?

Judge KAVANAUGH. So as a matter of precedent, the ordinary course is that you follow the precedent of the Supreme Court, even if you were on the losing side, maybe especially if you were on the losing side. There are times when Justices have persisted in their dissents repeatedly over the years, particularly in certain critical constitutional issues, or sometimes they have not persisted in the dissent but joined the majority, but said I still agree with myself back in the prior precedent where I had dissented originally.

You see different approaches to this by different Justices on different issues. I do not think it is a one-size-fits-all answer to your question, at least in terms of what the Justices have done over time on that particular question. Most famously, Justices Marshall and Brennan dissented in every death penalty case because they

did not accept the precedent of the Supreme Court that allowed the death penalty under the Eighth Amendment.

Senator SASSE. So how do you imagine you would act in that circumstance if there is a difference—there is a diversity of views across Justices in our history. But if you have got the same case coming back the next year, do you dissent again, or do you accept a majority opinion? Could you write the majority opinion?

Judge KAVANAUGH. Well, that is what I think a good judge does, which is once the decision has been made, you accept the precedent, subject to the rules of *stare decisis*. And yes, there are lots of historical examples where that has happened, and that has been done.

Justice White had been a dissenter in *Miranda v. Arizona* famously and then wrote many decisions applying *Miranda* subsequent to that, accepting the decision. Chief Justice Rehnquist, of course, ultimately wrote the decision where the question was whether to overrule *Miranda* and wrote the decision reaffirming *Miranda* because he decided that, at that point, it had—did not meet the conditions for overruling a precedent in that case.

So I think ordinarily, ordinarily you get onboard the precedent, but you might still write separately to say I think this was a huge mistake, and we should go back to a different approach. You see that sometimes. I think there are lots—there are lots of permutations to the question you are asking, Senator, but the ordinary course—

Senator SASSE. I want to ask them, but the Chairman will only let me have 3½ more minutes. He is miserly about this.

Judge KAVANAUGH. Yes.

Senator SASSE. What is the difference between an appellate court judge's job and a Supreme Court Justice's job?

Judge KAVANAUGH. There are many.

Senator SASSE. Specifically with regard to questions where there has been a precedent.

Judge KAVANAUGH. So at the D.C. Circuit level or the court of appeals level, we follow vertical *stare decisis*, absolutely, and that means that we are not permitted to deviate from a Supreme Court precedent. With respect to Supreme Court, or let us put it this way, when I am on the D.C. Circuit and we are reconsidering *en banc* a prior precedent of our own, we can do that at times if the conditions for overruling a precedent are met. We cannot do that with respect to Supreme Court precedent. We have to follow that.

And why is that? Because that is there is one Supreme Court in our hierarchical system, and lower courts have to follow that, or there would be chaos in the Federal system if lower courts were not strictly bound to follow the precedents of the Supreme Court.

Senator SASSE. Is there a single Supreme Court Justice today who agrees with the every extant opinion of the Court?

Judge KAVANAUGH. I think that has got to be zero.

Senator SASSE. Right. So how does that get netted out in the next controversial case? When you use these terms—precedent, super precedent, precedent on precedent—how does that get netted out?

Judge KAVANAUGH. Ordinarily, it gets netted out by the Court following the precedent until—until unless or until the conditions

for overturning something are met. *Brown v. Board* being the most prominent example of when that happened. *Erie Railroad* case overruling *Swift v. Tyson*. There are examples throughout our history where that has happened.

But it is rare, and ordinarily, what happens is once a decision has been decided, that is what *stare decisis* means. You follow the decision that has been set forth by the Supreme Court, subject to the rules of *stare decisis*.

And you see that time and again. That is part of stability. That is part of predictability. That is part of impartiality. That is part of public confidence in the rule of law that it is not just going to move pillar to post, that the law is stable and foundational.

Again, it is not—*Brown v. Board* shows it is not absolute. And that is a good thing, but it is critically important to the impartiality and stability and predictability of the law.

Senator SASSE. And the fact that Harlan should have been the guiding opinion for those 58 years is not true just for the Supreme Court. It was also true for appellate courts? Could an appellate judge have gone with Harlan in 1940?

Judge KAVANAUGH. An appellate judge was bound by the precedent of the Supreme Court, and that would have been, sadly, *Plessy v. Ferguson* at that time.

Senator SASSE. So the core difference here for the Supreme Court is there is greater latitude to reconsider the previous errors of the Court.

Judge KAVANAUGH. Of the Supreme Court, that is correct, Senator.

Senator SASSE. I am at 30 seconds left. So I have got to get my last one out to get in under the bell. I will shift gears just a tiny little bit.

What is the Declaration of Independence? In what way—the Constitution is fundamental law for us. What is the Declaration of Independence?

Judge KAVANAUGH. So, the Declaration of Independence, first of all, is a legal document, legally declaring independence, of course, from Great Britain. But it also sets forth a series of grievances against the monarchy, the system, many of which are reflected in the Constitution in terms of protections that are in the Constitution.

If you trace to the Declaration of Independence, you see the grievances they had reflected and protections we have in the Constitution, starting with the separation of powers, but also including the individual protections, whether it is *ex post facto* law or freedom of speech or quartering. The Third Amendment not much mitigated, as we know, Senator, but you can trace it.

But this Declaration of Independence is a set of principles that I think guide our beliefs of life, liberty, and the pursuit of happiness. All men are created equal. All people are created equal in our society. And those principles have guided us, inspired us, been the source of our liberty, the source of much of what we have done as a country since the Declaration of Independence.

But it is not law in the same way the Constitution is law that is applied in courts.

Senator SASSE. Thanks.

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Chairman Grassley.

[Disturbance in the hearing room.]

Senator COONS. Thank you, Chairman Grassley.

Thank you, Judge Kavanaugh. To you, to Ashley, to your family and friends, thank you for being here and for the opportunity to engage with you. Again, you have certainly shown great persistence and engagement.

[Disturbance in the hearing room.]

Senator COONS. In the last round, we talked about the bedrock constitutional principle that no one should be above the law, including the President, which is a principle foundational to our democracy. It is about more than any one person and any one President. And I just want to continue asking you about the President's obligation to cooperate with a Federal investigation and how your view of the President's power might implicate an investigation.

As we all know, in 1974, senior officials in the Nixon administration in the campaign were on trial for crimes related to Watergate. And with so many former White House and Justice Department officials implicated in crimes, then-President Nixon felt threatened by the investigation.

So special prosecutor Archibald Cox, when he issued a grand jury subpoena for the Watergate tapes, audio recordings of White House conversations, reasonably believing they contained evidence of criminal activity, the President acted. Instead of complying with the subpoena for tapes and providing the evidence, President Nixon had the special prosecutor fired, and he fought the subpoena for the tapes all the way to the Supreme Court.

I want to focus on the question of the President's action in firing the special prosecutor because that is what I think is a key issue here. Judge, when President Nixon fired special prosecutor Archibald Cox, did he violate the law or the Constitution?

[Disturbance in the hearing room.]

Judge KAVANAUGH. I know that the regulation in place for Leon Jaworski after the firing had special protection for against firing, and I think that has become the model for the regulations. I am not recalling the specifics of the Cox regulation in place at the time.

Senator COONS. I will tell you that there were for-cause restrictions in place in regulation at the time. Given that, do you think firing the special prosecutor violated the law or the Constitution?

Judge KAVANAUGH. Well, if it violated the regulation, it violated the regulation.

Senator COONS. Would it have violated the Constitution? What I am getting at, Judge, is your view of Presidential power and whether or not it would be a violation of the Constitution for there to be these for-cause restrictions on the President's ability to fire the special prosecutor?

Judge KAVANAUGH. Well, I think the Supreme Court in *United States v. Richard Nixon* analyzed the specific regulation at issue in that case and actually relied on the specific regulation in finding that the case was justiciable under the precise terms of the regulation in place at the time. In fact, the Court analyzed that in really specific detail, pointed out that so long as the—

[Disturbance in the hearing room.]

Senator COONS. Let me be clear about the point I am trying to get to.

Judge KAVANAUGH. Okay.

Senator COONS. It is your views about whether or not, when President Nixon fired Archibald Cox, he obstructed justice in violation of the Constitution or the firing itself violated the Constitution. It is important to know your views on *U.S. v. Nixon* as well, and we will turn to that. But I am interested in your understanding of the Constitution and whether or not it prohibits restrictions on the President's ability to fire a special prosecutor at will.

Judge KAVANAUGH. So the Supreme Court said, and so you are asking my views. My views are what the precedent says. In other words, I follow the precedent. The precedent of the Supreme Court in the *U.S. v. Nixon* case did apply that regulation, analyzed—

Senator COONS. And Judge, *U.S. v. Nixon* was unanimous. Correct?

Judge KAVANAUGH. It was unanimous, 8-to-0.

Senator COONS. Are you aware of any Justice having questioned the decision in *U.S. v. Nixon* since then?

Judge KAVANAUGH. No. I have called it one of the four greatest moments in Supreme Court history, *U.S. v. Richard Nixon*.

Senator COONS. You have, and that is exactly what I want to get to because you have also, in another context, as we talked about yesterday, in a roundtable in 1999, volunteered unprompted that maybe *Nixon* was wrongly decided. Do you think *U.S. v. Nixon* was wrongly decided?

Judge KAVANAUGH. I have said it was one of the four greatest decisions and correct decisions in terms of the specific regulation at issue in the case and the Court's holding in the context of a criminal trial subpoena, that the subpoena for the information, the tapes was enforceable in that context. And that is what I have said before publicly about the *Nixon* case.

And that 1999—

Senator COONS. So, Judge, you would agree that it was correctly decided? Did I just hear you right?

Judge KAVANAUGH. Can I—yes, of course. When I say it is one of the great—I mean, when I say something is the greatest, that means I agree with it. And the point was under the specific regulation at issue in that case, a criminal trial subpoena for the information, and it was a moment of judicial independence, a moment where the Court, I think, came together as unanimous opinion written by Chief Justice Burger. So that is an important moment in the Court's history.

Senator COONS. So you would agree then, just following the *U.S. v. Nixon* precedent, that a Court can order a President to produce records in response to a grand jury subpoena or can be compelled to testify in front of the grand jury?

Judge KAVANAUGH. I am not going to answer hypotheticals about to apply *U.S. v. Nixon*.

Senator COONS. But that is the holding?

Judge KAVANAUGH. The holding of *U.S. v. Nixon* was that the subpoena for the information in the context of the criminal trial had to—could be enforced and that, therefore, given the regulation

at issue in the case, the case was justiciable, and the subpoena could be enforced. I am not going to answer hypotheticals about how it applies in other contexts.

By the way, I should add that the context of what you have up there is incorrect. So, but I have said *Nixon* was one of the four greatest moments in Supreme Court history. I have written it several times before—

Senator COONS. You have.

Judge KAVANAUGH. Including 1999. The context of that, if you want to know, was a roundtable with me and some lawyers who had represented the Clinton administration. We were just talking, reflecting on the independent counsel investigation. And my point to them, they were concerned that the subpoenas that were enforced by the courts during the Starr independent counsel investigation had weakened the Presidency. That was the position of the Clinton lawyers.

And I said, well, we were just following *U.S. v. Nixon*. That was my position. So my position was either you are wrong or *Nixon* is wrong, to the Clinton lawyers. And that is the context of that comment. The tone of voice there makes the printed words look much different from how they were intended, and I think that been seriously mischaracterized.

Senator COONS. And the striking thing about the context, which we discussed before and I made clear in a letter I was going to question you about, is that Phil Lacovara, who was facilitating this roundtable, who was the Watergate prosecutor who argued *U.S. v. Nixon*, in a later interview said he did not think you were just being provocative, this was just some academic give-and-take with some Clinton lawyers. Lacovara has been quoted saying that statement that perhaps *Nixon* was wrongly decided was Brett staking out his jurisprudential approach since law school.

It seems Lacovara thought you were serious about raising a question about whether *U.S. v. Nixon* was wrongly decided because—and this is what you said at the roundtable—*Nixon* took away the power of the President to control information in the executive branch.

Judge KAVANAUGH. Right. And that is why the Clinton lawyers, I thought, were wrong.

Senator COONS. So—

Judge KAVANAUGH. That was my point.

Senator COONS. Why should the person being investigated—

Judge KAVANAUGH. The point, the point—the point that I was making was that Clinton lawyers, who were—were saying that the independent counsel office had weakened the Presidency, I was saying to the Clinton lawyers it was not the Starr office who had done that. It was *United States v. Nixon* that had done that. And then I pointed out to the Clinton lawyers—and I think we have discussed this in the office, had a good discussion in your office about this—was I said, but you were unwilling. I said this to the Clinton lawyers. You were unwilling to challenge *United States v. Nixon*.

Well, that was the governing precedent, and that is the precedent we were litigating, and that is where your concern should be. And that is the context in which that line was said. With all re-

spect to Mr. Lacovara, I think he is misunderstanding what I was saying there.

And here is how I know he was misunderstanding. Because in a contemporaneous Law Review article at that same time, I specifically talked about *U.S. v. Nixon* and the importance of that precedent. So that is how I know he was misunderstanding the point of what—I respectfully think he was misunderstanding the point of what I was saying there.

Senator COONS. So if *U.S. v. Nixon* was rightly decided, was *Morrison v. Olson* rightly decided?

Judge KAVANAUGH. Well, I have talked about *Morrison v. Olson*.

Senator COONS. Yes. That was the whole point of our exchange yesterday, and that is the root of my core concern. And what I am getting at in this whole line—

Judge KAVANAUGH. I have associated myself with Justice Kagan's position on *Morrison v. Olson*.

Senator COONS. And given our exchange yesterday, I went back and looked at "Presidential Administration," her article where she expressly rejects unitarianism, as she calls it, the unitary executive theory. The theory that you do not just mention in passing but expound in your *PHH* dissent.

Judge KAVANAUGH. I do not—

Senator COONS. It is exactly this reason that I have concerns, Judge.

Judge KAVANAUGH. But I specifically recognize, Senator—and I understand the point. But I specifically call *Humphrey's Executor* the precedent that we must follow in the independent agency context. *Humphrey's Executor*, of course, accepts independent agencies, as did I in that case, as precedent of the Supreme Court that I have referred to as entrenched.

The only thing I was—the only question in *PHH* was can we go further than that kind of independent agency, consistent with Article II, or does *Humphrey's Executor* draw the line that sets forth the permissible boundaries under which Congress can establish independent agencies?

Senator COONS. In an exchange you had with Senator Feinstein earlier today, this was exactly the question where I do not think you ever really answered it.

As I understand your dissent in the *CFPB* case, *PHH v. CFPB*, your exact problem with the structure Congress created for this independent agency was that the Director was not removable at will by the President. The Director is removable, but only for cause.

That is the line that I am drawing here between your concerns or criticisms in one context a long time ago about *U.S. v. Nixon*, your comments about being able to fire the prosecutor at will in a number of Law Review articles, your comments in some roundtables and discussions in 2016, and the dissent in *PHH* and the structure of the *CFPB*. What offended your constitutional sensibilities, as I understand your dissent, Judge, this year in *PHH*, was that the President could not fire at will the Director.

And that is the whole reason of my asking you about did the President violate the Constitution, in your understanding, in firing the special prosecutor in Watergate? It is a coherent theory. You can have a coherent theory that the Congress cannot restrain the

President's ability to fire at will lesser executive branch officials. I just want to have a clear understanding of it.

Judge KAVANAUGH. I want to understand the question. So the first part of the question was, part of your premise—

Senator COONS. So earlier today, let us return to an earlier exchange you had with Senator Feinstein. She was asking you about your dissent in *PHH*. What was it that caused you to write an opinion, what was the constitutional view, the underpinnings of your decision that having a single Director removable for cause by the President was constitutionally unsound?

Judge KAVANAUGH. Okay, I can explain. Can I get a minute?

Senator COONS. Yes.

Judge KAVANAUGH. Okay. So I was following a precedent of the Supreme Court from about 10 years ago, *Free Enterprise Fund* case. I had written the dissent at the D.C. Circuit in that case, a novel independent agency structure for the PCAOB, the accounting oversight board.

Senator COONS. Right. I am familiar.

Judge KAVANAUGH. I wrote a dissent saying that the—that structure departed from the traditional independent agency structure. I dissented. The Supreme Court took the case, agreed with my dissent in a majority opinion by Chief Justice Roberts saying that the outer lines, at least as I interpret what Chief Justice Roberts said for the Court, the outer lines of independent agencies are the traditional independent agency structures set forth in *Humphrey's Executor*. At least that is how I interpreted the opinion.

And then—

Senator COONS. But was *Humphrey's Executor* not also, Judge, critically about removable at will versus for-cause?

Judge KAVANAUGH. Yes. And that is so long as it—

Senator COONS. And is this not exactly why the majority in your Circuit said that your dissent flew in the face of *Morrison*?

Judge KAVANAUGH. They thought *Humphrey's Executor* allowed structures beyond the multi-member agency that was upheld—

Senator COONS. Yes, exactly.

Judge KAVANAUGH. In *Humphrey's Executor*. I disagreed, based on the *Free Enter*—the same thing had been said about my dissent in *Free Enterprise Fund*. The Supreme Court took it and agreed with my dissent in *Free Enterprise Fund*. I thought this case is very similar to what I had written in *Free Enterprise Fund*. In fact, I block quote my old dissent.

Senator COONS. But what you did not say in response to Senator Feinstein's question that I am still trying to get an answer to, was not your core concern in your *PHH* dissent that the President could not fire at will the Director of the CFPB?

Judge KAVANAUGH. That was the concern because that departed from history to have a single Director independent agency structure, not the multi-member independent agency structure that existed in *Humphrey's Executor*, and that had—

Senator COONS. And you can see how that then raises questions and concerns about your distinction between fireable at will or fireable for cause.

Judge KAVANAUGH. But—

Senator COONS. And as this body has taken up and debated whether or not it is permissible for us to legislate a protection for special prosecutors that they can only be fired for cause, not at will, your repeated citation of the Scalia dissent in *Morrison v. Olson* rises again to the fore. Thus, my question to you. Will you also agree that *Morrison* was correctly decided?

It is good law. It is a settled case. You may have in a response to a previous question said, oh, it is a one-off case about a now extinguished statute.

Judge KAVANAUGH. Right.

Senator COONS. But as I said yesterday, why then pick it out of the whole constellation of constitutional opinions as the one you most want to put a nail in its coffin? Why the animus against this if you do not think it was wrongly decided?

Judge KAVANAUGH. I have said what I have said about *Morrison*, but Justice Kagan said that it is one of the greatest dissents ever written by Justice Scalia, which—

Senator COONS. Yes.

Judge KAVANAUGH. Unless I am misreading something—

Senator COONS. You are misreading something, Judge, with all due respect. I went back to look at “Presidential Administration” by Justice Kagan after you cited it to me yesterday. That is clearly not what she is saying. She is not endorsing the unitary executive.

Judge KAVANAUGH. You are conflating—

Senator COONS. She is saying Scalia wrote a beautiful dissent, in my view.

Judge KAVANAUGH. You do not think she agrees with it?

Senator COONS. I do not think she agrees with it at all.

Judge KAVANAUGH. I think when she calls something the greatest, she probably agrees with it.

Senator COONS. But let us get to what you believe. What I am encouraged by is, that you have said when you call *U.S. v. Nixon* the greatest, you think it is rightly decided. What I am not getting an answer from you on is whether you think *Morrison v. Olson* was rightly decided.

But I would be interested in hearing whether you think *Griswold v. Connecticut* or *Eisenstadt v. Baird* were correctly decided. An opinion that Justices Kennedy, Ginsburg, Roberts, and Alito proffered when they were before this Committee in their confirmation hearing—

Judge KAVANAUGH. I think I—

Senator COONS [continuing]. Were those correctly decided?

Judge KAVANAUGH. I think I said last night in response to Senator Harris, who asked me about whether I agree with Senator— with Justice Alito and Chief Justice Roberts on that, I said yes.

Senator COONS. That they were correctly decided?

Judge KAVANAUGH. I answered that I agreed with Justice Alito and Chief Justice Roberts.

Senator COONS. Can I just take a minute and explore your view of the independent counsel, the idea that the independent counsel statute is unconstitutional? Because you have written and spoken about that repeatedly. 1998, 1999, in law journal articles and public speeches. As I perhaps pointedly raised yesterday, in 2016, you called the independent counsel statute a “constitutional travesty.”

Judge KAVANAUGH. That is what Senator Durbin had also, in essence, called it.

Senator COONS. Well, what I am concerned about is what you said about it because you are the nominee for the Supreme Court, not Senator Durbin.

Judge KAVANAUGH. That is what the entire—that is what the entire Congress, the entire Congress had basically taken that view in 1999 that it was unrestrained, unaccountable, a disaster.

Senator COONS. Let us say it was widely panned.

Judge KAVANAUGH. But it is very different—

Senator COONS. But you chose to call it out as a constitutional travesty, and you are the nominee for the Supreme Court in front of me. So just give me a moment. While you worked for Ken Starr as independent counsel under the independent counsel statute, you took an oath of office to defend the Constitution. Correct?

Judge KAVANAUGH. As interpreted by the—you know, you follow precedent of the Supreme Court. If the Supreme Court has upheld something, you still work in your public service.

Senator COONS. So you took an oath. You were engaged in public service. You believed then, as we all do, that it was your job to act in compliance with the Constitution. But you also fully utilized the tools available to the independent counsel, right? You were part of a team that sought a subpoena against President Clinton for evidence, for DNA evidence. Yes?

Judge KAVANAUGH. Can I get 30 seconds?

Senator COONS. I think this is a “yes” or “no” question. I am down to 2 minutes.

Judge KAVANAUGH. Can I get 30 seconds?

Senator COONS. If it is your last 30 seconds.

Judge KAVANAUGH. Okay. I want to emphasize that the special counsel system that is in place now is something that I have specifically repeatedly and expressly said is consistent with our traditions in my 1999 Georgetown Law Journal article and in the *CFPB* decision. The special counsel system, I have said, is part of our tradition.

That is the system in place. You are talking about something that has not been in place for 20 years.

Senator COONS. That is right. The independent counsel statute, that structure, has not been in place for 20 years. My core concern, first, was that you were perfectly happy to use all the tools available to the independent counsel when you worked there. After working there, discovered an enthusiasm for its invalidation as a constitutional matter.

In trying to understand that, I have dug into your writings, your opinions, your speeches and concluded that you hold a view of the executive branch, which I believe you made clear this year in your *PHH* dissent, which I believe is in line with Justice Scalia’s view as expounded in his dissent in *Morrison v. Olson*, which is that there has to be in the President, as the chief law enforcement officer of the United States—this is the unitary executive theory, not mine—the ability to fire at will any special prosecutor.

And the ability—and I have got quotes from you in different contexts saying that what is appropriate in this traditional special counsel setting like the Watergate period is if the President dis-

agrees with the conduct of the prosecutor, he should simply fire him and bear the consequences.

My point essentially is this. I am convinced that you—you have said repeatedly you support the traditional practice of appointing special counsels, but you have not acknowledged you have supported this practice because the President has retained the power to fire the special counsel at will. And those of us who have tried to enact statutes that might restrain the President in some way, by putting in place for-cause removal restrictions, have had thrown back at us the dissent from *Morrison v. Olson*, a dissent which you embrace and cite and a dissent which I think reveals a deep commitment to a view of the President that in our current context is profoundly dangerous.

And I simply wish, Judge—and we will have a third round to explore this. I simply wish you would be clear with us and the American people about your view of the scope of Presidential power and what its consequences might be. I do not think you are being direct with me about that because I think to be direct with me about that in this context would put your nomination at risk.

Judge KAVANAUGH. And I would respectfully disagree, Senator. You are talking about a statute that has been—not existed for 20 years.

Senator COONS. That is no longer what I am talking about, Your Honor, as you know. What I am talking about is your view of Presidential power as made clear in speeches and in writings and in a decision this year. We are not talking about the independent counsel statute now. We are talking about the scope of Presidential authority, and I think it has consequences for our Nation.

Chairman GRASSLEY. You can answer.

Senator COONS. You are clearly a capable and good man.

Chairman GRASSLEY. You can answer.

Senator COONS. And a good neighbor and a good coach, and we have heard a lot about that. What I want to hear more about is an honest answer about your view of Presidential power.

Chairman GRASSLEY. You can answer.

Judge KAVANAUGH. You are talking—if I can answer uninterrupted for 25 seconds?

Chairman GRASSLEY. You can answer—you can answer on the 10 minutes I did not use.

Judge KAVANAUGH. Yes. Respectfully, Senator, first of all, I appreciate your care—and we have known each other since law school, we have been friendly with each other since law school—and your devotion to this. Respectfully, I believe you are talking about a statute that has not been in place since 1999.

Second, the special counsel system I have specifically written about multiple times and approved. Third, if there were some kind of protection, for-cause protection or some other kind of protection that were different from the old independent counsel statute, I have said that I would keep an open mind about that. So I have not said anything to rule that out.

And finally, I have reaffirmed repeatedly or I have applied repeatedly the precedent of *Humphrey's Executor* for traditional independent agencies and have never suggested otherwise. I have referred to that as an entrenched precedent.

So those are—and I have referred to *U.S. v. Nixon* as one of the greatest decisions in Supreme Court history.

Chairman GRASSLEY. We will soon take a break, and then Senator Flake is up next. But before, there is a couple of things.

One, it will be a 15-minute break, but if you can make it 7½ minutes, I would appreciate it.

[Laughter.]

Chairman GRASSLEY. Well, I am not ordering you to do that. I just said I would appreciate it.

But before you go, I want to get back to this Justice Kagan's comment on *Morrison*, and this is something that you and the Senator from Delaware have discussed a long time. Somehow that the only commentary on *Morrison v. Olson* is from Kagan's Law Review article, "Presidential Administration."

But she also said this in a magazine, Stanford Lawyer, 3 years ago. And it says, "Justice Kagan has called Justice Scalia's dissent in *Morrison* one of the greatest dissents ever written and said that every year it gets better."

We are in recess.

[Whereupon, at 3:48 p.m., the Committee was recessed.]

[Whereupon, at 4:03 p.m., the Committee reconvened.]

Chairman GRASSLEY. Tell me when you are ready, Judge.

Judge KAVANAUGH. Thank you, sir.

Chairman GRASSLEY. Senator Flake.

Senator FLAKE. Thank you. Judge Kavanaugh, if it is fourth quarter and you are down by 1 point, what play do you call and which one of the young ladies in the front row do you get the ball to?

[Laughter.]

Judge KAVANAUGH. I cannot choose. They are all great players, as you know, Senator. It is awesome to have them all here.

Senator FLAKE. Do you want to let us know who they are and what your team is here?

Judge KAVANAUGH. These are a variety of teams that I have coached. So, I started coaching many years ago, and some of these girls are as old as 10th grade now, so they are older than my daughters. I started coaching the Fifth-16 then, I guess, 4 years ago. So, the oldest girls, Caroline and Abigail, 10th grade; Sara and Fiona, 10th graders; Madison, ninth grader. Girls over here. Well, these are my two, of course, and Keegan, and Coco, and Anna, and Shawnee, Quinn, Sophie are all here. And so, let us see. We have got: Liza is going into the fifth grade, Margaret is in seventh, Keegan is in fifth, Coco is in fifth, Anna is in seventh, Shawnee is in seventh, Quinn is in sixth, and Sophie is in seventh. So, I think I got it all right, yes.

[Applause.]

Senator FLAKE. Well, thank you.

Judge KAVANAUGH. And they are all awesome players. They really are. I mean, they are tough as nails, right, Caroline? Caroline Conahan, no one tougher.

Senator FLAKE. Well, there goes my whole line of questioning.

[Laughter.]

Senator FLAKE. Well, thank you all for coming. Welcome here. Let me ask a variation on the question that Senator Sasse asked a few minutes ago. He asked you what Supreme Court decisions

over the years were decided wrongly. You answered. You have decided over the past 12 years about 307 cases, I believe, on the circuit court. Are there any that you look back on and say I just did not get it right, or this one has not held up well over time? And I know that is a difficult question. I mean, as politicians, that is a tough thing for us to answer, but I would be glad to, you know, tell you the number of cases where Senator Sasse got it wrong.

Senator SASSE. And I will reserve my time for rebuttal.

Judge KAVANAUGH. Well, Senator, I will point out where I reconsidered something in one case. So, the *Bahlul* national security case that I had, one of the questions in that case was what did the “law of war” mean in Section 821, and I referenced it in a prior case as being limited solely to the international law of war. And then after reflection and actually after the Deputy Solicitor General for President Obama argued in our court, at oral argument he planted a seed in me that I interpreted it too narrowly, and that it included not just the international law of war, but the U.S. historical practice.

And I went back and really thought about that. He made a compelling case at oral argument, and I went back and dug deeper and studied it, and ultimately concluded he was right in what he had said at oral argument, and I referenced that in my subsequent *Bahlul* opinion that based on the arguments of the Deputy Solicitor General, I had gone back. It is like—it is like a replay official. You know, I made the call on the original case, but gone back and looked at it again carefully, studied it over and over again, and went back to the history, and concluded he was right. So, that is one example where I myself in one of my opinions pointed out that in a previous decision, I had, you know, under-interpreted the scope of one statute.

Senator FLAKE. Going a little further there, which ones have you struggled with? Which ones were the most difficult, and how did you deal with those?

Judge KAVANAUGH. Senator, I think what Justice Kennedy used to say in response to that question is something that always comes into my mind. When he was always asked what is the hardest case, what is the most difficult case, he would always say, “The one I am working on right now.” And I think that is—I think that—there is something to that, which is every case you want to give it your all and you are focused on the case you are working on at that moment.

There, of course—more responsive to your question, I think what Justice Kennedy said is correct, but perhaps more directly responsive to your question, I, of course, think national security cases are quite difficult and quite important because you know the significance of them. But, so, too, every case has an effect on real people in the real world. So, I want to give every single case, give it my all. I do not treat any case as a second-tier case. I treat every case as the most important case. And that is why I think Justice Kennedy’s comment really does resonate with me and does point out something, which is to the litigant before you in that particular case, that is the most important case they will ever have. It is probably the only case they will ever have, and it is important that

I treat it as the most important case for me at that moment in time and while I am deciding it.

Senator FLAKE. Can you talk briefly a little bit about the process that you have undergone in the appellant court. It will be a little different at the Supreme Court level. But when a case comes before you, you sit down with your clerks I am sure, and assign research to them. Do they frequently work with other clerks, compare notes? Do you do that with the other judges? How does it usually work, and how might that be different with the job you are applying for?

Judge KAVANAUGH. I think there are a lot of similarities to the Supreme Court in terms of the process from my time clerking for Justice Kennedy at least, my experience there and seeing how it works now. So, in basic terms, what I do is I read the briefs very carefully. I have my clerks prepare binders, many, many binders of all the cases I need to read, of all—I like to know the law review article and treatises on point. I like to go back and see if there are any historical materials that might be, and they are all in the binders. Then I will talk about it with the clerks. I will have one clerk who is handling it, but sometimes talk about it with all the clerks, about my tentative views.

The judges, interestingly, do not talk about the case ahead of time with each other, and the reason for that is we each want to come into the oral argument having formed our own tentative approaches and questions, and not having been influenced by maybe, well, this is what the other judge thinks, and so, that will suddenly influence you. But if we come into the oral argument with three independent perspectives, the practice has been that will help us reach a more informed decision. Each of us will be prepared.

Then at the oral argument itself—it is so important—we learn from the lawyers, but we also learn from each other at the oral, the questions, similarly the way this process works. You hear the questions of other Senators, and that sparks thoughts for you to ask questions and other Senators to ask questions. So, too, for the judges. Then we conference right after oral argument, and we give our tentative views and go around and debate and discuss. And it is very collegial, and there is a lot of fluidity in that discussion. It is not as—it is not here is my position and that is it. It is never—for 12 years, I have never been in a single conference where any judge has said anything like that. Rather, it is a here is what I am thinking, what are you thinking, and we go around and go in turns, and then discuss it, and reach a tentative resolution.

Then we write it up. One judge is assigned to draft up the opinion and writes—that is an intense process for me and I think for all judges of draft after draft after draft, and I talked about that, to get it exactly right. I want it to be clear, and I want it to be consistent with precedent, and I do not want to—I want the losing party to think they have gotten a fair shake. I want the affected parties to be able to understand it, to be as clear as possible.

And that discipline of writing sometimes convinces you you might have gotten it wrong when you first were thinking about it, and sometimes you change 180 sometimes, but often will just shift your views. But the writing is such a discipline. That is an important—the whole thing is a process with three judges, or nine on the Supreme Court, that is designed to make sure you get it right. And

so, the collective decisionmaking process combined with the discipline of preparing and the discipline of oral argument, the discipline of writing it out.

That is why judges when they come here are very reluctant when they get a hypothetical to just give a one-off answer without going through that process. Process protects us as judges. It protects the people who are affected by our decisions. So, we are—we love process because we are used to process, and process, in our view, helps us make better and more informed decisions.

Senator FLAKE. Thanks. Let me talk a little about what I touched on yesterday, obviously the independence of the judiciary or separation of powers are what's at issue here, and the most important questions I think you have been asked are about that. Senator Coons and I, along with a few others, traveled to Southern Africa a few months ago, and we met there with the constitutional court of South Africa at a time when just a few weeks before, or a month before, they had ruled against the sitting president, expenditure of funds issue and a few other things. But rendered a decision against the president of the country, the executive, that allowed the parliament then to go in and remove him.

And we talked about that, and they marveled at how this country—this country of South Africa had had such a court that understood their role and how important it was to be completely independent of the executive. One of the justices put it, well, he said, we cannot allow the executive to climb over the lectern, and I thought that that was an image that is apropos here as well. There have to be some limits to Executive power where he, head of the executive branch—the President in our case—cannot climb over the lectern. And in many cases, just north to Zimbabwe where for the past 37 years, Robert Mugabe had over a period of time climbed over the lectern enough where—to put judges in place that would rule whatever he wanted.

And the genius of our system, or separation of powers, and the independent judiciary is that we can never allow that to happen, and there have to be constraints. And you mentioned some of them yesterday with regard to what constrains the President. But still, the President has immense powers largely because we have conceded too much from the Article I branch to the Article II branch.

But when we talk about Presidential power now, I was struck by a conversation you had yesterday with Senator Feinstein, and I want to explore it a bit. You mentioned as a point of pride, and I think it is a point of pride, that you had ruled in the *Hamdan* case after 9/11. This is one of the bodyguards or drivers for Osama bin Laden. It was an extremely unpopular decision, but one to protect his constitutional rights, and to ensure that we just did not look and say, here, here is something unpopular, we cannot protect his rights.

Yet when you were asked why you feel how you do now on the independent counsel statute, you feel differently than you did in the 1990s. And you mentioned to Senator Feingold that you feel differently because of 9/11. And that ostensibly, the President needs to be given more reign, I guess, because he needed to focus on national security issues. But I am trying to square that. I think that your explanation of how you ruled in the *Hamdan* case is ad-

mirable. I am not sure about your explanation with regard to giving the President more leash or more authority because of 9/11 squares with that. Can you shed some light?

Judge KAVANAUGH. That was simply a proposal in 2009 when President Obama was coming into office that for Congress to consider, but there would be pros and cons if Congress did consider something like that, about—and it was not immunity. It was simply the timing of litigation, the *Clinton v. Jones* scenario, for example. And it was something—an idea based on my experience, but Congress would, of course, consider the pros and cons.

The principle I emphasized there was no one is above the law in the United States Constitution under the—in the United States Government. There is a question, and that is Federalist 69, of course, but it is also woven right into the text of the Constitution. But there is a question about timing for members of the military, for example. That is why we defer—have deferral for them. But it was not a constitutional position, so I really want to emphasize that, Senator, that that was not a position of what I thought was required by the Constitution; rather, something to be studied as Congress studies things all the time to ensure the effective operation of the Government.

On your point about *Hamdan*, I do think some of the—and your point about your trip, some of the great moments in Supreme Court history have been those moments of judicial independence and moments of political crisis, the *Youngstown Steel* case. We were at war with Korea, and the President seizes steel mills, well intentioned because it is well intentioned to serve the war effort, but the Court says it is not consistent with law, and, therefore, unlawful, and the Court rules against President Truman.

We talked a lot about the *United States v. Richard Nixon* case, a unanimous decision in 1974 by Chief Justice Burger who had been appointed. The *Clinton v. Jones* case itself was a moment where the President of the United States was ruled against by the Supreme Court, including two of his appointees. The *Boumediene* and *Hamdan* cases in the Supreme Court, before *Hamdan* came back to me, were cases; *Boumediene* by Justice Kennedy in 2008 ruling against President Bush, *Boumediene v. Bush*, in a wartime case.

And so, to my *Hamdan* case, I do look at that as a case where the rule of law protects all who come into court regardless of who you are. And no one is above the law, and the President is subject to many legal restraints in terms of the official capacity, the war effort. And I think my decisions have shown that independence in a variety of areas.

Senator FLAKE. Thank you. Let me shift gears in my final couple of minutes to technology. We struggle here in Congress with striking a balance obviously between security, freedom, between innovation, privacy. We just had the Facebook hearing in this room along with the Commerce Committee, and questioned Mark Zuckerberg on these issues. A late night comic that night commented that with all of us questioning out here, at least five of us, our password for our email is, “password.” And so, we were not as nimble in dealing with a lot of these issues, but the same applies to the Court.

How does the Court, how will the Court, how would you as a Supreme Court Justice deal with these issues? Would you describe yourself as technologically literate? I know you have dealt with these issues on the D.C. Circuit, but balancing privacy, and innovation, and security, and freedom. This is going to make up a big chunk of what the Supreme Court does over the coming months and years.

Judge KAVANAUGH. Senator, I do think that technological developments are going to be a huge issue for the Supreme Court over the next generation. And Chief Justice Roberts has been a—writing some of the key opinions, the *Carpenter* case most recently, which was a very important decision, the *Riley* case before that. And you see how he is—and this would not necessarily have been predicted at the time of his 2005 hearing, how he has focused and led the Court in making sure the Fourth Amendment keeps abreast of technological developments, and his opinions are very clear.

Senator FLAKE. Specifically, what impact does technology have on the Fourth and the First Amendments?

Judge KAVANAUGH. So, I think the *Carpenter* case explains that once upon a time if a piece of information of yours ended up in the hands of a third party and the Government got a third party, that really was not any effect on your privacy. But now when all of our data is in the hands of a business, a third party, and the Government obtains all your data, all your emails, all your texts, all your information, your financial transactions, your whole life is in the hands of a data company and the Government gets that, your privacy is very well affected. And that is the importance, I think, of the *Carpenter* decision is that it recognizes that change and understanding of our understandings of privacy. And I think going forward that is going to be a critical issue.

One of the cases I did write an opinion in, GPS surveillance, and putting a GPS tracker on your car. And I wrote an opinion in the D.C. Circuit where I recognized that putting a GPS tracker on your car was an invasion. A new technology was an invasion of your property. And, therefore, was something that violated the Fourth Amendment.

[Disturbance in the hearing room.]

Judge KAVANAUGH. So, and was something that the Supreme Court then in an opinion by Justice Scalia adopted that approach to recognizing the GPS surveillance. But I think going forward, as I have said, these are backward-looking hearings sometimes, but the forward-looking question you asked is, I think, a very important one about the change in Fourth Amendment, not doctrine, but the change in technology that in turn requires us to understand it as we apply Fourth Amendment doctrine going forward, and First Amendment free speech principles as well. Our conception of speech will have to take account of the technological developments as well.

Senator FLAKE. Just one last question. What does an independent judiciary mean in terms of judges and their personal political or religious beliefs? Have you known good judges who are Democrats, Republicans? Do you see a difference? Are they viewed that way? What about Catholic, or Mormon, or Muslim, or an atheist? What should be our approach to judiciary in that sense?

Judge KAVANAUGH. Well, I think, Senator, all judges are independent. We do not sit in separate caucus rooms. We do not sit on sides of an aisle. We are not Republican judges or Democratic judges. We are independent United States judges, and so, too, with respect to religious beliefs. As I have written, we are equally American no matter what religion we are or if we have no religion at all. And so, too, as judges. We are all equally United States judges no matter what religion we are, and we see that right in the text of the Constitution that no religious test shall be imposed as a qualification for any office in the United States.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Good afternoon, Your Honor.

Judge KAVANAUGH. Thank you.

Senator BLUMENTHAL. And welcome to your team.

Judge KAVANAUGH. Thank you, Senator.

Senator BLUMENTHAL. I want to, first of all, tie up a couple of loose ends from yesterday. I asked you yesterday whether during your service in the Bush administration you took the position that not all legal scholars believe *Roe v. Wade* is settled law, and whether the Supreme Court could overrule it. You said, in fact, that the Supreme Court could, and you declined to say whether you would commit to saying that you would not vote to overturn *Roe v. Wade*. I believe, thanks to that exchange, that an email has now been made public in which you took exactly that position, and you argued in that email that *Roe* can be overturned.

My question to you is whether during that break, did anyone suggest to you that I would ask about this email? I think we took a break before I asked you my question. Did anyone ask you whether—did anyone suggest to you that I might ask about this email during the break before the questioning?

Judge KAVANAUGH. Just now?

Senator BLUMENTHAL. No, yesterday.

Judge KAVANAUGH. Boy, I am not remembering. I am not remembering one way or another. What did I—I am not remembering.

Senator BLUMENTHAL. Did anyone show you this email during the session yesterday at any point?

Judge KAVANAUGH. I would have to check actually. I do not remember. During each break yesterday, I have had—I have had these emails, I think.

Senator BLUMENTHAL. And you reviewed this one before you came to testify.

Judge KAVANAUGH. I am not—I am not going to remember, Senator, but I do know that that email does refer to what—my impression of what legal scholars think. It is not—I think the premise of your questions was, respectfully—

Senator BLUMENTHAL. Well, if you do not—if you do not remember somebody—whether someone showed it to you or not, I want to move on to another area. You were asked yesterday by Senator Harris as to whether you had certain conversations about the special counsel investigation with anyone outside of the group of judges on the D.C. Circuit. At that point, your answer was vague, and it was again this morning when Senator Hatch asked you about it. So, I want to ask you very specifically, have you discussed

the special counsel investigation with anyone outside of the group of judges on the D.C. Circuit?

Judge KAVANAUGH. I have had no inappropriate discussions with anyone. Of course, it is on—

Senator BLUMENTHAL. Have you had any discussions with anyone, appropriate or inappropriate?

Judge KAVANAUGH. Well, when—

Senator BLUMENTHAL. Have you ever talked about the special counsel investigation with anyone outside the—

Judge KAVANAUGH. If you are walking around in America, it is coming up, Senator, so people discuss it. But in terms of—I have never made any—let me just finish if I could. I have never suggested anything about my views about anything, commitments, foreshadowing. I have had no inappropriate discussions. Of course, first of all, let me tell you a few contexts in which it can come up. Our courthouse has a lot of activity going on in it because of that. There are a lot of people there, so those are discussions that will come up.

Senator BLUMENTHAL. Let me be more specific so that we sort of hone in on what my concern is. Have you ever talked to anybody in the White House about the special counsel investigation?

Judge KAVANAUGH. I have no discussions with people in the White House about—

Senator BLUMENTHAL. No one, including—

Judge KAVANAUGH. What do you mean by—I guess I just want to make sure I am understanding what your question is going for. I have had no issues where I have discussed my views on any matters, issues, cases, no hints, previews, forecasts, no—

Senator BLUMENTHAL. But have you ever talked about the special counsel investigation with Don McGahn, who is behind you, or anyone else in the White House? That is a simple “yes” or “no.”

Judge KAVANAUGH. I am not remembering any discussions like that. Of course, in preparing for this hearing I prepared for questions like the one you are asking.

Senator BLUMENTHAL. And they have—

Judge KAVANAUGH. So, those are—those are moot court sessions where we have—

Senator BLUMENTHAL. Well, what discussions have you had about the special counsel with people in the White House?

Judge KAVANAUGH. I have not had discussions—if I am understanding your question correctly, I have not had such discussions, but I want to make sure I am understanding your question correctly.

Senator BLUMENTHAL. It is pretty simple English. Have you talked about the special counsel with anyone in the White House, anybody who works for the President of the United States?

Judge KAVANAUGH. Well, you just rephrased the question, though. That was about Mr. Mueller this time, and previously it was about the investigation. But I have had no—if I am understanding the question correctly, no discussions of the kind you are asking.

Senator BLUMENTHAL. So, you are saying, no, you have had no discussions. You have not talked to anyone in the White House about Robert Muller or the special counsel investigation.

Judge KAVANAUGH. So, you changed the question again, Senator. Of course, I know Mr. Mueller personally from my prior experience in the—I mean, I have not seen him in a long time, but I knew him when we worked in the Bush administration. So, but I have no discussions of the kind that I think you are asking about.

Senator BLUMENTHAL. Well, I am asking about the kind you are thinking about, not myself.

Judge KAVANAUGH. Well, I have not had any discussions of the kind I am thinking about either.

[Laughter.]

Senator BLUMENTHAL. Well, I am going to take that as a “no,” which you are giving under oath, and we can put aside the humor for the moment.

Judge KAVANAUGH. Right, I am not trying to be humorous, I am trying to be accurate. For example, if someone says your courthouse—

Senator BLUMENTHAL. No, I am talking about discussions with anybody who works for the President of the United States in the White House about the special counsel. And so far, frankly, your answer has been ambiguous.

Judge KAVANAUGH. I do not think it has been ambiguous.

Senator BLUMENTHAL. You have dodged the question. You have ducked it. It is the same question again and again and again, and I am going to move on because I have other ground to cover.

Judge KAVANAUGH. Okay.

Senator BLUMENTHAL. Have you had conversations about the special counsel investigation with anyone at the Kasowitz, Benson, and Torres firm?

Judge KAVANAUGH. No, I do not remember anything like that.

Senator BLUMENTHAL. Are you acquainted with anyone at that firm?

Judge KAVANAUGH. I know Ed McNally used to work at the White House Counsel’s Office, and I now—I understand that he works at that law firm.

Senator BLUMENTHAL. Have you ever talked to him about the special counsel investigation?

Judge KAVANAUGH. No.

Senator BLUMENTHAL. Are you acquainted with Marc Kasowitz?

Judge KAVANAUGH. I am not.

Senator BLUMENTHAL. Are you acquainted with anyone else at the Kasowitz law firm?

Judge KAVANAUGH. I do not believe so, but as I discussed with Senator Harris last night, I did not know, for example, Senator Lieberman worked at that firm, and he spoke to the judges a couple of years ago before this. But that is the kind of thing I was worried about when I was talking with Senator Harris last night is that I do not have the full roster. But I am pretty confident the answer is no.

Senator BLUMENTHAL. Okay. We have talked about the independence of the judiciary, and you have spoken compellingly about the importance of an independent judiciary, and I could not agree more. I think the heroes of this era will be the independent judiciary and our free press. I want to talk to you about President

Trump's attacks on the judiciary. They have been blatant, craven, and repeated, and I want to quote to you a couple of those attacks.

I have achieved a partial quotation of them, 41 tweets attacking the judiciary. But the one I want to cite to you is from July 13, 2013 when he said, of Justice Ruth Bader Ginsburg, "Justice Ginsburg of the United States Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot. Resign!" November 10th, 2013, again, speaking about Justice Ginsburg, "Supreme Court Justice Ruth Bader Ginsburg was going to apologize to me for her misconduct. Big mistake by an incompetent judge." Do you believe that Justice Ginsburg "embarrassed us all"?

Judge KAVANAUGH. Senator, I have, of course, spoken about all the Justices individually during the course of this hearing, and my—

Senator BLUMENTHAL. If I may interrupt, and I say this with all due respect, this is a question where less is more in the answer. Do you think Justice Ginsburg has embarrassed us all?

Judge KAVANAUGH. Senator, I am not going to get drawn into a political controversy, a line I have maintained. I am not going to get three zip codes of a political controversy here.

Senator BLUMENTHAL. This is not political. This is about Justice Ginsburg. Do you believe that her "mind is shot"?

Judge KAVANAUGH. Senator, respectfully, you are asking me to, after having read those comments, you are asking me to comment on something another person said, and I am not going to do that. I have spoken about my—

Senator BLUMENTHAL. Do you believe that—

Judge KAVANAUGH. I have spoken about—

Senator BLUMENTHAL [continuing]. She's an incompetent judge?

Judge KAVANAUGH. I have spoken about my respect and appreciation for the eight Justices on the Supreme Court, my—the honor it would be if I were to be confirmed to be part of that Team of Nine with those eight people, all of whom I know and respect, and I know they are all dedicated public servants who have given a great deal to this country. And so, I have made that clear throughout this hearing.

Senator BLUMENTHAL. Do you believe that a judge should be attacked based on his heritage? The President of the United States attacked Judge Gonzalo Curiel saying that the Judge—"the judge who happens to be, we believe, Mexican" in attacking him? Do you believe that judges should be attacked based on their heritage?

Judge KAVANAUGH. Senator, again, I am not going to comment on—

Senator BLUMENTHAL. Well, these are issues that concern the independence of the judiciary, Your Honor. With all due respect, you talked about your heroes who have the grip and backbone to stand up and speak out. We are talking here about an independent judiciary, and my colleagues have raised this point. And I might just say to you as I said to Judge Gorsuch, then-Judge Gorsuch, now Justice Gorsuch, that the judiciary and nominees like yourself have an obligation to stand up for the judiciary. And he said that these attacks are "disheartening and demoralizing." Do you agree?

Judge KAVANAUGH. Senator, I am not sure of the circumstances, but the way we stand up is by deciding cases and controversies

independently without fear or favor. Beyond that, we follow the canons in the leadership of Chief Justice Roberts, who is a superb leader of the American judiciary in terms of maintaining the independence of the judiciary and staying well clear of political controversy.

Senator BLUMENTHAL. Let me ask you something else then about the intersection of President Trump and yourself. On the night of the announcement of your nomination, you were at the White House.

Judge KAVANAUGH. Yes.

Senator BLUMENTHAL. And you chose to begin your speech introducing yourself to the American people by saying, and I quote, “No President has ever consulted more widely or talked with more people from more backgrounds to seek input about a Supreme Court nomination.” What was the factual basis for that statement?

Judge KAVANAUGH. So, I did think about that. Those were my words. Senator Harris asked me about that last night, and the President and Mrs. Trump when we were there, my family was there that night at the White House. He and Mrs. Trump were very gracious. I was very impressed with during the 12-day period between Justice Kennedy’s announcement of his retirement and the announcement of my nomination, I was impressed as a citizen and as a judge with the thoroughness of the process. And I did look into, to your point directly, and thought about and looked into comparing what I knew about past processes and made that comment—

Senator BLUMENTHAL. You looked into past appointments? Did you talk to President Clinton about how many people he talked to before he nominated Justice Ginsburg?

Judge KAVANAUGH. So, last night I said to Senator Harris that President Clinton, I do recall, talked to a lot of people as well. And I indicated that is why I used the phrase—

Senator BLUMENTHAL. He talked to just about everybody in Washington, did he not?

Judge KAVANAUGH. And President Trump talked to a lot of people as well, and so I said to Senator Harris last night, I mentioned President Clinton specifically as an indication of someone who likewise consulted very widely, as I recalled.

Senator BLUMENTHAL. But you did not have any factual basis, any record, any research at the time of that statement, did you?

Judge KAVANAUGH. I did actually look into it as best I could, you know, thinking about the technological developments, and I did think about it very carefully. He talked to an enormous number of people based on my understanding in those 12 days.

Senator BLUMENTHAL. I want to talk to you now about real-world consequences; that is, impacts in the real world on real people of the decisions that courts make. We were talking yesterday about the statement that you made in *Seven-Sky v. Holder*, and I think we have it here. Under the Constitution essentially, that statement says to me a President can deem a statute to be unconstitutional, even if a court has held or would hold the statute constitutional. Now, you stated yesterday to me when we talked at some length that your view was compelled by *Heckler v. Chaney* and other cases on prosecutorial discretion. I disagree. Nothing in *Heckler* suggests

that the President can essentially nullify, simply deem a law unilaterally unconstitutional based on his personal view of the law's constitutionality.

So, *Heckler* stands for the principle that courts will generally not second guess executive branch's decision on how to use scare enforcement resources, like I did as a U.S. Attorney or as Attorney General of my State of Connecticut. Nowhere it says that Chief Executives are free effectively to nullify duly passed statutes that have been upheld by the Court. But I want to go to the real-world impact.

Clearly, *Heckler* does not say that there are no limits, but for the sake of real-world impacts, I think there must be impacts. And one of them affects the Affordable Care Act and the protections it provides to millions of Americans, about 13 million Americans, including 500,000 in Connecticut who suffer from diabetes or high blood pressure or mental health issues. There are 15 to 20 or more pre-existing conditions.

And one of them affects a young boy. His name is Connor Curran. He is 8 years old. He suffers from Duchenne muscular dystrophy, and I want you to think about Connor. This is a chronic and terminal condition. It will slowly erode his motor function. Unless we find a cure, eventually it will take his life. His parents have told me, and I have gotten to know his family pretty well, although he appears healthy and happy today, he will slowly lose his ability to run, to walk, even to hug them goodnight. As Connor gets older, he will need more and more help. He will need the Affordable Care Act more and more. He will need protection from abuses that involve pre-existing condition.

My reading of your view of the constitutional authority of Donald Trump is that he could simply deem the Affordable Care Act unconstitutional even if it is upheld by the D.C. Circuit Court of Appeals and then by the United States Supreme Court, and even though it has been signed by a President who deems it to be constitutional and passed by a Congress who deem it to be constitutional. Do you think the President of the United States has that unilateral authority to nullify protection for Connor, and should the Connor family be afraid?

Judge KAVANAUGH. Senator, thank you for bringing up this example. In my opinions on the Affordable Care Act in the *Sissel* case where I upheld the Affordable Care Act against an Origination Clause challenge and in the *Seven-Sky* case where I made clear that I thought the timing of the case was premature, in both those decisions I expressed my respect for the congressional goal in that legislation of ensuring health insurance for uninsured Americans and providing more affordable healthcare for all Americans to take care of people who did not have health insurance, people who had conditions like the one you are bringing out here.

I understand the real-world impacts of the Affordable Care Act. I have made that clear in my decisions. I have also——

[Disturbance in the hearing room.]

Judge KAVANAUGH. So, in my decisions on the Affordable Care Act, I have shown respect for the act and respect for Congress, respect for the law, and understanding of the real-world impacts. In terms of prosecutorial discretion, the *United States v. Nixon* case

did say that the executive branch has the exclusive authority and absolute discretion whether to prosecute a case——

Senator BLUMENTHAL. I am just going to interrupt you because I am out of time.

Judge KAVANAUGH. Okay.

Senator BLUMENTHAL. And if the Chairman wants to give you more time, I am more than happy to hear the rest of your answer.

Judge KAVANAUGH. Thank you, Senator.

Senator BLUMENTHAL. But I just want to express to you my fear and my deep concern that you will not apply the law to the facts, but use the law to advance an ideological position that may affect the people of America like Connor. Thank you.

Chairman GRASSLEY. Before I go to Senator Crapo, did you say all you wanted to the Senator?

Judge KAVANAUGH. I did.

Chairman GRASSLEY. You do not have to respond to what I am going to say, but I think that we need some clarification if you want to give it, but only if you want to give it. We have heard it suggested that you did not give clear testimony about the—any relationship you might have with various people in regard to the Mueller investigation. So, have you made any pre-commitments or offered any hints, previews, forecasts, winks, nods, or secret handshakes to the President, the Vice President, the White House lawyers, anyone else in the administration or anyone at all about if and how you would rule on any matter related in any way to Special Counsel Robert Mueller's current investigation?

Judge KAVANAUGH. No, I have not.

Chairman GRASSLEY. Senator Crapo.

Senator CRAPO. Well, thank you, Mr. Chairman. And before I begin asking questions, I would like to follow up on that exact line. I have in my hands a printout of the story that was published 2 hours ago on CNBC. The headline says, "Trump lawyer Marc Kasowitz denies Kavanaugh ever spoke to anyone at the firm about Mueller probe." It goes on to discuss this in a little more detail, but I would like to ask unanimous consent that this report be put into the record.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator CRAPO. Thank you, Mr. Chairman. Judge Kavanaugh, before I go to some of my questions, and which I am going to ask you just to describe mostly some of the legal parameters in which we work together with regard to the separation of powers, I wanted to go back to the independent counsel versus special counsel issue just one more time. You will recall yesterday in my questioning I went through the differences between the independent counsel and special counsel.

The reason I am coming back to it is I have been a little puzzled by my colleagues' attacks on your writings about the *Morrison* case back in—which was talking then about the 1988 case in which the Supreme Court upheld that then old independent counsel system. And I have concluded—maybe I am wrong, but I have concluded that the reason they keep bringing it up and bringing it up and bringing it up is that they may be trying to create some confusion between the old case—the old system, which you were criticizing,

which Justice Scalia criticized, if I understand correctly, which Senator Durbin criticized, and others did, and the current system.

And I think—I wonder if maybe they are trying to create an impression in the public that you were criticizing the current system, so I just want to give you one more chance to make it clear. In your writings about the *Morrison* case, were you criticizing the current special counsel system?

Judge KAVANAUGH. Thank you, Senator. No, I was not, and I have tried to make clear to Senator Coons and you and otherwise that I have repeatedly discussed the special counsel system, the tradition of that kind of system with approval in the Georgetown Law Journal article that I wrote in the late 1990s, as well most recently in the *PHH* decision where I specifically distinguished that from the independent counsel system. The old independent counsel system in *Morrison*, which dealt with it has not existed since 1999. The current special counsel system I have always spoken approvingly of the general system and the tradition of special counsel.

Senator CRAPO. Well, thank you, and I hope that that puts it to rest. Like I said, for several days now, I have been perplexed as to why it is that your criticism of a system that ended in 1999 was of such concern. And I hope that any confusion that has been created by those consistent attacks does not create and will not create an impression that you were making any comment about our current situation. So, thank you for that.

What I would like to do with the rest of the time I have is to go through some issues related to the separation of powers, and I realize that you have been through this it may seem like endlessly in the last few days. But I want to go back and first start with the notion of deference with regard to rulemaking in the *Chevron* doctrine. Could you just describe to us what the *Chevron* doctrine is?

Judge KAVANAUGH. Yes, Senator. What that says, that doctrine, when Congress passes a statute in an administrative agency, executive or independent agency is implementing that statute, the agency's interpretation of that statute will be upheld by a court so long as it is a reasonable interpretation of any ambiguity or gap that may exist in the statute. If the agency is interpreting it in a way contrary to its language as interpreted by the text structure, history as reflected in *Chevron* Footnote 9, then it is an impermissible interpretation. But otherwise, if it is—there is an ambiguity or a gap and the interpretation is reasonable, the courts under the *Chevron* doctrine uphold it.

Senator CRAPO. And when you talk about interpreting the statute, you are talking about agency rulemaking.

Judge KAVANAUGH. Ordinarily, it will be a—typically it will be an agency rulemaking or at least often it will be an agency rulemaking.

Senator CRAPO. And there is an exception, correct, for major cases? What is the exception?

Judge KAVANAUGH. For rules of major economic or social significance, the Supreme Court has long made clear that the deference to the agencies will not apply in those cases. In those cases we expect Congress, in the words of the Supreme Court most recently in the *UARG* case, we expect Congress to speak clearly if it wants to assign rulemaking on an issue of major economic or social signifi-

cance to an agency. And that is a doctrine that Justice Breyer in the 1980s first talked about, I believe, Justice Rehnquist in a 1980s decision as well talked about. And those—that doctrine has been applied by the Supreme Court since the 1990s most recently in the *King v. Burwell* and *UARG* decisions.

Senator CRAPO. It seems to me that that is a pretty broad or maybe narrow exception, and what I mean is ill defined. How does a judge—

[Disturbance in the hearing room.]

Senator CRAPO. How does a judge determine when you have a major circumstance that would be impacted by the exception? Is there a standard or are there some rules of how a judge makes that determination?

Judge KAVANAUGH. There is no clear rule on that. I have talked about that in the *U.S. Telecom* decision that the Supreme Court has not as yet provided specific guidance. And you look at the number of people affected, the amount of money involved, the kind of attention it has received in Congress, the kind of attention it has received in the public, and you make a judgment based on that whether this is the kind of rule, as Justice Breyer first explained, that is really filling a smaller intricacies of a statute or as a big social or economic decision. And there are lots of factors you can look into to determine that.

Senator CRAPO. Well, also it seems to me, and this is relevant to a number of other comments that you have received in questions, that if the congressional statute that is passed is vague or broad, that the room for agency discretion is greater. Does that play an impact—play a role in the determination as to whether it is a major exception that would require a deeper review by the Court?

Judge KAVANAUGH. Well, the question of ambiguity is something that applies in all of these *Chevron* cases, but I do think, as well, in the major rules situation, what Justice Scalia said for the Supreme Court in the *UARG* case is, if it is a rule of major economic or social significance, we expect Congress to speak clearly. And that “speak clearly” phrase in Justice Scalia’s opinion for the Court is quite important. In other words, we want to see an express assignment of authority to decide a major social or economic issue if that is going to be upheld as a rule by the courts.

Senator CRAPO. Well, thank you. I appreciate that. This issue is very important to me and to a number of my colleagues because there is a concern among many Members of Congress that Congress has delegated too much of its responsibility to the executive branch by giving them this deference in rulemaking. And the broader and more vague the congressional delegations are, the greater the opportunity for the Executive to simply write law through rulemakings. And so, it is a very significant issue.

A further question I have is, and I know you have also been asked this earlier, is there a point at which congressional delegation can be so broad as to be unconstitutional? For example, one of the cases or examples you were given earlier was if Congress just decided to create another group and say we are going to have them be Congress now.

Judge KAVANAUGH. So, the Supreme Court has long applied the non-delegation doctrine that allows broad delegations, at least under the precedent, but there is a limit to how broad those delegations can be. And there are—there is litigation in the Federal courts now and in the Supreme Court now about certain applications of the non-delegation doctrine. But the general law is that Congress can delegate broadly, but there are limits. It has to be “an intelligible principle” is the phrase that the Supreme Court has used.

Now, what that means in practice has been decided under a series of cases applying that principle over time, and those precedents build on one another, and that is what the Court applies to figure out whether a delegation has gone too far.

Senator CRAPO. And this brings in the issue of independent agencies as well, and I know you have talked about that a lot as well. *Humphrey’s Executor* is the case that sets the standard, correct, as to what is an appropriate—appropriately constitutionally created independent agency?

Judge KAVANAUGH. That is correct. The 1935 decision in *Humphrey’s Executor* upheld the concept of independent agencies where the heads of the agencies are removable only for cause, not at will, and the—so we see agencies such as the FERC, the Federal Communications Commission, the SEC, and the like.

Senator CRAPO. And you have ruled in the *PCAOB* case that the creation of that independent agency was unconstitutional?

Judge KAVANAUGH. That particular independent agency was differently structured than the typical and traditional independent agencies. I dissented in the D.C. Circuit on the—in a challenge to the constitutionality of that structure because it was two levels of for cause removal, in essence. The Supreme Court granted review. In an opinion by Chief Justice Roberts, they agree with the approach I had set forth, in essence, in the dissent in the *Free Enterprise Fund v. PCAOB* case in Chief Justice Roberts’ opinion for the Court in that case.

Senator CRAPO. And what about the *CFPB* case? I understand that you did not rule that the *CFPB* could be—was so unconstitutional that it had to be eliminated, but that its structure needed to be changed with regard to the President’s authority to replace the director. Could you first of all just describe your reasoning in that case a little bit, and then I have one follow-up question on that.

Judge KAVANAUGH. That decision, in my view, followed from the *PCAOB* case Chief Justice Roberts had written for the Supreme Court. The *CFPB* was also structured differently from the traditional independent agency, and the Supreme Court, speaking through Chief Justice Roberts, had made clear that independent agencies that were novel, not historically rooted, the structure, were problematic constitutionally, and the single director head of an independent agency was something novel, not something that had traditionally occurred in independent agencies.

So, I felt under the precedent set forth by the Supreme Court in the *Free Enterprise Fund* case that that was a problem, but I did not say that the agency was invalid or could not continue to pursue its important functions, regulatory functions for consumer protec-

tion. Rather, I said simply that the single director head of it had to be removable at will, not for cause. And I also made clear, though, if Congress wanted to have a traditional multi-member independent agency, Congress could, of course, change that structure if it wanted.

The important point for your question is that the agency would continue to operate. There was another judge who did say that due to that flaw, the whole agency should stop, cease operation. I did not agree with that remedy because I did not think that was the proper remedy under the Supreme Court's precedents remedying constitutional problems.

Senator CRAPO. Well, that is really my follow-up question. I am one of those who has been working since almost before the creation of the CFPB to establish a board, a balanced board to run the CFPB, which I think would have addressed the constitutional issue that you found. But the question I have is why did you choose the route that kept the agency operative rather than joining with the other judge to say that it had to cease operating until it was fixed?

Judge KAVANAUGH. Senator, that is a question of a doctrine known as severability, and that—what that doctrine means is suppose you have a law, a big law, and one provision of the law is unconstitutional, what do you do as a court? Do you strike down the entire law or do you hold simply the one provision invalid and excise that provision from the law. And the traditional approach is reflected perhaps best in *Marbury v. Madison*, which found a section of the Judiciary Act of 1799 on jurisdiction of the Supreme Court, of the courts, to be unconstitutional. And what did the Court do in *Marbury v. Madison*? Did it strike down the entire Judiciary Act? No, it excised the one provision that was—or did not enforce the one provision that was unconstitutional, and simply excised that.

The traditional approach to severability is ultimately one of congressional intent to try to figure out what Congress would have wanted in the statute, but I have written about this both in cases and in articles that as a general proposition, the proper approach for a court is to try not to disturb more than is necessary of the work Congress has done in setting forth the statute to a scheme. And, therefore, severability, as I referred to it, narrow severability is the norm unless Congress has specified a contrary intent, or unless the whole law just—unless it just would not work otherwise.

Senator CRAPO. All right. I appreciate that explanation. And to go back to agency deference for just a minute, I would like to talk about the Administrative Procedures Act just to create the full picture. When we were talking about the *Chevron* doctrine, that is a Court-made doctrine with regard to deference on agency rule-making and other interpretation of statutes.

The Administrative Procedures Act contains a statutory requirement, does it not, that requires the findings of fact that the agency makes in quasi-judicial proceedings to be honored. Have I got that right?

Judge KAVANAUGH. That is with some deference, that is correct.

Senator CRAPO. And the reason I bring that up is not so much because it is a judicially created issue, but because it just shows the broad parameter of deference that either through Congress or

through judicial precedent has been given to the executive branch in terms of what many of us believe is the equivalent of making law. And just as we do not want you making law, I personally do not want to see the executive branch making law without involvement of Congress to the maximum extent possible.

And so, these are issues that I just hope that you will pay attention to in terms of the appropriate establishment and precedent necessary for the kind of separation of powers in our constitutional system that we need to have as we move forward. I am not even asking you to comment on that. I am just making an observation.

Judge KAVANAUGH. Well, I will add one comment, which I do think it is important when we do review adjudications, which is another part of the bread and butter of the D.C. Circuit, so agency adjudications where, for example, it could be a benefits case of some kind or a—an adjudication of an NLRB case. That when we review those adjudications, I do think it is important that courts be aware of the importance of those cases for the individuals affected by those cases, and to make sure that the adjudications are complying with the principles of American justice and due process that we expect in the adjudication when someone's life, liberty, or property is on the line. And administrative adjudication is something I have written about in many of my cases to make sure that the proper kind of fact finding is occurring even in the administrative adjudications.

Senator CRAPO. Well, thank you. I appreciate you making that note, and I actually have pages of summaries of your adjudications on those kinds of issues. And I will just make a conclusory statement there for the argument that you are not watching out for the little guy or that you are not making sure that the litigants in their engagement with executive agencies are protected, people just have to read the cases. I commend you for being very, very carefully attentive to making sure that the rights of individuals in agency adjudications are protected and honored.

Judge KAVANAUGH. Thank you, Senator.

Senator CRAPO. Last thing I will do with my 2 minutes is, I want to talk to you about western States issues. Senator Flake got into this a little bit yesterday, and I actually was surprised to hear him say—I think he said—83 or 85 percent of Arizona was owned by the Federal Government. I am impressed. I am sorry for him, but in Idaho it is 63 percent of the State is Federal land. We believe that—you know, we have got the bragging rights to gorgeous country, whether it is mountains, rivers, deserts, fishing, hunting, recreation of all different kinds. The environment that we have in Idaho is a wonderful place. That is one of the reasons people go there to live.

We are also very concerned about the management of that Federal land. We want to make sure that at the same time we protect and preserve this heritage, we also allow the people who live there to be able to have an ability to make a life and to make a living. And there is a conflict there. I do not believe it is an irreparable conflict. In fact, I believe it is something where both a strong economy and a strong environment can be achieved. I am not asking you to make any commitments about anything, except I would like you to just acknowledge to me as you did to Senator Flake that you

understand we have got some incredibly different types of issues in the West that relate to the differences in land ownership.

Judge KAVANAUGH. Absolutely, Senator. I understand that, and I have tried through my decisions—cases like the *Otay Mesa* case, cases like the *Carpenters* case—to understand the situation with the West, the land, the designations of land. It is not my job, of course, as a judge to make the policy decisions for those land or environmental regulations, but it is my job to police the boundaries of what you have set forth in the statute, and to make sure that the Executive is not unilaterally rewriting the law or going beyond what has been authorized by Congress.

It is also my job when constitutional boundaries are crossed in terms of action taken by the Government with respect to land or landowners, to make sure that I am enforcing the Constitution. I understand, and I hope my opinions demonstrate my understanding and appreciation for the importance of land and land owners in the western States and throughout the entire United States for that matter. But I know how important it is to you and Senator Flake as well.

Senator CRAPO. Thank you very much.

Judge KAVANAUGH. Thank you, Senator.

Chairman GRASSLEY. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

The Chairman asked and you responded that you had not engaged in any secret handshakes, winks, and no discussions relating to the Mueller investigation. On the other hand, your Minnesota Law Review article, wherein you said Congress should protect a sitting President from criminal or civil proceedings, is a pretty big signal or notice to this President, and as far as I can see, it is a very big blinking red light.

I was also listening to the series of questions asked of you by Senator Blumenthal regarding the comments made by the President referencing judges. Is disagreeing with the President a concern to you?

Judge KAVANAUGH. I am an independent judge. I have ruled in cases such as the *Hamdan* case where that was a signature prosecution of the Bush—

Senator HIRONO. So you are saying that disagreeing with the President is not a concern to you. Is that what your response is?

Judge KAVANAUGH. I am saying that, as a judge deciding cases or controversies, I decide cases based on who has the better position. I have done that for 12 years, and I have a record to show that in 307 opinions and—

Senator HIRONO. Is—

Judge KAVANAUGH. Over 2,000 cases.

Senator HIRONO [continuing]. Is disagreeing with the President a concern to you when it is not a case in front of you?

Judge KAVANAUGH. Following the lead of the judicial canons, following the lead of Chief Justice Roberts who leads the Federal judiciary, we stay out of politics. We do not comment on politics, we do not comment on comments made by politicians. We stay out—way away from politics.

Senator HIRONO. So to the extent that a comment is made by the President, then disagreeing with him, any statement that the

President makes is political to you and you will not respond. Thank you.

Let me follow up with some questions that some of us had of you yesterday and last night. Yesterday evening, Senator Tillis asked you about *Rice v. Cayetano*, and that is the case that I discussed where the issue was whether the State of Hawaii could restrict those voting for offices of the officers of the Office of Hawaiian Affairs, which administers certain lands held in trust for Native Hawaiians to only Native Hawaiians.

In fact, Hawaii felt so strongly about the importance of its trust obligations to the Native Hawaiian community, the people of Hawaii—the people of Hawaii voted to create the Office of Hawaiian Affairs, also known as OHA, in our Constitution. It is not just a law; it is in our Constitution that we created the Office of Hawaiian Affairs in 1978.

In answering Senator Tillis, you describe the case, *Rice v. Cayetano*, giving it a different and a grossly misleading spin. What you said totally ignored and disparaged the trust obligation that the State had to Native Hawaiians, and this trust obligation led the State to create the Office of Hawaiian Affairs and to decide who should be able to vote for the leaders of that office, Native Hawaiians.

You said the State, quote, “denied voting to people who were residents and citizens of Hawaii but were not of the correct, correct race, and therefore, African Americans and Latinos and Asian Americans and Whites were barred from voting for that office.” You then misstated the holding of *Rice v. Cayetano*. You said, quote, “The Supreme Court held that that was a straightforward violation of the Fourteenth and Fifteenth Amendments of the U.S. Constitution.”

I will get to your misstatement later, but my first question to you is, Do you think that *Rice* can be used to justify the argument that programs to benefit Native Hawaiians are subject to strict scrutiny and of questionable validity under the Constitution, as you noted in the email that I referred to last night?

Judge KAVANAUGH. I appreciate the question, Senator, and thank you for raising it. In *Rice v. Cayetano* Justice Kennedy wrote the opinion, for 7-to-2 Supreme Court, saying that the voting restriction in that case violated the Constitution.

To your question about—I am getting to your question—about the other question, that was something I wrote in an email then, and if that issue came before me, I would—there has been subsequent precedent that would be relevant, and I would have an open mind about how to apply the precedents of the Supreme Court, the strict scrutiny or intermediate scrutiny that would apply in a case like that and would consider the facts and circumstances and arguments.

Senator HIRONO. *Rice* is a Fifteenth Amendment case. It was a State-action case, so should another State-action-voting case come to you, you would apply *Rice*.

My question was, whether you would turn to *Rice* with a proposition that programs that benefit Native Hawaiians should be subject to strict scrutiny because they are of questionable validity under the Constitution—

Judge KAVANAUGH. Right, but—

Senator HIRONO [continuing]. Then to my question—

Judge KAVANAUGH. Yes, so I appreciate that, Senator, and I think that would be analyzed in the light of *Rice* but in the light of all the other precedents of the Supreme Court on programs that—so contracting programs and higher education programs, which has set for the body of precedent under which programs like that would be analyzed. And I would look at the specific program under the facts and arguments of that case—

Senator HIRONO. So considering that *Rice* was a Fifteenth Amendment case and you are citing to other examples where other constitutional provisions may come into play, *Rice* should be limited to a Fifteenth Amendment case because that is what the Court decided. But, in fact, you answered last night that the case was decided under the Fourteenth and Fifteenth—you said it was a straightforward violation of Fourteenth and Fifteenth Amendments of the U.S. Constitution. So that is not what the Court did, as I have iterated, and I think you agree because, I mean, that is what you wanted the decision to be based on. You wanted the *Rice* decision to be based on the Fourteenth and Fifteenth Amendments, so that is not what they did.

So this reminds me of the criticism that was lodged against you in the *U.S. v. Anthem* case where the majority said that you applied the law as you wanted it to be, not what it is.

A question to you is where in the *Rice* Court's opinion did the Court decide the case on Fourteenth Amendment grounds?

Judge KAVANAUGH. Well, the principal of the Fifteenth Amendment is that there cannot be voting restrictions on the basis—

Senator HIRONO. I am asking you where in the decision does the Court rely on the Fourteenth Amendment. You are citing to the Fifteenth Amendment. This is the Fourteenth Amendment.

Judge KAVANAUGH. Well, I think the Fourteenth and Fifteenth Amendments, I think both prohibit restrictions on voting on the basis of race. The Fifteenth Amendment explicitly—this refers to voting, but the Fourteenth Amendment, of course, applies, as I read the precedent, to all State restrictions on the basis of race.

Senator HIRONO. Well, the Fourteenth Amendment mainly relies on one man, one vote. That is a whole other line of cases, but that is not what the Court chose to decide to base its decision on *Rice*, so I would expect someone who is going to be on the Supreme Court to be very, very careful in citing precedent and to be very accurate in saying what the Court based its decision on.

And it is totally clear to me because you have not been able to cite to the opinion in *Rice* that says we are deciding this case based on the Fourteenth Amendment. They did not. So that is very disturbing to me that you would cite that case for the proposition that it was based on the Fourteenth Amendment when clearly it was not. And you have been, as I noted, been criticized for citing law as you wished it to be and not as it is.

Let me go on to *Priests for Life* case. And the Free Exercise Clause of the First Amendment ensures that each person has the freedom of conscience to pursue their own religious values. These rights end where they would interfere with another's ability to do the same. However, in recent years, a wide range of individuals

and institutions have received special dispensation to impose their beliefs on others. And, of course, most notably this is the *Hobby Lobby v. Burwell* case.

So a case that raised those kinds of issues came before you in the *Priests for Life*, and in that case one of the things you had to determine was whether there was a substantial burden on the employers. And the employers, their claim, the act of filling out a form to let their insurance company and Health and Human Services know that they had a religious objection were not going to cover the contraception, was overly burdensome.

And it was not the priests who were providing the contraception coverage. A third party was. And the priests were not forcing that third party to cover birth control. Congress was through the ACA. In your dissent you thought that was too much. You said the employer's religious exercise was substantially burdensome and that they could deny contraceptive coverage to their employees.

So my question to you is do you believe that the Freedom of Religion Clause supersedes other rights?

Judge KAVANAUGH. No, Senator. I made clear in that decision that the Religious Freedom Restoration Act has a three-part test: first, substantial burden. I found that satisfied their based on the *Hobby Lobby* precedent, which I was bound to follow and the *Wheaton College*; second, compelling interest. I did find a compelling interest there for the Government in ensuring access. And then the third prong is least restrictive means, and I made clear there—I cited Reva Siegel's law review article, which makes clear the—

Senator HIRONO. Let me get to the first prong, which is whether this was an unduly burdensome. So you determined that filling out a two-page form was unduly burdensome. Did you now?

Judge KAVANAUGH. I concluded that penalizing someone thousands and thousands of dollars for failing to fill out a form when they did not fill it out because of their religious beliefs was a substantial—

Senator HIRONO. No, if they filled out a two-page form, they could have been totally insulated from thousands and thousands of fines. So the question became not the fines. That was irrelevant. The question was whether a two-page form was overly burdensome, and you determined it was overly burdensome. So, you know, it kind of defies logic to me.

Let me go on to what I would consider to be a related case, which is *Garza v. Hargan*. And I would consider these two cases as being related because, first of all, they are both cases about women's reproductive freedom. And second, while you balance the interest of the parties involved in very different ways, you come to different conclusions, what is similar is in both cases you ruled against the women.

In *Garza v. Hargan*, been brought up before, you argue that the Government's basically charade of trying to keep the young women in custody until it was too late to get an abortion was not an undue burden on her rights. So forcing her to remain in HHS's custody and in fact considering this to be a parental consent case, which was not the case, that was irrelevant. And in *Priests for Life* you insisted that a Government requirement that religious employers

fill out a pretty short form declaring their objection to providing health care was too much of a burden.

And in each case you reached your desired outcome, which is against women's reproductive rights and you ignore the common-sense meaning of burden. By the way, filling out the two-page form, the majority opinion did not consider that overly burdensome. And, you know, I really think that your conclusions that filling out this form was overly burdensome defied logic, but it is logical in the sense that in both cases you were against women's reproductive rights.

So how is it possible for me to draw any other conclusions that basically you really want to limit a woman's reproductive rights? So even though you engaged in a balancing test in the case of *Priests for Life*, filling out a two-page form was too much, but in the case of *Garza*, it was not too much to have this young woman remain in custody and to be forced, as far as you are concerned, to wait around for foster parents to be found.

Judge KAVANAUGH. In each case, Senator, I was doing my best to apply the precedent on point. The *Hobby Lobby* and *Wheaton College* case—the *Wheaton College* case had dealt with a form, and so I followed as best I could the *Wheaton College* case. The Supreme Court had, I think, a 6-to-3 vote, found—or granted emergency injunction in that case. I tried my best to follow that precedent.

Senator HIRONO. See, that is the thing about following precedent because, you know, oftentimes, your own perspective—a judge's ideological viewpoints, et cetera, come into play as to which precedent to apply, how to apply the precedent, and what parts of the precedent you want to apply.

Let me get to something that should be really simple. I think you said yesterday that *Korematsu* had been overruled. And in *Trump v. Hawaii*, the Chief Justice wrote, "*Korematsu* was gravely wrong the day it was decided. It has been overruled in the court of history and to be clear has no place in the law under the Constitution." I am just really curious. Is being overruled by the court of history a valid way to overrule a case?

Judge KAVANAUGH. I think what the Chief Justice was recognizing in that case was the same thing the Supreme Court Justice Brennan had recognized in *New York Times v. Sullivan* where he said the Sedition Act of 1798 had been overruled in the court of history. In other words, there was not a specific case that arose, but it was important for the Supreme Court to nonetheless recognize that this law in the case of the Sedition Act and this precedent in the case of *Korematsu* was no longer good law and to note that. And so the Chief Justice noted that in the *Trump v. Hawaii* case.

Senator HIRONO. This was, by the way, long after a *coram nobis* case was brought many, many years later when it was made very clear that *Korematsu* had been wrongly decided. It would be nice if the court of history can overrule cases, but let me go on to *Trump v. Hawaii*.

The Chief Justice declared that *Korematsu* has nothing to do with this case, but Justice Sotomayor called the—I am quoting her holding—"all the more troubling given the stark parallels between the reasoning of this case and that of *Korematsu v. United States*."

And she continued, quote, “In *Korematsu* the Court gave a pass to an odious, gravely injurious racial classification authored by an Executive order and basically the Court invoked an ill-defined national security threat to justify an exclusionary policy in sweeping proportion.”

Now, are not the parallels between the cases very strong? Because in *Trump v. Hawaii*, as it was in *Korematsu*, the President discriminated against a minority group on national security grounds, and in both cases the Court did not question an obviously bogus justification. They did not, in both cases, go behind the bald-faced assertion by the President that this was based on national security.

So where does this reasoning take us? Because if the President can claim national security as a shield against any challenge to his actions, under what circumstances do you think a Court—based on the most recent case, *Trump v. Hawaii*, should a Court look behind the President’s stated justification of national security?

Judge KAVANAUGH. The Supreme Court has made clear, Senator, in a variety of cases that it will hold the executive branch to account in national security cases, the *Boumediene* case in 2008, the *Youngstown* case in 1952, the *Hamdan* case. National security is not a blank check for the President. The Supreme Court has said, Justice O’Connor writing in the *Hamdi* case. And that is an important principle under our Constitution, is that even in the context of wartime, the courts are not silent. Civil liberties are not silent.

In the particular case you are raising, Chief Justice Roberts concluded that there was no violation in that case, but the general principle that, I think, is important to reiterate is, that we are a nation of laws, including in the national security context, and that precedent of the Supreme Court over the course of our history has recognized that the law applies even in wartime and national security.

Senator HIRONO. Well, the thing is, though, the most recent iteration of an articulation of national security to justify an Executive order is *Trump v. Hawaii*. The record was replete with references and statements that the President had made as to what his true intentions were, that this was a Muslim ban. He talked about it during the campaign. He talked about it after the campaign. He told the Justice Department—

[Disturbance in the hearing room.]

Senator HIRONO. He told the Justice Department, as President, get me an iteration of this ban that would withstand constitutional challenge, and so the most recent iteration is very concerning because it says to me that the President can say this is based on national security, and the Supreme Court made very plain that it would not look behind that articulation. Let me move on. I am running out of time.

So the Warren Court, in 2017 you gave a tribute to the late Chief Justice William Rehnquist. You explained that you chose the topic because “it pains me”—you—“that many young lawyers and law students, even Federalist Society types, have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.” And then you went on, “they do not know about his role in turning the Supreme Court away from its 1960s

Warren Court approach where the Court, in some cases, seemed to be simply enshrining its policy views into the Constitution, or so the critics charged.”

And then you praised Chief Justice Rehnquist because he “righted the ship of constitutional jurisdiction.” What decisions of the Warren Court were you referring to as, “simply enshrining its policy views into the Constitution”? Were you thinking about *Brown*? Were you thinking about *Loving*? Were you thinking about any of the Warren Court decisions that created rights for individuals? Privacy rights? There is a whole array. So which were the Warren Court decisions that you thought needed to be righted by the Rehnquist Court?

Judge KAVANAUGH. And I said, “or so the critics charged.” I identified the areas where Chief Justice Rehnquist had helped the Court, I think, reach consensus or maybe a middle ground on areas such as criminal procedure that is Religion Clause cases, and I identified all those in the speeches. When he passed away—and even before he passed away, many of the Justices who worked with him were very much praiseworthy of Chief Justice Rehnquist for fiercely defending the independence of the judiciary—

Senator HIRONO. I would really be interested to know the particular cases that you are referring to, not general kinds of cases, particular cases.

Judge KAVANAUGH. I think I referred to them in the speech, but thank you, Senator.

Chairman GRASSLEY. After Senator Kennedy asks his questions, we will take a 30-minute dinner break. I expect we will be back around 6:15 then, and four Senators will be able to ask questions, Booker, Tillis, Harris, Cornyn, and then several Members have requested a third round. After all questions are finished, we will then move to Dirksen 226 for the closed session. Senator—

Judge KAVANAUGH. I just wanted to say one thing—

Chairman GRASSLEY. I am sorry. I—

Judge KAVANAUGH. Mr. Chairman. When I introduced the players earlier, I did not see the three in the second row, Mary Grace, Shay, and Keke are in the second row. They are all three eighth-graders.

[Disturbance in the hearing room.]

Judge KAVANAUGH. And Megan.

Chairman GRASSLEY. Okay.

[Disturbance in the hearing room.]

Judge KAVANAUGH. They are getting an introduction to democracy, Mr. Chairman—

[Laughter.]

Judge KAVANAUGH. So it is noisy and I will explain that to them later.

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman. Welcome, ladies. You will get used to the yelling. Senator Tillis is keeping count. It has happened over 200 times in the last 3 days. It is not really how democracy is supposed to work.

Judge, I will repeat what I said yesterday. I am not going to ask you to give me a hint about how you might vote on the Court if you are confirmed. I certainly do not want you to violate the judi-

cial canons of ethics, and I may have to gently interrupt you a few times to kind of move you along or move me along.

Yesterday, you started to talk about Justice Harlan and his feeling about whether he should vote in a political election, and somehow we ran out of time, and I thought I would give you an opportunity to finish that thought.

Judge KAVANAUGH. Thank you, Senator. And one of the things that we have to do as judges, as I have emphasized many times in this hearing, is maintain the independence of the Federal judiciary, independence from politics, independence from political influence or public pressure or public influence. And part of that, part of the canons for Federal judges, Federal judiciary is that we do not attend political rallies, we are not allowed to donate to political campaigns, support political candidates, put bumper stickers on our cars, signs in our yard.

And one of the things I decided—we are allowed technically to vote, but one of the things I decided after I voted in the first election and I read something about how the second Justice Harlan had decided not to vote in elections because he thought that reinforced the independence that he felt as a judge. And I thought about that and I decided to follow that lead.

I am not saying my approach is right and other judges take a different approach on that, and I fully respect that, but for me it just felt more consistent for me with the independence of the judiciary not to vote because I have always consider voting a sacred responsibility and one in which I think very deeply about the policies I am supporting and the people I am supporting. And that seemed almost as if I were taking policy views at least to myself into the voting booth, and I did not want to do that as a judge. So I decided to follow the lead of the second Justice Harlan.

I will be the first to say I am not the second Justice Harlan. He was a great Justice on the Supreme Court and someone, of course, who I would be very—if I were to be confirmed, honored to be on that Court and follow in his lead.

Senator KENNEDY. You do not vote in political elections?

Judge KAVANAUGH. I do not vote in political elections.

Senator KENNEDY. Interesting. Last night, you talked a little bit about your outreach efforts to attract more women and minority law clerks. Would you quickly go through that for me again? I think I was getting coffee when you were talking about that.

Judge KAVANAUGH. Senator, one of the issues in American society generally, of course, but also in the judiciary in particular, has been to advance—to overcome the discriminatory history of the country and to help advance the cause of women and minorities in the legal profession. And one of the areas where that has revealed itself is law clerk hiring. And one of the—and that is important because the—

Senator KENNEDY. Law clerks for judges, you mean?

Judge KAVANAUGH. Yes, law clerks for judges. We get four law clerks each year, and they are there for just 1 year and then they turn over after a year. They are like a team. They turn over after the year and you get a new team of four the next year. Those law clerks are among the best and brightest out of American law schools, and they often will go on to leadership positions in the

Congress or in the State legislatures or in the judiciary or in the bar or in public service, and so those are important training positions for the future leaders of America.

And there were disparities when I came on the bench in the number of women and minorities, so I decided to be very proactive about that. There was a problem identified. I decided to be proactive. So on the women law clerk front I am very proud that of my 48 law clerks, a majority of them have been women, and they are the best and brightest. And one of them was just confirmed as a Federal judge on the U.S. Court of Appeals for the Eleventh Circuit, Britt Grant, and she was in my second class of clerks.

That is important because, as I talked about, my mom was a trailblazer in the law and overcame barriers to help women achieve equality in the law, and I want to do my part as well and not just because of her but she was an example to help achieve equality for all women to give them an equal place at the table and future opportunities. And I think I have helped one small—I am just one small piece and I do not want to overdo it, but I have tried to be proactive about it and to make a difference. So, too——

Senator KENNEDY. What about minority outreach?

Judge KAVANAUGH. Right. So in 2009 or 2010, so after I was on the court for about 3 years, there was a hearing I think in the House Appropriations Committee with—the two Justices usually go up every year and talk about the Supreme Court budget and testify before the Appropriations Committee to get money or to explain the need for money for the Supreme Court for the following year. And Justice Thomas and Justice Breyer were there that year, and they were asked about the seeming disparity with minority law clerks in general, African-American law clerks in particular, and one of the things they said—and they were talking about Supreme Court law clerks. Those are the law clerks for the Supreme Court Justices. And one of the things they said was they hired from the lower courts, from the courts of appeals. And they pointed out that the pool in the courts of appeals had the disparities, and so they were really dependent on what the court of appeals did and does. I took that as a bit of a call to action to do something about it myself.

Senator KENNEDY. And what did you do, Judge?

Judge KAVANAUGH. I reached out initially to the Black Law Students Association at Yale Law School, emailed them and asked them if I could come talk to them. Yale Law School is a school that produces a lot of law clerks, so I thought—and it is my alma mater——

Senator KENNEDY. I have heard of it.

Judge KAVANAUGH. I start there, and I went and spoke to them. What I did is I went and spoke to the group and I explained to them the importance of clerking. I encouraged them to clerk. I explained the history of the disparities. Then I gave them in essence what I thought were tips about how to make yourself a better clerk, kind of like a coach, tips to how to be a better clerk candidate, classes to take, professors, how to deal with professors——

Senator KENNEDY. Do you think that helped?

Judge KAVANAUGH. I do think it helped. I was uncertain frankly when I walked into the room how that would work, and it worked

great in terms of the reaction I got and also in terms of I think the real-world results. And the way I thought about it is if I make even a difference for one clerk or one student, it is worth it.

Senator KENNEDY. Sure.

Judge KAVANAUGH. And I think I did for more, and I have kept it up year after year. I have done it also where I teach at Harvard Law School, and I am proud of the results. I think it has made, you know, again, a small difference, but it is one person at a time, one clerk at a time, one student at a time, and I think hopefully by talking about it in this forum, I can encourage more efforts of that nature, which are really just recruiting efforts and explanation for—many of the students at law schools are first-generation professionals and do not have the networks necessarily that others do and so—

Senator KENNEDY. I know we could—I can tell you enjoy talking about it.

Judge KAVANAUGH. I could go for about 2 hours on that, but yes, Senator, thank you for cutting me off.

Senator KENNEDY. And I will be glad to go if the Chairman will give me 2 hours, but I do not think he will.

[Laughter.]

Senator KENNEDY. I know you have read an opinion before where you agree with the conclusion but you do not agree with the reasoning. Have you had that experience?

Judge KAVANAUGH. I have.

Senator KENNEDY. Yes, I think we all have.

Judge KAVANAUGH. Yes.

Senator KENNEDY. Here is why I ask that. Can you tell me what in God's name a penumbra is?

Judge KAVANAUGH. Senator, the Supreme Court, as I think you are referring to, once used that term, but it does not use that term anymore for figuring out what otherwise unenumerated rights are protected by the Constitution of the United States. What it refers to now is a test in the *Glucksberg* case—and Justice Kagan talked about this in her confirmation hearing when she was sitting in this seat. The *Glucksberg* case sets forth a test where unenumerated rights will be recognized if they are rooted in history and tradition. And why that matters I think to your point—

Senator KENNEDY. Can I stop you? It is deeply rooted—

Judge KAVANAUGH. Yes.

Senator KENNEDY [continuing]. And are those roots that are just deep or are those roots that are deep that have been growing there a long time? Do you understand what I am asking? Is it—

Judge KAVANAUGH. I fear I do not.

[Laughter.]

Senator KENNEDY. Well, that is my fault, not yours. Is it something that Americans have cherished for a long time or can it be something that is a moray of contemporary society?

Judge KAVANAUGH. So when the Court is referred to deeply rooted in history and tradition, it has looked to history. Now, how deep the history must be, I do not think there is a one-size-fits-all answer to that and how much contemporary practice matters. I also do not think there is a one-size-fits-all. But the important thing is the Court—and again, Justice Kagan emphasized this in her hear-

ing—that the *Glucksberg* test means that the Court is not simply doing what your role is, which is to figure out the best policy and to enshrine it into the law, in the Constitution in the case of the Court, but rather is looking for as best it can objective indicia of rights that are not explicitly enumerated in the Constitution but that are nonetheless protected.

The best example I think is the *Pierce* case. Oregon passed a law saying that everyone—and this is in the 1920s—saying that everyone in the State of Oregon, every student had to attend a public school and could not attend a parochial or private school. And parents who wanted to send their children or child to a Catholic school sued and argued that that violated the United States Constitution. It made it to the Supreme Court. The right in essence, the claimed right was, the right of parents to direct the upbringing of their children by sending them to a private or parochial school. And the Supreme Court affirmed and recognized that right under the United States Constitution even though that is—

Senator KENNEDY. And that is a good example, Judge, and again, I apologize for interrupting, but we are dealing here with values, are we not, that we all cherish together as Americans like the rule of law or privacy or equal opportunity or personal responsibility? How are you to determine what values all Americans cherish? How do nine people determine what values all Americans cherish enough to read into or to discover as a result of the superior intellect of those nine individuals is a part of the Constitution and has been there for a long time? But most of us could not see it except the nine Justices.

Judge KAVANAUGH. Well, I do not think that is the conception of the judicial role that the Supreme Court has articulated.

Senator KENNEDY. I agree, but that is the perception some people have, and perception is important in appreciation of government.

Judge KAVANAUGH. Well, I agree with you. The values question is one that, of course, is first and foremost for Congress to figure out the policy or the State legislatures. Judges, Federal judges, the Supreme Court, we are not supposed to be, I think consistent with your question, simply importing our own values into the Constitution. It is not just supposed to be five people. We are five people like every other American. We do not have a charter to create new rights just because we think they are best. Rather, we find them—

Senator KENNEDY. Excuse me again for interrupting, but I think Justice Scalia would say and has said that, no disrespect, but that five people, whoever they may be in the United States Supreme Court, can establish this value and that their sense of morality or their value system is no better or worse than picking the first five names in the Washington, DC, phone book.

Judge KAVANAUGH. He did say that, and I think that is a comment that I think is shared by the Justices on the Supreme Court, and it is reflected now in the *Glucksberg* test. But I recognize that it is important to explain that to people so that people do not get confused about our role. Our role is rooted in law, it is rooted in precedent, it is rooted in not our values per se but the values reflected either in the Constitution or reflected in the legislation

passed by Congress. And I realize there are gray areas in what I am just saying, but it is very important to explain that to people.

Senator KENNEDY. And here is my point. Excuse me again for interrupting. I will bet most Americans could agree today and would agree that we have a privacy right. Search and seizure privacy is important, but we also believe now that disclosure privacy is important, autonomy privacy is important, and it is part of our Constitution. And frankly, I am glad that it is. But how it got there matters. How it got there matters. It is not just the end result. Let me leave that for a second—

Judge KAVANAUGH. I agree with that.

Senator KENNEDY [continuing]. And just kind of shift gears. I have just got a few minutes left. I can tell from your testimony the last 3 days or 2 days that high school, those were formative years for you. You went to Georgetown Preparatory School?

Judge KAVANAUGH. I did Georgetown Prep, a Jesuit high school here. It was very formative.

Senator KENNEDY. What was it like for you? What were you like? Did you ever get in trouble?

[Laughter.]

Senator KENNEDY. Were you more of a John-Boy Walton type or—

[Laughter.]

Senator KENNEDY [continuing]. A Ferris Bueller type?

[Laughter.]

Senator KENNEDY. These ladies are old enough to understand.

Judge KAVANAUGH. I loved sports first and foremost. I think that—I worked hard at school. I had a lot of friends. I have talked a lot about my friends.

Senator KENNEDY. Yes.

Judge KAVANAUGH. And they have been here. So it was very formative. And when I think back on it—

Senator KENNEDY. You left out of the trouble part. I was waiting for that but—

Judge KAVANAUGH. Right, so that is encompassed under the friends I think. Yes.

[Laughter.]

Senator KENNEDY. Yes. You were an athlete?

Judge KAVANAUGH. Yes, I played football and basketball. My football coach was named Jim Fegan, and he is a legendary football coach. And so over the last 8 weeks where I have been in a slightly different situation than I have been for the previous 53 years in terms of where I can go freely, I have been working out on weekends at my old high school and running on the track and ran into him out there. It was awesome to run into him. He still helps out with the football team, and he sent me a text three nights ago, so it is awesome.

Senator KENNEDY. Okay. That is all I am going to get out of you, is it not? I understand. All right. Let me yield back.

Strike that, Mr. Chairman. Just in case we have to have the time, I am going to reserve my 2 hours and 10 minutes. I am sorry, my 2 minutes and 7 seconds.

[Laughter.]

Senator KENNEDY. Now, see, I was going to ask the Judge if—not him but any of his underage running buddies had ever tried to sneak a few beers past Jesus or something like that in high school, but I am not going to go there.

[Laughter.]

Judge KAVANAUGH. Okay.

Senator CORNYN [presiding]. I want you to.

[Laughter.]

Senator CORNYN. Well, I for one am grateful for the Senator's self-restraint.

[Laughter.]

Senator CORNYN. Judge, your endurance has been remarkable. Those of us on the dais have been able to come and go and tend to other business along the way. You have had to sit there for two full days and you are not through yet—

Judge KAVANAUGH. No—

Senator CORNYN [continuing]. But you are getting close. I think you said you have run a couple marathons. Consider this about the 20-mile mark—

Judge KAVANAUGH. Yes.

Senator CORNYN [continuing]. Where you hit the wall.

Judge KAVANAUGH. Yes.

Senator CORNYN. But we are getting closer.

I just want to say briefly that your conversation with Senator Kennedy about your recruiting female law clerks and the importance of being proactive there reminds me of a conversation I had briefly before you and I met when I served on a State Appeals Court, the Texas Supreme Court, where I would also hire law clerks, and most often they would be female law clerks. And I would ask them occasionally, I said, "Well, why do you think it is that I end up hiring predominantly female law clerks?" She said, "It is easy, Your Honor. We are smarter and we work harder."

[Laughter.]

Judge KAVANAUGH. Yes.

Senator CORNYN. So with that, we are going to take a 30-minute break. We will be back about 6:15, and then Senator Booker, Senator Tillis, Senator Harris, and I will ask questions before we go to the third round.

[Whereupon, at 5:48 p.m., the Committee was recessed.]

[Whereupon, at 6:16 p.m., the Committee reconvened.]

Chairman GRASSLEY. Are you ready, Judge?

Judge KAVANAUGH. I am.

Chairman GRASSLEY. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman.

Judge, we, at 1:20 p.m. today, received another 1,000 documents, and I am just wanting to know, are you familiar with the 1,000 documents we just received at 1:20 p.m. today? Are you familiar with those documents or what is in those documents?

Judge KAVANAUGH. I have not been involved in the documents. So I do not know what you have and what—I do not know.

Senator BOOKER. So even if I were to ask you questions from one of those 1,000 documents, you would not—you would need to see them?

Judge KAVANAUGH. Even if I have seen them before, I would like to see them.

Senator BOOKER. I understand. So 1,000 documents, the idea that any Senator up here could go through 1,000 documents since 1:20 p.m. and ask you questions, have you have a chance to see what we would like to ask you questions, seems a little absurd. If Bill Burck was the one to give those documents, I cannot help but wonder what else, again, he might be holding back, what else they might be trying to hide.

And so I understand you stand by your record, but it is our job to try to examine that record, the fullness of that record. And so I just want to ask you some questions perhaps that can illuminate Bill Burck's role. And so, Judge, have you communicated in any way with Bill Burck or his team since Justice Kennedy's retirement announcement on June 27, 2018?

Judge KAVANAUGH. I saw him on the Saturday after my—the Saturday after my nomination, I saw him at an event, a social event with a number of people.

Senator BOOKER. Was that—did you communicate with him beyond that?

Judge KAVANAUGH. No, I have not communicated with him beyond that, nor do I—have I had—I said before on the documents, I have not been involved in the substance, the process. I have stayed away from that. That is an issue for the Senate and the Bush library.

Senator BOOKER. Okay. So if you have not communicated directly with him about this process, have any of your intermediaries that have been working with you or preparing you for this been in discussions with Bill Burck or his team since Justice Kennedy's retirement announcement on June 27, 2018?

Judge KAVANAUGH. All I can say is what I know.

Senator BOOKER. So to your knowledge, you do not know if your people who have been preparing you for this have been in consultation or coordination with Bill Burck?

Judge KAVANAUGH. When you say people?

Senator BOOKER. Who you have been helped to prepare for these hearings, I imagine?

Judge KAVANAUGH. You mean White House and Justice Department people?

Senator BOOKER. Whoever might be helping you prepare for these hearings.

Judge KAVANAUGH. I do not know what the White House—the White House and Justice Department people could speak for themselves about that.

Senator BOOKER. I guess what, you see, I am asking you is if the folks who are preparing you have been communicating with Bill Burck about these documents, what is being released, or anything like that. Do you have no knowledge of that, or do you know if people who have been preparing you have been in contact and communication with Bill Burck about these documents?

Judge KAVANAUGH. I do not know what the process has been, other than what I—

Senator BOOKER. But I am not asking about the process. I am asking do you know if the people who have been preparing you

have been in touch with Bill Burke about the documents, content of the documents, or anything related to the documents?

Judge KAVANAUGH. I do not know the answer to that question.

Senator BOOKER. You do not know if the people who have been preparing you have in any way been communicating with Bill Burck about the documents?

Judge KAVANAUGH. Can you—do you want to identify some specific—

Senator BOOKER. No, sir. I am just asking you that.

Judge KAVANAUGH. Is who prepare—I just want to make sure we are on the same page.

Senator BOOKER. Yes, sir.

Judge KAVANAUGH. So that there is no confusion. I do not know who is—I have been staying out of it for obvious reasons. I mean, I let other—it is not my privilege to assert.

Senator BOOKER. So you have never taken—you have never taken a stand regarding the release of the documents with anybody in the White House, the DOJ, or anyone else? You have never taken a stand on this?

Judge KAVANAUGH. This was an issue for the Bush library.

Senator BOOKER. I understand there is an issue. You have stated this on the record. I am just asking have you ever taken a stand with anyone from the White House or the DOJ about document release?

Judge KAVANAUGH. No. I do not have a—I do not have a position, stand on—

Senator BOOKER. I know you do not have a position. I am asking what has transpired.

Judge KAVANAUGH. Right. And I am in the position that I think Justice Scalia was in when he was being asked about his memos from the Office of Legal Counsel, and he said that is a decision—

Senator BOOKER. Again, I have a lot—a short amount of time. I appreciate your knowledge of Justice Scalia's record and statements. I just want to know what you think, sir, and what you know.

Judge KAVANAUGH. What I think is that—I am just going to repeat myself. But what I think, it is an issue for the Senate and the Bush library.

Senator BOOKER. So why do we not move on? You told Ranking Member Feinstein and Senator Coons that you had never taken a position on the constitutionality of criminally investigating or indicting a sitting President. You stand by what you told the Ranking Member?

Judge KAVANAUGH. I am happy to have my recollection refreshed.

Senator BOOKER. Sir—

Judge KAVANAUGH. But that is my recollection.

Senator BOOKER. Okay. You told Senator Klobuchar that you “did not take a position on the constitutionality, period.” You stand by that?

Judge KAVANAUGH. Again, I am happy to have my recollection refreshed, but that is my recollection as I sit here.

Senator BOOKER. And that is your position now? Because you have said this to me in private as well, that you had never taken

a stand on the constitutionality of this issue about—about investigating or indicting a sitting President.

Judge KAVANAUGH. I think in the various Georgetown events, I referred to it as an open question. In my Minnesota Law Review, I referred to it as an open question. I think here I have referred to it as an open question.

And I have said if it comes to me, you know, a lot of things would have to happen. I just—

Senator BOOKER. But you indicated—

Judge KAVANAUGH. Just 20 seconds.

Senator BOOKER. I just want to try to get the question, so you understand what I am asking.

Judge KAVANAUGH. Yes. Yes, sir.

Senator BOOKER. That the constitutionality itself, have you taken an issue on the constitutionality of these issues about criminally indicting or investigating a sitting President?

Judge KAVANAUGH. No. I have said repeatedly, and here is—

Senator BOOKER. No. That was it. “Yes” or “no.” You said “no.” Can I refresh your recollection with things you have said, sir?

So this is a Georgetown article, and again, I have the quote—

Judge KAVANAUGH. I have—seems that—

Senator BOOKER. Okay. I just want to walk through it, okay? So you agree you did say this. You said, “The constitutionality itself seems to dictate.”

Judge KAVANAUGH. Yes.

Senator BOOKER. So you are expressing a view on the constitutionality. Look at what you wrote in The Washington Post. The Constitution—again, you use the conditional word—appears to preclude, but you talked about the constitutionality. Appears to preclude.

Judge KAVANAUGH. And that was—

Senator BOOKER. Please.

Judge KAVANAUGH. In the Georgetown Law Journal in 1998 and, as has been reported, I advised—my advice to Independent Counsel Starr was not to seek—

Senator BOOKER. In the Minnesota Law Review article, you said that the Constitution establishes a clear mechanism, talking about what the Constitution establishes, yes?

Judge KAVANAUGH. Well, let us be very clear. Can I get 30 seconds?

Senator BOOKER. Yes, of course.

Judge KAVANAUGH. Okay. So the Constitution obviously sets out a mechanism for removal.

Senator BOOKER. Yes.

Judge KAVANAUGH. Right. The question of criminal indictment is simply a question of timing, and the question is does it have to be after or may it also be before? The Justice Department—10 more seconds. The Justice Department for 45 years has said it must be after.

Senator BOOKER. And I guess you see what I am getting at here is that you have talked about this issue quite a bit. Even what Senator Whitehouse brought up when you were asked, people were asked to raise their hand, give a hand how many people believe a

sitting—as a matter of law that a sitting President cannot be indicted during a term of office.

We saw the videotape. You raised your hand. You have commented on it multiple times. I guess this is sort of what I am saying. I am going to get this—

Judge KAVANAUGH. It said law, right, in the Justice—it did not say Constitution.

Senator BOOKER. As a matter of law, yes.

Judge KAVANAUGH. Right. And I do think it is important—again, I do not want to take too much of your time, but it is important to know that the Justice Department, since 1973 and to this day, through Republican and Democratic administrations, has had that position.

So before it could come to a court, if I am on the D.C. Circuit, before it could come to a court, that position presumably would have to change after 45 years. So it would have to change. And then a prosecutor with a President would have to decide I want to go forward as a matter of prudence. And then, third, would have to decide you have the evidence.

Senator BOOKER. Okay.

Judge KAVANAUGH. And fourth, a—it would have to be challenged.

Senator BOOKER. Sir? Okay.

Judge KAVANAUGH. After all that, it would get to court. And then I would consider—

Senator BOOKER. Sir? Okay. I want to move on, but you—you have made clear that you have never, you know spoken about these issues in a constitutional manner. And I just want to say that in a lot of your statements it seems like that you are not just talking about this as a matter of policy, you are making some speculations about the constitutionality of it, which I think sends a clear signal about where you stand on those issues.

I really want to move on because—

Judge KAVANAUGH. I promise you I have an open mind.

Senator BOOKER. Okay. You speak a lot in your speeches and articles about the matter of character. And just looking at President Trump's comments, there is a number of sources that keep track of how many lies he tells. There is about—it is sort of stunning that according to one source, he has made 4,200 misleading claims during his Presidency. That is an average of about 7.6 false or misleading statements per day.

Now I have listened to you speak a lot about character and the character of the Presidency. At Duke University in 2000, for example, you said that character matters and that the President of the United States should not—should be a role model for America. Do you still think character matters for the President of the United States?

Judge KAVANAUGH. Senator, given the lead-in to your question that you have heard me talk about, I need to stay so far away from any political conversation.

Senator BOOKER. Three zip codes away. I have heard you say that a number of times.

Judge KAVANAUGH. Three zip codes.

Senator BOOKER. And, but that was not what you did when you were a Bush appointee. You talked a lot about Bush's character, even in your confirmation hearing, you said at your swearing-in ceremony. You were willing to comment about President Bush, who—and his character. In fact, you said he was—you had the greatest respect for President Bush.

Now we have a President now that has said a lot of comments, and this is not in any way a partisan or political issue because people on both sides of the aisle have denounced the kind of statements that this President has made, matters of character. Trump—President Trump during the campaign referred to immigrants as rapists. He said a Federal judge was not able to do his job because of his heritage.

He bragged about sexually assaulting women. He has mocked a disabled reporter. I could go on and on and on. The list they provided me is long, but my time is brief.

Do you want to say right now, do you have the greatest respect? You said this about the last President, you thought it was okay. Do you have the greatest respect for Donald Trump?

Judge KAVANAUGH. Senator, to reiterate, you do not hear—

Senator BOOKER. You cannot even say if you have great respect for Donald Trump?

Judge KAVANAUGH. You do not hear sitting judges commenting on political—

Senator BOOKER. I am just asking what you said about President Bush in the last time you were before the United States Senate. Do you have the greatest respect for Donald Trump?

Judge KAVANAUGH. I appreciate the question. And what I have said during this process is I need to stay away—

Senator BOOKER. And you do not need to—three zip codes. You do not need to repeat again. You are not answering my question. And I want to tell you why I am building toward this. Because there is an issue of this President who is asking for loyalty tests from the people he is putting forward for offices.

Now you heard how he is continuing to bash the Attorney General of the United States of America and saying that if you knew he was going to recuse himself that he would not have put him forward. You have seen this President demanding loyalty, expecting loyalty. President Trump not only said that about Jeff Sessions, but you know he has said that about other folks.

And so you are not willing to say about—to comment on the character of this President. You are not willing to say if you have great respect for this President. Just last night, you would not comment on the fact that the President, to one of my other colleagues when he was talking about both sides being to blame, really excusing, it seemed, the behavior of neo-Nazis. And I am just wondering what kind of loyalty is being required of you for this job? That is what I am building to by asking you and trying to keep apples to apples.

What you said about President Bush, why are you not saying it about President Trump? And so I want to just—just build to this in the remaining time I have left. In May 2016, then-candidate Trump put out his first list of potential Supreme Court nominees. You were not on that list.

In September 2016, he put out another longer list. You were not on that one. Then in May 2017, something incredible happened. Robert Mueller was appointed by the special counsel to investigate any links and coordination between the Russian government and the Trump campaign. The President was now in jeopardy, or at least his campaign was in jeopardy. He was a subject of a criminal investigation.

And then President Trump puts out a third list of nominees, and your name is on that list. Now you have heard so many of my colleagues asking about your views, the constitutionality of a President being investigated. You are failing to at least hold President Trump in your eyes to the same level of the Presidential character, which you have talked about in speech after speech. And suddenly, you are going mum as to the character of this President, given all his lies, all his remarks that have been renounced, actually criticized on both sides of the aisle.

And now there is a suspicion, and I do not think it is a big leap to think that the public has this suspicion that somehow you want a position, and I wonder, do you credibly believe that if you agreed right now to recuse yourself, do you credibly believe that somehow, like he said with Jeff Sessions, that he would not hold your nomination up. If you recused yourself. Do you credibly believe that?

Judge KAVANAUGH. Senator, in this process, I need to uphold the independence of the judiciary. And one of those—

Senator BOOKER. But that is what is at question right now. I mean, right now, there is a shadow over the independence of the judiciary because a President who has been credibly accused by his former lawyer of being an unindicted co-conspirator has the opportunity to put a judge on the Bench.

The only judge from that list that was added after the Mueller investigation, of all those judges, you are the only one that has spoken extensively, from raising your hand at a Georgetown Law School event to speaking about it. I do not think it is a big leap to have the common person begin to suspect that you are being put up right now, a person that cannot even speak to the character of this President, will not even say what you said about George Bush, that you have the greatest respect for a President.

And granted, it is hard to say about someone who brags about sexually assaulting women. It is understandable for people to suspect that there is something going on, that somehow this is rigged that you are going to get on that bench. And I hear your admonitions that you are going to be independent, but the suspicion is clearly there.

And so you have written extensively about this. You have spoken to the issue. You have written about the issue in law journals. Can you tell me why the common person, millions of Americans, would not sit back and say, well, this is Donald Trump, who has demanded loyalty from an FBI Director, demanded loyalty from the Attorney General, all the people he seems to be putting in positions of law enforcement.

In fact, he criticizes in the most—as a tweet we saw right before these hearings began, criticizes very dramatically the Justice Department for doing investigations on folks, it seems, because they

are Republicans in the most partisan way. And to me, that cast a shadow over these whole processes.

It is a shadow. Of course, it is extended by not having your documents. It is extended by not having access to your full record. But can you speak to that for me, sir? Can you speak to that credible suspicion that people might have that the system is somehow rigged and the President is putting somebody up just to protect him from a criminal investigation?

Judge KAVANAUGH. Senator, three quick points. One, my only loyalty is to the Constitution. I have made that clear, and I am an independent judge. Two, the Justice Department for 45 years has taken the position, and still does, that a sitting President may not be indicted while still in office. Three, I have not a position on the constitutionality and promised you I have an open mind on that question.

And four, I did talk about a congressional proposal which was not enacted, and as you have heard me say for 2 days, I draw a distinction between what Congress does and what the Constitution requires. So just because I talked about something for Congress to consider in the wake of the experience with President Bush does not mean that I think that is in the Constitution. I have made clear that I have not taken a position on the constitutionality and have an open mind.

So if you put those four points together, I think you should conclude that I—and read my 12 years of opinions and read the letters and read the teaching evaluations and look at my whole life, I think you should conclude, respectfully, that I have the independence required to be a good judge.

Senator BOOKER. And I appreciate it and respect—and I afford you, sir, respect as well. You have spent your whole life in public service. And you and I both know, and I am not sure if you will say it right now, but this is unusual times in the United States of America. If you had told me what has been going on the last 3, 4 months was going to happen 4 years ago, I would think you are describing a fiction novel and not something that actually could be happening in our country right now.

You have seen in these last few days everything from a high-level White House official writing about the chaos and the President, invoking the Twenty-fifth Amendment, which you know very well, and much more. We have a President under investigation. People surrounding him being indicted, criminally charged.

All of us, I really believe this, every single Senator up here is going to be tested. The test for all of us is coming, and the test for the Supreme Court is coming as well. And this is going to be a time, if we have a constitutional crisis, where the faith in this country will be tested, shaken again. And it is really important that the Supreme Court be above suspicion.

And so Senator Blumenthal asked you this. I sent you a letter. Why not right now, right now, even at the jeopardy of President Trump pulling back your nomination, why not now alleviate all of that suspicion that the reasonable person can have? Why not just announce right now that you will recuse yourself from any matters coming before the Supreme Court involving the Mueller investigation?

Judge KAVANAUGH. Because if I committed to how I would decide or resolve a particular case and that it would be——

Senator BOOKER. But would not a recusal take you out of the position that you had to decide or resolve? To say that this is a time in this Nation where I should do the right thing, and just take that suspicion off to restore the faith in the Supreme Court and in this country.

Chairman GRASSLEY. I have 10 minutes on my time. I will give you whatever time you want to respond to it, and I will make sure you are not interrupted.

Judge KAVANAUGH. Just a few seconds.

Chairman GRASSLEY. Look at me, will you, please? I am the guy that gave you the time.

[Laughter.]

Judge KAVANAUGH. Oh, yes, sir. I will try to keep you both.

If I committed to deciding a particular case, which includes committing to whether I would participate in a particular case, all I would be doing is demonstrating that I do not have the independence of the judiciary that is of the judging that is necessary to be a good judge. Because all of the nominees who have gone before have declined to commit because that would be inconsistent with judicial independence.

Chairman GRASSLEY. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair.

And Judge Kavanaugh, if you want to continue to look at the Chair, you can, because he gave me the time.

[Laughter.]

Senator TILLIS. Mr. Chair, I would like unanimous consent to introduce some documents for the record. First is, from 13 States' Attorneys Generals who, among other things, said that Judge Kavanaugh has an unshakable respect for the proper role of the courts within the constitutional structure.

I have an op-ed from the New Hampshire Union Leader. Among other things, they said that Kavanaugh is an experienced, well qualified pick.

Another document is from 80 former law students at Harvard Law. They say Judge Kavanaugh consistently encouraged his students to voice different viewpoints, even if others or the Judge himself might disagree.

Another document written—or I should say an article written by Jonathan Turley of The Hill, who says that no one can use the Mueller probe to hold up the Supreme Court nominee.

Another document from Salvador Rizzo from The Washington Post, and basically, the question is, does Brett Kavanaugh think that the President is immune from criminal charges? And his assumption—or his assertion is that Kavanaugh does not think so.

Ed Whelan, National Review, "Dems' Latest Documents Hullabaloo." Catholic Charities CEO, someone that I know Judge Kavanaugh has worked closely with. He says, "I know Brett to be a man committed to his community and to those less fortunate."

Catholic Youth Organization basketball parents—and I might add, I coached my kids, and I actually think that parents are the toughest constituency to get support from. And you apparently have done that, and they have submitted letters to that effect.

Also, a letter from the Charleston Post and Courier editorial board, "Kavanaugh, the Right Choice." From the Boston Herald staff, "Nix the Toxic, Give Brett Kavanaugh a Shot."

From William Whitaker, the president of the Washington Jesuit Academy, lauding Judge Kavanaugh for the work that he has done for tutoring over the past several years. From my former colleagues in the House; a letter from the Majorities of the House and Senate supporting Brett Kavanaugh's nomination; from my Lieutenant Governor supporting same.

And finally, a letter from the DOJ dated August 5, 2005, in response to Senator Joe Biden's, at the time, request for Justice Roberts' information. I think it is a very interesting read.

Now before I make some comments and hope to keep the record alive for yielding back the most—

Chairman GRASSLEY. Wait a minute. You asked permission to put them in the record.

Senator TILLIS. I did.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Chairman GRASSLEY. Proceed.

Senator TILLIS. Thank you.

First, before I get started, I think it is really important. I ran over to a convenience store when I was taking a break and thinking, I am taking a break. The other Members are taking a break. Hopefully, Judge Kavanaugh did. The ones who were not taking a break were the staff.

So I would like to thank the staff on both sides of the aisle. I know you work hard.

And to the police, who are working mandatory 16-hour shifts. You know, it is one thing—

[Applause.]

Senator TILLIS. It is hard—it is very—it is very difficult for those of you facing forward to see what they are doing. But I do not think you understand the complex operation and the work they are doing to keep us all safe. And those who are exercising their First Amendment right safe.

And finally, to the Chair, thank you. You have done a great job, as you always do. And I appreciate your fairness. I love your sense of humor, and I look forward to us continuing this for probably about another 5 hours. Now—

[Laughter.]

Senator TILLIS. Now I have got to get on to a few things, and you know, Judge, I was Speaker of the House in North Carolina for 4 years. And when we would get into extended debates and our conference would meet, at a break I would say, "Guys, if it has already been said, do not say it again." So, there is not a whole lot more I am going to say.

Clearly, we have got an impasse here, but that impasse did not start based on the discussions we had over the last 3 days. The impasse started in some cases before you were ever nominated. There are people on the other side of the aisle, including people on this Committee, who opposed your nomination on a fill-in-the-blank basis before you were ever nominated. And all they did is fill in the blank on July 10th.

These are the assertions people made. They already concluded before they saw the first document, and they were not going to change their minds. Now they do deserve getting as many documents as possible, and they will have more time to get documents.

I want to make a point on the 1,000 documents that the Senator from New Jersey mentioned. It is actually 1,000 pages, not 1,000 documents. So let us just be sure to be clear on volume. And let us also be clear that those documents are publicly available.

And let us also be clear that the record will be held open until early next week so additional questions for the record, I assume, and other information can be submitted.

Next week, you will go into the hearing—or you will go into the Committee, you will be held over. That is another week. The following week, you will go to Committee. We will have debates again. Another opportunity for comments to be made by the same Members who have already made up their minds.

And then, hopefully, the following week, you will be on the floor, and every Member will have an opportunity to have their say on the floor. So for anybody to say that this discussion is over and the discovery is over, over the next couple hours is simply creating theater.

Now I want to talk a little bit about theater. I want to talk about what happened last night. I did something I seldom do. I seldom interrupt another Member, regardless of how much I want to talk. Last night was the first time of probably only three times in the 3½ years I have been in the U.S. Senate.

But the reason I did it is, I felt like we were going down a path that subsequently proved to be true, and at the time, Senator Kennedy was chairing. He rightfully allowed the discussion to go. But I want to talk about the timeline that occurred and then what happened this morning.

So at about 9:30 last night, we had an exchange where you were being asked to respond to something that you had not seen. We subsequently found out, it was because it was “committee confidential.” And again, I am not an Ivy League school attorney, but I really feel like when you have got in 30-point type running diagonally across the page something that says “committee confidential,” you probably ought not read verbatim from it. But that is what happened last night.

But about 9:30 last night, a request was made to release those documents. That is one of the reasons why I thanked the staff, because those staff stayed up until about 4 a.m. this morning, talking first with President Bush’s people, then talking with the White House and getting it cleared. And they were cleared and in an email box at about 3:15 this morning, 3:30.

Now I do not expect somebody to check their email at 3:15 or 3:30. Maybe some of you do. But certainly in the 6 hours between the time that email hit your email box and the theatrics that happened in this Chamber today, you could have actually found out that you did not have to be Spartacus. You did not have to go interact with civil disobedience. You got what you wanted.

You could have come in here and started out, had a discussion about it if you wanted to, incorporated it into the discussion today.

But that would have given you an opportunity to put that in the proper context. So perhaps it was not as helpful.

The fact of the matter is what happened today and what has happened subsequent to this afternoon reminds me of something I am more likely to see at the Kennedy Center. Maybe, maybe a version of “Much Ado About Nothing,” but not really appropriate for what we are doing here.

Now I have noticed—I love watching people and body language, and I have noticed you—I have had hash marks for the number of times we have been interrupted. I just did not think I could keep track of the number of times that you touched that pocket Constitution.

[Laughter.]

Senator TILLIS. And I have to know—and I know it is tattered. It is almost a metaphor for the very document itself, challenged, kind of torn through, but kept together, largely intact, hopefully will continue to be intact. But do you have a story behind that pocket Constitution?

Judge KAVANAUGH. Well, I got it about 25 years ago. I know that because the Twenty-seventh Amendment, which was ratified in 1992, is not in my version. So I have written in the Twenty-seventh Amendment in my handwriting.

And then I have used it each year teaching my classes at Harvard Law School on separation of powers in the Constitution, and I have written a lot of notes, and there is a lot of ink in there. And the assignment on the first—for the first day of class, the students have to read the entire Constitution word for word. And for the last day of class, they have to read the entire Constitution word for word.

And on the first day of class for about the first hour or hour and a half, I give them a tour of the Constitution. So I start with the beginning and kind of roll through the whole thing, Article I, and I go through the different clauses. Article II, Article III, Article IV, go through the whole thing. Article V, Article VI.

Then we go through the amendments, and but I really focus on the original text of the Constitution because people have heard a lot about a lot of the individual amendments, although I point out some of the less—the ones that are not always discussed as much. But I go through the structure because I try to explain how the structure fits together to protect individual liberty. And some of the clauses about how the House of Representatives and the power of Congress, the power of the Senate, how that all fit together, the different—

Senator TILLIS. I just find it remarkable—

Judge KAVANAUGH. Sorry.

Senator TILLIS [continuing]. That in spite of your encyclopedic knowledge that you keep it with you, and you always refer back to it. And the fact that you have had it for 25 years is a testament to those cheap pocket Constitutions.

Judge KAVANAUGH. I will say that when I met with Senator Feinstein, I wish she were here, but she saw this, and she—and because she talked about how much she appreciated the words of the Constitution, and I pulled it out. And she said, “Well, that looks tattered.” And she gave me a new one.

So if this thing ever totally falls apart and hers has the Twenty-seventh Amendment in it—so if this falls apart, I told her I would use her copy for the future.

Senator TILLIS. Thank you. Well, I am going to ask you a few other personal questions, but also, you know, I started out by saying we know where everybody was beforehand because a couple people made public statements. We know people want more documents. You have more time.

If you have more questions, ask them and submit them for the record. If you want more documents, request them because they have been in each and every case granted. Do not wait until the day before the floor to say I have not gotten the document, when now you have had a running clock since August the 22nd to request some documents that were actually cleared overnight.

I also want to point to this. I do not understand how somebody with that kind of track record, with either judges appointed by a Democratic President and judges appointed by a Republican President on the district court or the D.C. Circuit could actually be viewed in such a divisive way. I do not see how somebody who has clearly judged on both sides of the issues here, sometimes you have judged in a way that made some of my folks mad, and sometimes you have judged in a way that made some of their folks mad.

But I think if we go back and really examine this, this has been a political exercise more than anything else. I, for one, think you should be very proud of that record, and I, for one, will not be surprised if you do not have—meet or exceed that when you get on the Bench.

And that is the last thing I want to talk about. You know, last night I went through some of the cases, and I kept on going through more. But folks, I mean, let us get real. Read his opinions. And the amazing thing about these opinions, I had never read an opinion. I read a few when I was speaker, but not many.

I first started reading opinions when Justice Gorsuch was in front of us. And the first thing that I was amazed with is how approachable they are. You do not have to read all the footnotes. If you are like me, you can read the summary. You get the point. You can go to some of the footnotes, but read them. Because if you do, you will be amazed by them.

Do not judge it based on a tweet or some sort of get out and protest. Read them.

John Locke, I think, said, “To prejudge other men’s notions before we have looked into them is not to show their darkness, but to put out our own eyes.” Do not put your eyes. You may disagree, but you may want to take a look at how thoughtful all of Judge Gorsuch’s 307 opinions are. I said Gorsuch—and Judge Kavanaugh.

[Laughter.]

Senator TILLIS. So just look at it. I mean, go away. I walked over to this convenience store to get me some kombucha and come back here and—and I was just thinking. I talked with some people there. Apparently, they were in the audience. I think they were clearly on the other side, and they said, “What are you doing here?” I said, “I am getting a drink.”

And I said, look, you know, what really bothers me is how we go into this process and we take these incredible people, and you wonder why they do it. So that is the last thing. And I told them the same thing. I said read some of his opinions. Do not believe what you have been told. Do not judge someone based on someone else's judgment.

Judge them based on the body of work. And your body of work extends long before the 12 years that you have actually been in the role of public service, and that is what I am going to end with. I actually started public service about the same time you did, Judge Kavanaugh. Actually, we have, I think, some similarities.

I was a partner at a big four accounting firm. I traveled all over the place. I have two kids. I coach their tee-ball, their soccer. I was sometimes flying in for practice on Monday night and trying to get home on Friday night to be on the ballfields.

I then went into the legislature in 2011. That is really the first time I did, or 2007, I should say, public service. And then became Speaker of the House, and came up here.

And sometimes when I am in settings like this, I ask myself the question I am about to ask you. Why on earth do you do this, and why on earth do you want to do it? You are brilliant. You have augmented your God-given talents with an extraordinary education, and you have served so extraordinarily well. You know well that in the private sector—I mean, your potential is endless.

So in the remaining time, and whatever you do not use I will yield back, why on earth are you doing this?

Judge KAVANAUGH. Senator, I appreciate that. I am doing—been a judge and doing this and going through this process because from an early age, I tried to commit myself to public service. I have talked about the motto of our Jesuit high school, which was, “Men for Others”—and that motto of public service is something I have always tried to pursue.

And following the example set by my mom of law, and I found that an important way to contribute to public service. And then became, of course, a lawyer and within public service as a lawyer, I think one of the highest forms—not the only, but one of the highest forms of public service as a lawyer is to be a judge. Because our rule of law in this country, our rights and liberties depend on independent, neutral, impartial judges, and I thought I could contribute in that way to the public service and the rule of law.

And so I, when that opportunity arose, I was honored to be considered and honored to become a judge. And I have enjoyed and been honored to do it for the last 12 years because I know that it is not abstract. It is not academic. It has real effects for real people in the real world.

And being part of the process of our Government by which the rights and liberties of people are protected in the real world was the highest form of public service. At the same time, I have recognized that that is not the only way to contribute. So I have, as I have mentioned before, sought to teach, sought in hiring law clerks to train the next generation, teaching the Constitution, sought to volunteer with Father John in Washington Jesuit Academy.

Coaching has been just an enormous part of the last 7 years, and then, you know, my family.

So, but the public service as a judge is—it is a great honor, and it is a great—it is a great responsibility. To the discussion I just had with Senator Booker, I understand the responsibility I bear as a nominee to this Court. I appreciate that. I hope my experience gives me the ability to, if I were to be confirmed, to live up to that responsibility. I will give it my all, if I am confirmed, as I have tried to do for the last 12 years.

So thank you for the question.

Senator TILLIS. Judge Kavanaugh, thank you. Thank you for what you are going through. Thank you for your past service and what I believe is going to be a distinguished career on the Bench. And God bless you and your family.

I yield the rest of my time.

Judge KAVANAUGH. Thank you, Senator.

Chairman GRASSLEY. Thank you for the 2 minutes you did not use.

Senator Harris.

Senator HARRIS. Thank you.

Judge, as you know, these hearings are placed to hopefully get answers, and as I am sure you have noticed, your lack of a clear answer to a question I asked you last night has generated a lot of interest.

I received reliable information that you had a conversation about the special counsel or his investigation with the law firm that has represented President Trump. As you will recall last night, I asked you whether you had had such a conversation, and under oath, you gave no clear answer.

Then today my Republican colleagues raised the issue with you, and again, you said you do not recall and that you had no “inappropriate conversations” with anyone at that law firm, which has led a lot of people to believe that that was equivocal in terms of a response.

So whether a conversation was appropriate in your opinion is not a clear answer to my question. My colleague, Senator Blumenthal, again, asked you, and you said you were pretty confident the answer was “no.” So, frankly, if last night you had just said “no” or an “absolute no” even today, I think this could be put to rest.

But I will ask you again and for the last time. “Yes” or “no,” have you ever been part of a conversation with lawyers at the firm of Kasowitz Benson Torres about Special Counsel Mueller or his investigation, and I ask were you ever part of a conversation? I am not asking you what did you say. I am asking you were you a party to a conversation that occurred regarding Special Counsel Mueller’s investigation? And a simple “yes” or “no” would suffice.

Judge KAVANAUGH. About his investigation. And are you referring to a specific person?

Senator HARRIS. I am referring to a specific subject, and the specific person I am referring to is you.

Judge KAVANAUGH. No, who was the conversation with? You said you had information.

Senator HARRIS. That is not the subject of the question, sir.

Judge KAVANAUGH. Okay.

Senator HARRIS. The subject of the question is you and whether you were part of a conversation regarding Special Counsel Mueller's investigation.

Judge KAVANAUGH. The answer is no.

Senator HARRIS. Thank you. And it would have been great if you could have said that last night.

Judge KAVANAUGH. Well, I—

Senator HARRIS. Thank you.

Judge KAVANAUGH. In my—never mind.

Senator HARRIS. Let us move on.

Judge KAVANAUGH. Okay.

Senator HARRIS. Yesterday, Senator Blumenthal asked if you could recuse yourself in cases involving the personal civil or criminal liability of the President. You declined to say that you would. So my question is could a reasonable person question your independence in cases involving the President's civil or criminal liability?

Judge KAVANAUGH. I am sorry. Can you repeat it for me?

Senator HARRIS. Would it be reasonable for someone to question your independence in cases involving the President's civil or criminal liability, should that occur?

Judge KAVANAUGH. My independence I believe has been demonstrated through my 12-year record and what you have heard from the people who have worked with me, and I believe deeply in the independence of the judiciary. I rule based on the law, and you can look at cases that I have ruled against when I became a judge against the Bush administration. And I have talked about the history of our country and the history of the Supreme Court.

Senator HARRIS. And on that point, sir, and particularly history of the Supreme Court in confirmation hearings. Justice Kagan, during her confirmation hearing, committed to recusing in cases she handled as Solicitor General. Justice Breyer committed to recusing in cases implicating his financial interests in Lloyd's of London.

Justice Ginsburg refused to commit to recusing in cases that were on her D.C. Circuit recusal list. Justice Scalia committed at the hearing to recuse in a case implicating an issue that was the same as an issue he had decided as a D.C. Circuit judge. So my question to you is will you commit to recusing in any case involving the civil or criminal liability of the President who appointed you—or nominated you?

Judge KAVANAUGH. The independence of the judiciary requires that I not commit to how I would decide a particular case and to issue a commitment on a discretionary recusal issue in either direction. So if I answered that question in either direction—

Senator HARRIS. But do you think it is inappropriate—

Judge KAVANAUGH. That would be a—I would be violating my judicial independence, in my view, by committing in this context. I have explained—

Senator HARRIS. But with all due respect, sir, I shared with you that other nominees sitting at that desk, or some desk like that, have committed to recusing. There have been circumstances where they have committed. So is it your opinion then that they violated some ethical code or rule?

Judge KAVANAUGH. I do not know all of the circumstances, but I believe those were situations that were required recusals where they had previously had to recuse and were simply indicating their required recusals. But I do not know all of the circumstances.

A discretionary recusal as a commitment to get a job or a discretionary nonrecusal as a commitment to get a job, either direction would be violating my independence as a judge, as a sitting judge and as a nominee to the Court.

Senator HARRIS. Okay. It is clear you are unwilling at this point to commit to recusal. So we can move on.

One of your mentors, Justice Kennedy, wrote landmark opinions in the area of LGBTQ rights that have had a major impact on the lives of many Americans. Let us assess one of those cases, and that is the *Obergefell* case.

In *Obergefell*, as you know, the Court held that same-sex couples have a right to marry. My question is whether the *Obergefell* case was correctly decided, in your opinion?

Judge KAVANAUGH. Senator, Justice Kennedy wrote the majority opinion in a series of five cases, *Romer v. Evans*—

Senator HARRIS. If we can just talk about *Obergefell*, that would be great.

Judge KAVANAUGH. I want to explain it.

Senator HARRIS. I actually know the history leading up to *Obergefell*, so can you just please address your comments to *Obergefell*?

Judge KAVANAUGH. I would like to explain it, if I can? He wrote the majority opinion in *Romer v. Evans*, *Lawrence v. Texas*, *United States v. Windsor*, *Obergefell*, and *Masterpiece Cakeshop*. Concluding in *Masterpiece Cakeshop* importantly with a statement, if I could just read this?

Senator HARRIS. But, no, please do not. Because I actually have read it, and I am sure most have. My question is very specific. Can you comment on your personal opinion on whether *Obergefell* was correctly decided? It is a “yes” or “no,” please.

Judge KAVANAUGH. In *Masterpiece Cakeshop*, and this is, I think, relevant to your question, Justice Kennedy wrote in the majority opinion joined by Chief Justice Roberts and Justice Alito and Justice Gorsuch and Justice Breyer and Justice Kagan, the days of discriminating against gay and lesbian Americans or treating gay and lesbian Americans as inferior in dignity and worth are over, paraphrasing.

Senator HARRIS. Are over. Right. Do you agree with that statement?

Judge KAVANAUGH. That is the precedent of the Supreme Court agreed with by a—

Senator HARRIS. Sir, I am asking your opinion.

Judge KAVANAUGH. I—

Senator HARRIS. You are the nominee right now, and so it is probative of your ability to serve on the highest court in our land. So I am asking you a very specific question. Either you are willing to answer or not. And if you are not willing to answer it, we can move on.

But do you believe *Obergefell* was correctly decided?

Judge KAVANAUGH. So each of the Justices have declined, as a matter of judicial independence, each of them, to answer questions in that line of cases.

Senator HARRIS. So you will not answer that question?

Judge KAVANAUGH. Following the precedent set by those eight Justices, they have all declined—

Senator HARRIS. Thank you.

Judge KAVANAUGH. When asked to answer that question.

Senator HARRIS. I have limited time.

Judge KAVANAUGH. But it is important that—

Senator HARRIS. I would really like to move on. You have said that *Brown v. Board of Education* was one of the greatest moments in the Court's history. Do you believe that *Obergefell* was also one of those moments?

Judge KAVANAUGH. I have said, Senator, consistent with what the nominees have done, that the vast swathe of modern case law, as Justice Kagan put it, you cannot, as a nominee in this seat, give a thumbs up or thumbs down. That was—that is her words.

Senator HARRIS. Do you think that *Obergefell* was one of the great moments in the history of the Supreme Court of the United States?

Judge KAVANAUGH. And for that reason, those nominees have declined to comment on recent cases, all of them.

Senator HARRIS. Is it a great moment, is what I am asking you, not to comment on the legal analysis. Do you believe that was a great moment in the history of the Court?

Judge KAVANAUGH. So Justice Kennedy wrote the majority opinion saying the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over on the Supreme Court. That is a very important statement, Senator.

Senator HARRIS. I agree. That is why I think you repeated it. Thank you.

Let us move on. Over the last several months, we have all witnessed the inhumane and heartbreaking separation of immigrant children from their families by this administration. Despite a court order requiring the administration to reunite them over a month ago, nearly 500 immigrant children are still separated from their parents.

Do you believe that constitutional rights of parents, specifically fundamental due process rights, are implicated in such family separations?

Judge KAVANAUGH. Senator, that is a matter of pending litigation, I believe. And as a sitting judge on the D.C. Circuit or as the nominee, I, of course, cannot comment.

Senator HARRIS. Have you watched the coverage of any of these cases on television, or have you read about the experiences those parents and those children have had?

Judge KAVANAUGH. I have seen some television.

Senator HARRIS. In the 1889 Chinese Exclusion Case, the Supreme Court permitted a ban on Chinese people entering the United States. The Court said Chinese people are “impossible to assimilate with our people” and said they were immigrating in numbers “approaching an invasion.”

This case has never been explicitly overruled. You have said you would be willing to talk about older cases. So can you tell me, was the United States Supreme Court correct in holding that Chinese people could be banned from entering our country?

Judge KAVANAUGH. Senator, the cases in the 1890s, as you know—

Senator HARRIS. 1889, to be specific.

Judge KAVANAUGH. Okay, in that era reflect discriminatory attitudes by the Supreme Court. Of course, that is the era also of *Plessy v. Ferguson*.

Senator HARRIS. But would you be willing to say that that was incorrectly decided?

Judge KAVANAUGH. Senator, I do not want to opine on a case, a particular case without looking at it and studying with the discrimination—

Senator HARRIS. Are you aware that that case has not been overturned?

Judge KAVANAUGH. Senator, I know that with a number of the cases, like *Korematsu*. Let me use that as an example.

Senator HARRIS. Which we have discussed earlier.

Judge KAVANAUGH. That is—

Senator HARRIS. But this case in particular, were you aware that it had not been overturned?

Judge KAVANAUGH. Senator, I realize that there are still cases in the immigration context—

Senator HARRIS. Have you ever written about any of those cases and your thoughts about whether they should be re-examined or potentially overturned, and sometimes obviously they should be overturned?

Judge KAVANAUGH. Well, there is a swathe of cases—

Senator HARRIS. Have you talked about this case ever?

Judge KAVANAUGH. I do not believe. I am happy to be refreshed if you have something that suggests I have.

Senator HARRIS. No, it is actually a question.

[Laughter.]

Judge KAVANAUGH. Okay.

Senator HARRIS. And under the Constitution, Judge, do you believe that Congress or the President can ban entry into the United States on the basis of race?

Judge KAVANAUGH. That was, of course, one of the issues that was just in litigation, and there is still litigation about the immigration laws and how exclusions—

Senator HARRIS. So you are not going to answer that.

Judge KAVANAUGH. That is pending litigation, so I think I, as a matter of independence and precedent.

Senator HARRIS. Will not answer that. That is fine. Let us move on.

In 2013, Texas passed a law that imposed new restrictions on healthcare facilities that provide abortions. The effect was that after the law was passed, half those facilities closed, which severely limited access to healthcare for the women of Texas.

In 2016, *Whole Woman's Health* was decided, wherein the Supreme Court invalidated the Texas restrictions. Was *Whole Wom-*

an's Health correctly decided? “Yes” or “no”? And we can keep it short and move on.

Judge KAVANAUGH. Senator, consistent with the approach of nominees—

Senator HARRIS. You will not be answering that.

Judge KAVANAUGH. Following that nominee precedent.

Senator HARRIS. Okay. I would like to ask you another question, which I believe you can answer. You have said repeatedly that *Roe v. Wade* is an important precedent. I would like to understand what that really means for the lives of women. We have had a lot of conversations about how the discussion we are having in this room will impact real people out there.

And so my question is what, in your opinion, is still unresolved? For example, can a State prevent a woman from using the most common or widely accepted medical procedure to terminate her pregnancy? Do you believe that that is still an unresolved issue? I am not asking how you would decide it.

Judge KAVANAUGH. Senator, I do not want to comment on hypothetical cases. *Roe v. Wade* is an important precedent. It has been reaffirmed many times.

Senator HARRIS. So are you willing to say that it would be unconstitutional for a State to place such a restriction on women for *Roe v. Wade*?

Judge KAVANAUGH. Senator, you can—the process on the Supreme Court was—in *Roe* was reaffirmed in *Planned Parenthood v. Casey*, of course, and that is precedent on precedent. And then there are a lot of cases applying the undue burden standard. And those themselves are important precedents, and I had to apply them—

Senator HARRIS. And we have discussed that many times. I actually had the benefit of sitting through most of the hours of your testimony over the last 2 days.

Judge KAVANAUGH. Thank you.

Senator HARRIS. I know you have talked a lot about that. Can Congress ban abortions nationwide after 20 weeks of pregnancy?

Judge KAVANAUGH. Senator, that would require me to comment on potential legislation that I understand, and therefore, I should not, as a matter of judicial independence following the precedent of other nominees, do that.

Senator HARRIS. Okay. Then we can move on. I am going to ask you about unenumerated rights. So you gave a speech praising former Justice Rehnquist’s dissent in *Roe*. There has been much discussion about that, and you wrote celebrating his success that “successful in stemming the general tide of freewheeling judicial creation of unenumerated rights.” That is what you said in celebration of Justice Rehnquist.

So, “unenumerated rights” is a phrase that lawyers use, but I want to make clear what we are talking about. It means rights that are protected by the Constitution even if they are not specifically mentioned in the Constitution.

Judge KAVANAUGH. Right.

Senator HARRIS. So they are not in that book that you carry. So what we are talking about is the right to vote. That is an unenumerated right. The right to have children, the right to con-

trol the upbringing of your children, the right to refuse medical care, the right to love the partner of your choice, the right to marry, and the right to have an abortion.

Now putting those unenumerated rights in the context of the statement you made, which was to praise the stemming of the general tide of freewheeling creation of unenumerated rights, which means you were—the interpretation there is you were praising the quest to end those unenumerated rights. My question to you is which of the rights that I just mentioned do you want to put an end to or roll back?

Judge KAVANAUGH. Three points, I believe, Senator. First, the Constitution, it is in the book that I carry. The Constitution protects unenumerated rights. That is what the Supreme Court has said.

Senator HARRIS. But it does not explicitly protect the rights that I just listed, and we both know that that is the case.

Judge KAVANAUGH. Right. So that is point one. Point two is *Glucksberg*, the case you are referring to, specifically cited *Planned Parenthood v. Casey* as authority in that case. So *Casey* reaffirmed *Roe*. *Casey* is cited as authority in *Glucksberg*. That is point two.

And point three, Justice Kagan, when she sat in this chair, pointed repeatedly to *Glucksberg* as the test for recognizing unenumerated rights going forward. In describing the precedent, I agree with her description of that in her hearing.

Senator HARRIS. So thank you for that. So then let us put the rights that I mentioned, which are unenumerated, in the context of your praise of Justice Rehnquist as having “stemmed the general tide of freewheeling judicial creation of unenumerated rights.” Arguably, every right that I mentioned on that list was a judicially created unenumerated right.

And my question then is when you praised a jurist who attempted to end those rights, which rights in particular do you believe are praiseworthy of ending?

Judge KAVANAUGH. So that was the test that was set forth by the Supreme Court going forward for recognition of additional unenumerated rights. That was cited as authority in that case, *Planned Parenthood v. Casey*, which reaffirmed *Roe*. The point—

Senator HARRIS. So let us talk about the right to vote. Do you believe that that falls in the category of having been caught up in the general tide of freewheeling judicial creation of unenumerated rights?

Judge KAVANAUGH. What I was describing with Chief Justice Rehnquist, and it was a description of his career was in a variety of areas and his role—

Senator HARRIS. But specifically your reference was to unenumerated rights, sir.

Judge KAVANAUGH. Right. And in a number of areas I have described five different areas of his jurisprudence, where he had helped the Supreme Court achieve what I think has been a common sense middle ground that has stood the test of time in terms of precedent in a variety of areas. At least that is how others have described it.

The *Glucksberg* case, as Justice Kagan explained when she was in this chair, is the case that the Supreme Court has relied on for

forward-looking future recognition of unenumerated rights. It did not—

Senator HARRIS. Thank you, sir. I am familiar with that. I think you are not going to address the specific unenumerated rights, or are you? Because if not, we can move on.

Judge KAVANAUGH. I think I have addressed it. Thank you, Senator.

Senator HARRIS. Okay. In 2011, you were a judge on one of the challenges to the Affordable Care Act. The court you sat upon held there that you dissented on procedural grounds on the court, which upheld the Act.

One of your former law clerks described your opinion in that case, and that is the *Seven-Sky* case, as “a thorough take-down of the individual mandate.” He would go on to clerk for Supreme Court Justice Kennedy that year or the next year, and the Supreme Court then held or heard the challenge to the Affordable Care Act. And according to him, your opinion was “a road map” for the dissenting Justices, the ones who would have struck down the Affordable Care Act.

Given you wrote the “road map,” according to your law clerk, could one reasonably conclude that you would have voted to strike down the Affordable Care Act, had you been on the Supreme Court?

Judge KAVANAUGH. A couple points, Senator. First, I concluded—in one case I upheld the Affordable Care Act against an Origination Clause challenge. In the case you are referring to, I did not reach the merits. But I discussed the merits pro that were being argued in both directions.

My opinion has been described as the road map for both sides because I described both positions, and actually, it was not a road map at all because I did not reach—

Senator HARRIS. He also described it as a take-down.

Judge KAVANAUGH. Well, I speak for myself, and my own opinions speak for themselves. And what my—

Senator HARRIS. So he was out of bounds—of line then? And I am sure the Chairman wants to close this questioning, so we can leave it with that.

I thank you, Judge.

Judge KAVANAUGH. All right. Thank you for your time, Senator.

Chairman GRASSLEY. Before I call on Senator Cornyn, the Minority has requested a third round of questions, and that is perfectly legitimate. It may make your day longer, Judge, but we did the same thing in the Gorsuch hearing.

We have agreed to 8-minute rounds. Senator Leahy has given his additional 8 minutes to Senator Hirono. So she will have 16 minutes. And then we will go to our traditional closed session down in the regular Committee room, 226, that we have already discussed.

So two things I need to know. Would you like to have a few minutes from me if you would like to respond to some of the issues my colleague has raised, including recusal from any cases involving the Mueller investigation, your opinion or response to whether *Obergefell* was correctly decided, and about *Whole Woman's Health* issues, that due process rights of family separation? Any of those

things that you did not get a chance to explain you want to explain?

Judge KAVANAUGH. No. That is okay, Mr. Chairman. I think we had a good dialogue.

Chairman GRASSLEY. Okay. Then one other thing, would you like—when we get done with Senator Cornyn, before we start the third round, because that adds up to about 80 minutes, assuming none of you guys want to talk—and I hope you do not want to.

[Laughter.]

Chairman GRASSLEY. Would you like to have a 2½-minute break or a quick 10-minute break or 7—

Judge KAVANAUGH. I can go with 5, Mr. Chairman.

Chairman GRASSLEY. Okay. When Senator Cornyn is done, we will take a 5-minute break.

Senator CORNYN. Mr. Chairman, this side may have a few pearls of wisdom, too.

Chairman GRASSLEY. Okay, but here—

Senator CORNYN. No, I take your point.

Chairman GRASSLEY. Okay. Well, let me explain.

Senator CORNYN. I think most everything has been asked and answered.

Chairman GRASSLEY. I would not want to cut anybody off if they get really warmed up about something.

Senator CORNYN. Mr. Chairman, I have in my hand a description of a series of letters and editorials. I would like to ask that those letters and editorials described in this document be made part of the record.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Senator CORNYN. So, Judge, a lot of things going on here today and yesterday, I think you will agree. One of the things that bothers me a little bit is the suggestion that some Americans can participate in the political debates and others should be demonized and be condemned, sort of a guilt by association.

And we have heard in particular you being criticized, and the Federalist Society in particular being criticized for participating in the judicial selection process, debating legal issues, social issues, and the like. But, and I recall my friend from Minnesota talked about the Brennan Center. She referred to it as a nonpartisan group. I would not call it that. I would call it a left-leaning, progressive group, just like I would call NARAL, the Alliance for Justice, Sierra Club, Emily's List, and others.

I mention all of those because each of those organizations and their members have weighed in on the important topic of your confirmation. And I just think it is—well, it reminds me a little bit of Joseph McCarthy, talk about one of the dark periods of the Senate's history. In the red scare of the 1950s, he was known for asking, "Were you now or have you ever been a member of the Communist Party?"

And he was appropriately admonished and ultimately left the Senate because he made irresponsible allegations in public against innocent people. But the idea that we would somehow disparage Americans or their associations and somehow disparage their right to express themselves on a matter of public interest like the con-

firmation of a Supreme Court Justice strikes me as a bad road to go down.

That is not a question. That is a statement. I want to—I have found this hearing, I hope you have, to be edifying in a number of ways. It is not always pretty. It is like democracy itself. Sometimes it gets pretty messy. But that is what we do here in the Senate. We make sausage and—or we give those who make sausage a bad name sometimes by what we do here.

But this is democracy. This is the people—people’s representatives in action, advocating on their behalf different points of view. And the ultimate decisionmaker in all this, of course, is the American people, and that is as it should be.

But one of the things that Senator Crapo and Senator Sasse and others have raised during the course of this hearing is, the role of administrative agencies in our Government. First of all, were there any administrative agencies at the founding of America?

Judge KAVANAUGH. Senator, in the First Congress, they created a Secretary—Department of War and Foreign Affairs, Treasury. So there were a few departments created at the beginning of the republic. But obviously, those were ones of core executive functions, and as more—so those were the ones at the beginning.

But to your point, not anything approaching the number of agencies now.

Senator CORNYN. Well, that is very helpful. I had not really thought about those as being administrative agencies, but they certainly are departments of Government, and they would issue regulations and rules that essentially what we see today when administrative agencies issue rules and regulations, they have the force of law, do they not?

Judge KAVANAUGH. They do, Senator.

Senator CORNYN. And we do not get to vote on the bureaucrats who occupy those agencies, do we?

Judge KAVANAUGH. Senator, for the independent agencies, of course, they operate with for-cause protection, and the executive agencies are appointed by the President with the advice and consent of the Senate, the principal executive officers. They are not elected. As to your point, they are not elected.

Senator CORNYN. Well, one of the things that I think is part of the genius of our representative Government is the fact that those of us who do make policy are—run for election, and we can either be voted into office or voted out of office. But when it comes to administrative agencies, the American people do not have that choice, do they?

Judge KAVANAUGH. They are not elected. That is correct, Senator.

Senator CORNYN. And so what I want to talk to you about briefly here is just the growth of the administrative—of administrative agencies in our Government and the fact that over time an enormous body of decisionmaking has been delegated from the collected representatives of the people, the Congress, to these administrative agencies that issue voluminous rules and regulations, which have the force of law.

And to the comments made by some of my colleagues more eloquently than I am making them, Congress has delegated more and

more responsibility to them and accepted less and less responsibility to make the hard judgments that ultimately we will be held accountable for at the ballot box. And I want to just talk to you a little bit about—we talked about the *Chevron* case, and you have explained that. I will come back to that in a minute.

But if a community bank or credit union in Austin, Texas, the regulatory agencies that govern them and audit them and the like, they have—they issue regulations and rules and can basically penalize or otherwise punish those community banks and credit unions in Austin, Texas, can they not?

Judge KAVANAUGH. That is correct in terms of establishing rules and then being able to bring enforcement actions sometimes that are brought before administrative law judges subject to sometimes deferential judicial review.

Senator CORNYN. And because of the Administrative Procedures Act that Senator Crapo talked about and because we presume that these administrative agencies have expertise that courts do not, there is deference afforded to the fact-finding and the legal conclusions in the application of those rules to contested cases, correct?

Judge KAVANAUGH. That is correct. That is a concern that I have identified in some of my cases about fact-finding and the fact that sometimes it appears not always to live up to the due process requirements. It is something I have identified in a few cases. It is a part of our administrative system, so I am talking about specific cases where I have ruled that in that specific case there was a problem with how the adjudication was conducted.

Senator CORNYN. And if the courts will defer under Administrative Procedures Act and under that body of law to the fact-finding by an administrative agency and the courts say, well, unless it is arbitrary and capricious or some similar standard, they are going to let it stand. There is really no recourse for an individual even in a court of law if in fact what that agency has done has made an erroneous decision in all circumstances, right?

Judge KAVANAUGH. That can be correct.

Senator CORNYN. I know we are getting into a little bit of complexity here and there are some nuances associated with—

Judge KAVANAUGH. But—

Senator CORNYN [continuing]. But I think you get my drift.

Judge KAVANAUGH. Your general description is right. I have been very in the weeds sometimes in cases involving individuals in administrative adjudications where we have had judicial review because I know those of the cases where individual lives and liberty and property—the *Rossello* case was a good example where the woman was denied Social Security benefits for her disability because of a claim that she had had employment at some point even though she really had not. It had gone on for 15 years, and I was very stern, I would say, in the opinion I wrote in that case about how that was inconsistent with basic due process and the law.

And so I have been—every case matters, of course, but the cases with individuals who seem to have gotten the runaround from the Government are cases where I think judicial review is especially important. And that can be criminal defendants, that can be in administrative adjudications. Whoever it is, you want to make sure they are getting treated fairly under the law.

Senator CORNYN. And I do not know if it happened in the case of the woman you described, but in some instances even after the agency makes a decision, if you want to appeal the decision of that agency, they tell you to go next door and talk to another employee of the same agency and state your grounds for appeal, hardly due process in my regard. Is that generally a concern about whether there is an independent review process even within an administrative agency?

Judge KAVANAUGH. That is an issue many have raised as a concern in the Supreme Court since *Crowell v. Benson* has upheld the general concept of administrative adjudication. But whether it is Article III adjudication or administrative adjudication and we are reviewing it, we need to make sure that people's due process rights are being respected.

Senator CORNYN. Well, it just strikes me that, given the explosion of administrative agencies and the people that work for them, the explosion of regulations that Congress never passes on and that the courts are, by doctrine, by precedent, deferential to both the finding of fact and the conclusions of law under the *Chevron* doctrine, then there is a lot of room for a lot of abuse, and a lot of individuals strike me as—the frustration they feel that their Government is no longer responsive to them is very real and a serious issue.

But now let us get into the *Chevron* case, it strikes me—and I may not get this right. You will correct me if I am wrong. That basically where Congress is ambiguous on the grant of authority to an administrative agency, the Court will defer to the agency in the interpretation of its own legal authority if it is a reasonable conclusion. Is that right?

Judge KAVANAUGH. That is a correct description of the *Chevron* doctrine.

Senator CORNYN. Well, I got lucky, I guess.

[Laughter.]

Senator CORNYN. But my point is why in the world would an agency be able to determine their own legal authority? I mean, given the other concerns we have about a lack of accountability, a lack of due process, would the courts then say, well, we are going to let them define the scope of their own legal authority where they can act, and we are going to defer to that. Why in the world would the courts do that?

Judge KAVANAUGH. Well, that is one of the critiques that has been leveled at *Chevron*, one of the things that is important, I believe, is to recognize *Chevron* itself—I hate to get in the weeds, but Footnote 9 of *Chevron* is very important in terms of using all the tools of statutory construction before you make a finding of ambiguity in the statutory term at issue or otherwise. And I think that is important for courts to take seriously.

As I have pointed out, the ambiguity finding is sufficiently uncertain that, that is, in my view, as I have written, in tension with the notion of the judge as neutral umpire and something that has been of concern to me. There is also the major questions exception, major rules exception to the *Chevron* doctrine that I have written about.

Senator CORNYN. Well, I am certainly not going to ask you on how you might rule in a future case, but this has been identified by legal scholars and by judges of all description and orientation as a serious issue that may need to be revisited in the future.

And like I did with our *Santa Fe School District* case, I will just express my own frustration with that, but especially when you compound it with the Consumer Financial Protection Bureau where Congress insulated the Bureau from any sort of oversight by Congress and where they appointed a head of the Consumer Financial Protection Bureau with vast powers to get into the personal financial information of every American and give them really more authority than we would ever give any of our intelligence agencies, it just strikes me as a tremendous abuse of power. Again, it is not a question, but I will use the opportunity to express a frustration I know Senator Crapo, as the Chairman of the Banking Committee, shares with me.

In the 5-minutes I have left, let me ask you a softball question, cameras in the courtroom. One of the reasons why I think these confirmation hearings, as painful as they are to the nominee and their family and friends, are so important is I think more people in America have learned about how their Government should operate and does operate by watching the last 2 days and you and the doc then they have through all their time in elementary school, junior high school and high school and college.

Most Americans do not really study American history anymore, much less civics, and so I think this is a wonderful opportunity, and I am glad your students, your team are here on the front row may be listening to a few things because I think this is really important. If Americans are going to accept responsibility for their Government and if they are going to hold public officials accountable for performing their responsibilities according to the Constitution, they need to be able to understand the sorts of issues we have been talking about here today, and they need to get involved and express themselves.

So, to me, cameras in the courtroom I know are controversial on the Supreme Court. I will tell you—and you know this already—many State courts, for example—

Judge KAVANAUGH. Yes.

Senator CORNYN [continuing]. The Texas Supreme Court has a fixed camera in the corner that never moves, and everybody forgets it is there and nobody grandstands and they have oral arguments and the judges do their thing and ask questions. The lawyers give answers. And I think it is another great opportunity for people to see their government in action.

And I know the Supreme Court, no cameras in the courtroom, you maybe pay to have a very nice artist rendition of your oral argument. I was given a copy of mine from my staff when I argued the case we talked about, and my staff said, “Well, we paid \$50 to take 5 years and 10 pounds off.” And I said, “Thank you. Money well spent.”

But the point is, I think the American people would learn an awful lot by seeing the Supreme Court in action, and I applaud the action that your court and others have taken to make that more accessible with recordings and the like. But I would hope that the

Court would continue to look at the possibility that more and more of its activities would be available to the American people because not everybody can go across the street and get a nice seat in that wonderful marble palace over there and see the Court in action. I think they would be awed, I think they would be impressed, and I think they would learn a lot about how the courts do operate and should operate in our system of government.

So, I know the O.J. Simpson trial—and I am showing my age here—gave cameras in the courtroom a bad name and certainly some of the activities we see at hearings like this where people know they are going to be on TV camera encourages them to misbehave and disrupt. That may be the cost of doing business sometimes. I am confident that the Court could control that much better than we in Congress can.

But I would just like for you to take a couple minutes to comment on that. And how should the judiciary look at this great opportunity to inform and educate the American people about how their Government works and certainly the judiciary and what the risks you see to the litigants into the fair administration of justice?

Judge KAVANAUGH. Senator, thank you. First, you mentioned that this—you used the word painful. For me, this has been a great honor to be here, the greatest honor, and for my family to be here. I have enjoyed the discussions with all the Senators on the Committee. I have enjoyed—and it is continuing, I know. And I have enjoyed it, the 65 meetings. I know this is not my last comment, but I have enjoyed the 65 meetings, I have enjoyed the hearing. It is a great honor.

As I have said repeatedly, I am a sunrise side of the mountain. I am an optimist. I am positive about the future of the judiciary. I am positive and optimistic about the future of the country. We are always forming a more perfect union, seeking to fulfill the promises of the Constitution, and to be here is a great honor.

You mentioned people watching. If there is one thing they take away, I hope they understand that an independent judiciary is the crown jewel of our constitutional republic in my view and that the judiciary has been, must be, and must continue to be independent of politics, that we do not make the policy decisions. We do the best we can to decide the law under the precedent of the Supreme Court, the laws passed by Congress.

To your point about cameras, I view it as of vital importance going forward, vital importance to maintain the confidence of all Americans, all Americans in the independence and impartiality of the judiciary. And I know how concerned and focused Chief Justice Roberts is on maintaining confidence—and all the Justices on the Supreme Court—maintaining the confidence of all the American people in the independence of the judiciary and the rule of law in the United States of America. And I understand that. I understand the responsibility I bear as a nominee and, if confirmed as a Justice, to do everything I can and everything I do to maintain confidence in the independence of the judiciary going forward.

I do agree with you; when you watch an oral argument of the Supreme Court and you see the Justices in action grappling with cases, it is inspiring to see them in action grappling, as I have said, not sitting on different sides of an aisle, not caucusing in different

rooms, as one group seeking as best they can to get the right answer under the precedent and laws of the United States. It is inspiring, and it is something, if I am fortunate enough to be there, that I will give it my all to live up to that responsibility. As I said to Senator Booker, I understand the responsibility I would bear if I were on that Court, and I would do everything I can to live up to it and maintain it.

As to cameras, consistent with what I have said, I have an open mind on that. I have seen the benefits of live audio, but I would want to listen first, listen to the eight Justices who are there and have thought about it, have experienced it. But I have an open mind.

And I will close with this: I want to do everything I can, as I said to the Chairman, to maintain confidence of the American people, all the American people in the independence and impartiality of the judiciary.

Chairman GRASSLEY. Okay. We will take a 5-minute break.

[Whereupon the Committee was recessed and reconvened.]

Chairman GRASSLEY. Judge, I want to apologize to you. I am the one that did not get back here on time.

Okay. I think we will start with Senator Durbin with your 8 minutes right now. Well, if she wants to go first, she can, but—

Senator DURBIN. Yes.

Chairman GRASSLEY [continuing]. I would like to have somebody start. Why do you not take a couple minutes right now just to use up two of your minutes? I do not think she will care. Go ahead.

Senator DURBIN. You are going to have to represent me in this. Is she here? All right.

Judge, thank you very much. I have a granddaughter who is going into the second grade, and she came home from school in first grade last year to tell her mom that there had been an instruction from the teacher about what to do in her first-grade classroom if a shooter came into their school. She was told to get on the floor and stay away from the windows. Her mom called me in tears and said I cannot believe it has come to this, that in the first grade we have got to warn our kids about shooters coming in to schools. But we know we do. And I talked to Senator Blumenthal and Senator Murphy about the tragedy at Sandy Hook and so many other tragedies.

That is why I want to spend a moment talking about the Second Amendment here because you have taken a position on the Second Amendment which you yourself have described as a lonely voice. You have taken a position which I do not believe is responsible from a public safety viewpoint. You laid out your text history and tradition test for reviewing Second Amendment challenges to gun laws and your dissent in the D.C. Circuit Court *Heller* case. Your test would have courts ignore the public safety impact of laws and instead search to see if the laws had historic analogs.

In a March 31, 2016, speech at the American Enterprise Institute, you said, quote, “I thought Justice Scalia said pretty clearly what the test is, that history and tradition-based approach. I have been a lonely voice in reading *Heller* that way,” end of quote. Indeed, Judge, I am not aware of any Circuit that follows your test,

the history and tradition test. They all apply intermediate or strict scrutiny and ask basic questions about public safety.

In the 2011 *Heller* case, the two judges in the majority of the D.C. Circuit, both Republicans I might add, said this about your lone dissent: “Unlike our dissenting colleague, we read *Heller* straightforwardly.”

Now, one lonely voice can connote that you are inspiring, insightful, or brave. It might also connote that you are just plain wrong. And in this situation it is a life or death test, whether it is an assault weapon or the person who can buy it or use it. I need to know from you how you can reconcile your position with your opening statement to this Committee. Do you remember what you told us, the rule of common sense? The rule of common sense suggests to me that you would not be a lone voice on an issue of life and death involving innocent Americans. Common sense would suggest that you would join with Justice Scalia and other Federal courts who believe that scrutiny, which involves public safety, should be the test.

Judge KAVANAUGH. Senator, thank you. It is not my test. It is my interpretation of the Supreme Court’s test. In my opening statement I emphasized precedent. It is all about precedent so—

Senator DURBIN. You are alone. You are alone. You have admitted you are alone.

Judge KAVANAUGH. Not anymore.

Senator DURBIN. How can you read the same case others have read and come up with a completely different solution and say, “I am just following the precedent”?

Judge KAVANAUGH. Many other judges since I gave that talk have agreed with the approach I set forth in that case, but the important thing is the opinion speaks for itself. It goes through in painstaking detail the *Heller* case for the Supreme Court authored by Justice Scalia and then the *McDonald* case authored by Justice Alito and explains that the exceptions to the individual right protected by the Second Amendment are laid out in part three of the Supreme Court’s *Heller* opinion.

You mentioned intermediate or strict scrutiny. I said specifically in my opinion that the history and tradition test may allow some additional regulations than strict scrutiny test, so in terms of comparing how much, to your point, gun regulation is permissible, I made that explicit point in my—

Senator DURBIN. But would not the commonsense rule that you stressed in your opening statement, at a time when so many innocent people are being killed with guns, suggests that we ought to be mindful that the Second Amendment is not a suicide pact? We ought to make America safe and to find a construction of this which sets you apart from those who are looking to public safety as the standard is a troubling thing. I am sure that some groups—I am not going to name names; you know what I am talking about—applaud your position, but I would just say from the viewpoint of parents and families and people worried about gun safety, why do you set yourself aside from the mainstream of thinking on this?

Judge KAVANAUGH. Because that is how I read the precedent of the Supreme Court as best I could. I specifically talked about at

the end of that opinion, too, as well, the real-world consequences. I was very aware of the real-world consequences. I am very aware of the drills that are done in the schools these days. I am very aware that I lived in the DC area, which was known as the murder capital of the world, for a time in the 1980s with mostly handgun violence. I am very attentive to that issue.

At the same time, I am a judge. My duty, as I have explained repeatedly, is to follow the Constitution, as interpreted by the Supreme Court. I explained in as much detail as I possibly could how I analyzed Justice Scalia's majority opinion and Justice Alito's plurality opinion in *McDonald*. They, as I read them, seem to reject the balancing test that had been articulated in Justice Breyer's dissenting opinions in both cases. I explained that in detail. It is important to underscore the Supreme Court said and I have said, following it, machine guns can be banned—

Senator DURBIN. That has been the case since the 1930s.

Judge KAVANAUGH. But I just want to reiterate, machine guns can be banned under the Supreme Court precedent.

Senator DURBIN. Thank goodness.

Judge KAVANAUGH. And so, too, the Supreme Court said traditional laws such as felony possession laws, concealed carry laws are permissible, bans on possession by mentally ill, bans on possession of guns in schools and government buildings, all of those were articulated by the Supreme Court as permissible regulations, and those are some of the regulations that has traditionally existed.

But I understand and I am aware of what you are talking about in terms of schools, and I understand the drills. And, of course, the test—

Senator DURBIN. Common sense.

Judge KAVANAUGH. Gun violence—

Senator DURBIN. Rules of common sense.

Last question I have for you is this: When the President introduced you as his nominee, you said, "Throughout this process, I have witnessed firsthand"—you said this to the President—"I have witnessed firsthand your appreciation for the vital role of the American judiciary." What did you witness about this President's appreciation for the vital role of the judiciary?

Judge KAVANAUGH. I witnessed his discussion with me in my interview, his discussion with me the night he announced me at the White House, his discussion on that Sunday night when I went to the White House—he and Mrs. Trump met with me—and his discussion of the judiciary with me. What I based that judgment on was my interactions with him on the Monday, on the Sunday, and on the Monday.

Senator DURBIN. We usually instruct juries not to put their life experience and common sense aside when they make a verdict, and I think the verdict on this President and his vital role in the judiciary would include more than those meetings. Thank you.

Chairman GRASSLEY. In between any Democrat, if a Republican wants recognition, ask for it. Otherwise, Senator Hatch.

Senator HATCH. Well, let me just ask one question. Hang on. Let me just ask one question to you. You told Senator Durbin earlier that, quote, "We are all equal before the law in the United States of America," unquote. And yesterday, you said that, quote, "No

matter where you come from, no matter how rich you are, no matter your race, your gender, no matter your station in life, no matter your position in government, it is all equal justice under the law,” unquote.

So in your opinion, what does equal justice under the law mean to you?

Judge KAVANAUGH. Equal justice under the law means that every American, every citizen, everyone who ends up in an American court is entitled to equal treatment, due process, equal protection, your argument will prevail on the facts and the law in a particular case, not—

[Disturbance in the hearing room.]

Judge KAVANAUGH. Not based on the identity of the parties or the litigants, not based on policy views, and that is a critical foundation of the rule of law in the United States and of the independence and impartial judiciary that we hold dear in the United States.

Senator HATCH. Well, thank you, Judge. That is all I care to ask.

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

If I do not use all my time, I would like to cede what remains to Senator Coons.

Chairman GRASSLEY. That will be done, yes.

Senator FEINSTEIN. Thanks.

Judge, you have very expansive views on Presidential power, and they are not limited in whether the President can be checked by Congress or the courts. I think you believe that a sitting President cannot be indicted, cannot be prosecuted, cannot be investigated, and should have the authority to fire a special counsel at will.

It is my understanding in 2016 you told the American Enterprise Institute that you will put the final nail into the, I guess, coffin of the independent counsel. Would you comment on that, please?

Judge KAVANAUGH. Senator, thank you. The nail in the independent counsel statute was put in by Congress in 1999 when Congress overwhelmingly decided not to reauthorize the law as a general matter.

In terms of Executive power, I would just urge—we have not discussed a few issues here today, but by opinion on the political question doctrine in *El-Shifa*, my article on national security and my book review of Judge David Barron’s book, my mens rea opinion dissent in *Burwell* joined by Judge Tatel, my administrative law—the Harvard Law Review piece, if you just read those four pieces, just read those four pieces, I think you will understand that I am not someone who has an unduly expansive view, that I am one who has held the executive branch to account in a number of different areas, consistent with our constitutional structure. And those are important, so if you are just going to read a few things, just read those four things—

Senator FEINSTEIN. I will.

Judge KAVANAUGH. And I think you will understand my understanding—

Senator FEINSTEIN. I will.

Judge KAVANAUGH. Of how Executive power and legislative power interact.

Senator FEINSTEIN. Okay. In 2003 while you were in the White House Counsel's Office, the Supreme Court decided to hear two cases involving University of Michigan's efforts to increase racial diversity. The Bush administration filed briefs in the Michigan case arguing that the University of Michigan's programs were unconstitutional. Senator Booker asked you about this. So please tell me, what was your view on whether the Bush administration should oppose the University of Michigan's efforts to increase racial diversity on the campus? And do you support using race as one factor in admission to college or universities to achieve racial diversity on campuses?

Judge KAVANAUGH. Thank you, Senator. This was an issue on which the existing precedent of the Supreme Court and President Bush's views, in my view, dovetailed. I was working for President Bush. He was interested in promoting racial diversity. He had said as much as Governor of Texas. That was his position as President of the United States. He believed also, and this is consistent with Supreme Court precedent as well I believe, in using race-neutral means first to see if that—in Texas, the top 10 percent plan in the wake of the *Hopwood* decision of 1996, then-Governor Bush had been part of that. He always talked about the importance of diversity. And in the Michigan case, he insisted that the brief filed by the administration reflect his position that promoting racial diversity was an important goal for his administration.

Senator FEINSTEIN. Okay. Let me ask you a question on employment discrimination involving the LGBT community, and this is a while back. On July 11, 2001, you received an email from your White House colleague, Brad Berenson, who wrote that you were a walking point on faith-based issues. You replied to him that you had, and I quote, "mapped out a preliminary strategy to respond to concerns raised about the Bush administration's policies allowing Federal funding to go to religious organizations that discriminate against LGBT individuals." Could you describe your involvement in Bush administration's efforts to exempt charities from State and local laws prohibiting employment discrimination against LGBT individuals?

Judge KAVANAUGH. Senator, thank you. I do not recall the specifics, but I do know that one of President Bush's initiatives when he came into office in 2001 was an Office of Faith-Based Initiatives. He was very focused on making sure that religious organizations could participate as equals, not as preferred, but as equals in American society, and that was something that the Faith-Based Initiatives Office worked on and something he was very focused on. I do not remember the details of—

[Disturbance in the hearing room.]

Judge KAVANAUGH. I do not remember the details of particular—of that particular, but I do know that President Bush—at the same time, I also did speak to—on occasion to the Log Cabin Republicans, which was a group that we—that I talked to about judicial nominations, as I recall. And President Bush is someone who, you know, believed deeply, as he said repeatedly, in quality for all Americans.

Senator FEINSTEIN. Were you involved in the discussion of any other action to permit employment discrimination against LGBT persons?

Judge KAVANAUGH. Employment discrimination? I do not recall anything specific on that, Senator.

Senator FEINSTEIN. Okay. That is all I have.

Chairman GRASSLEY. Okay. Senator Coons will have another 1 minute and 22 seconds before I call on you. Any Republican want the floor? Senator Kennedy, then I will—I am going to—

Senator KENNEDY. Now, Mr. Chairman? Okay. Nothing. Thank you.

[Laughter.]

Senator KENNEDY. My office is now going to be moved to Arlington.

[Laughter.]

Senator KENNEDY. Judge, real quickly, yesterday you—we talked about originalism, and you defined that as constitutional textualism. And what counts according to the Supreme Court in interpreting the United States Constitution and the Bill of Rights is the public understanding of the document—what the words meant at the time they were drafted and approved. And you pointed—if I get this wrong, stop me. And you pointed out that intent—the intent of the delegates was not something that should be focused on.

There were 55 delegates, I think about 55 delegates to the Convention.

Judge KAVANAUGH. Originally.

Senator KENNEDY. Originally. They obviously did not move in lock step. Delegates, Senators, Congressmen, Congresswomen have a multitude of reasons for voting as they do. That is why we focus on the public understanding, which is sort of an objective, reasonable person standard, right? Am I in the ballpark?

Judge KAVANAUGH. That is correct.

Senator KENNEDY. Okay. So, here is my question. Why then—I am not suggesting we should not. I am just curious. Why then do we put so much emphasis on the Federalist Papers, or for that matter, the Anti-Federalist Papers when you are only getting the point of view of one person?

Judge KAVANAUGH. That is a great question, and we should be careful when we look at the Federalist Papers. It is a great document. Those papers describe the structure of government in magnificent ways, but they were an advocacy piece to try to convince people in the ratifying Convention and a ratifying convention to vote “yes” on the draft Constitution. So, sometimes the—as with everything else that is an advocacy piece, we have to be careful to make sure that the words control and not necessarily an advocacy piece about the—about the document. And there were lots of statements in ratifying conventions as well.

This was a compromise, and not everyone, in fact, probably no one was a hundred percent with the final product, yet they came together. Ben Franklin performed a critical role at the Convention in bringing about the spirit of compromise that ultimately allowed them to get over the finish line, with George Washington as the presider at the Convention. And that compromise is contained in the words of the document.

Of course, precedent is part of the system we have now, and I always like to add that, that precedent is critical to how we today decide cases. But the original meaning, the words control over any intent of any one person or group of people.

Senator KENNEDY. Briefly, do you put much stock in Theron's treatise, compilation, discussion of the Convention record?

Judge KAVANAUGH. So, I find them fascinating, the notes of the Convention, and to see the day-by-day debate on the Convention and how things changed, how close we were to so many different things, things such as proportional representation in the Senate. That was close. A one-term President, that was close. The various compromises that were reached, the debate over the Necessary and Proper Clause. Some of those things that caused Gary, and Randolph, and Mason not to sign the final Constitution because they had such profound disagreements with the structure and were concerned in some respects with having a Bill of Rights which was not part of the original Constitution.

So, I enjoy the notes. I put—you learn from them. But, again, those don't necessarily control—those help you understand, but they do not control over the actual words of the document. So, to the Federalist Papers, they help you understand what is going on and how to read it all together as a whole, and they help you understand the Government. But you have to be focused on the words.

Senator KENNEDY. Thank you, Judge. Thank you, Mr. Chairman.

Chairman GRASSLEY. Since Senator Leahy gave his 8 minutes to Senator Hirono, I am going to give Senator Leahy what time he needs off of my time.

Senator LEAHY. Thank you, Mr. Chairman. I will be very brief. Judge, how are you doing?

Judge KAVANAUGH. I am doing great. It is an honor to be here, Senator.

Senator LEAHY. I will leave that one alone.

[Laughter.]

Senator LEAHY. In your concurrence in *Klayman v. Obama*, you went out of your way to say that not only is the dragnet collection of America's telephone records by the National Security Agency okay because it is not a search, you also said, and I did not see any support in this, that even if it is a search, it is justified in order to prevent terrorism. I believe Senator Lee is still here. This was months after Senator Lee and I worked to pass the USA Freedom Act, which prohibited such collection.

Now, the year before you issued your opinion, the Privacy and Civil Liberties Oversight Board had stated it could not identify a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counter-terrorist investigation. Now, it also found the NSA phone records program was not essential to thwarting terrorist attacks. Why did you—I am just curious why you went out of your way to write an opinion stating that the program met a critical national security need when it already had been found by the national security people, it made no concrete difference in fighting terrorism.

Judge KAVANAUGH. Senator, I appreciate that question. The important point, I would say, as I was trying to articulate what I thought based on the precedent at the time. At the time, when your

information went to a third party and the Government obtained the information from the third party, the existing Supreme Court precedent was that your privacy interest was essentially zero.

The opinion for the Supreme Court by Chief Justice Roberts this past spring in the *Carpenter* case is a game changer, and that is important. I talked repeatedly in this hearing about how technology will be one of the huge issues with the Fourth Amendment going forward, and you see Chief Justice Roberts' majority opinion in *Carpenter*. That alters and really is a game changer from the precedent on which I was writing at that time, so I would—

Senator LEAHY. Do you think if *Carpenter* had been decided, you would have written the concurrence you did in *Klayman*?

Judge KAVANAUGH. I think—I do not see how I could have.

Senator LEAHY. Thank you. I agree with that. And you joined the dissent in *U.S. v. Jones*. You claimed that there was zero expectation of privacy in a person's movement outside their home. You said, "Infinite number, zero value part is also zero." Given the ever-greater data available to all of us and the ever-greater computing power to analyze everything, there is more computing power here than there was in our first moonshot. This sounds more like an analysis we get from the Chinese government than we would from James Madison had he known about what we can do. So, because of *Carpenter*, do you believe that there comes a point in which collection of data about a person becomes so pervasive that a warrant would be required even if the collection of one bit of the same data would not?

Judge KAVANAUGH. Two points on that, Senator. I also went on in that opinion to say the attachment of the GPS device on the car was an invasion of the property right, and that independently would be a Fourth Amendment problem. When the case went to the Supreme Court, the majority opinion for the Supreme Court followed that approach that I had articulated in saying that it was a violation of the Fourth Amendment. So, the approach I had articulated there formed the basis of saying it was actually unconstitutional in that case to install the device. I relied on that in the *Silverman* decision from 1961 and Justice Brennan's concurring opinion in the *Knotts* case in the 1970s.

On your other point on technology and the phone that you held up, I do think the Supreme Court case law in the *Riley* case written by Chief Justice Roberts and the *Carpenter* case written by Chief Justice Roberts, both majority opinions, show his and the Court's recognition of the issue that you are describing in that technology, it has made things different, and we need to understand those differences for purposes of applying Fourth Amendment law now.

And I do think those two decisions are quite important as we move forward. And I think this will be one of—someone sitting in this chair 10 years from now, I think the question of technology on Fourth Amendment, First Amendment, war powers, is going to be of central importance. So, I appreciate the question, but I think the Supreme Court case law is developing in a way consistent with your concern.

Senator LEAHY. Do you think it is consistent with the fact that there will be areas so pervasive that you will need warrants?

Judge KAVANAUGH. Well, that—the Supreme Court case law is certainly suggesting as much in the *Riley* and *Carpenter* cases, and the *Jones* GPS case, which I had written an opinion on.

Senator LEAHY. Yes. I mentioned this, and I thank you, Mr. Chairman, because Senator Lee and I spent a great deal of time talking to our colleagues, both Republicans and Democrats, because of our concern that privacy is disappearing, and, frankly, privacy is important. Thank you, Mr. Chairman.

Senator SASSE. Mr. Chairman? Mr. Chairman, could I make a 30-second comment?

Chairman GRASSLEY. Yes.

Senator SASSE. I am not aligned with the Leahy-Lee bill on USA Freedom, but I just want to say I thought that was a great line of questioning. And so much of the American people's, you know, absorption of events like this through cable news is right versus left, and I think that was past versus future. And I just think there is a lot there, Senator Leahy, that is really useful for us to think about. Thank you.

Chairman GRASSLEY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much, Judge. When we met in my office, I was trying to get a sense of the intimacy of your relationship with Mr. Leo of the Federalist Society. And I asked you if he was in your phone. Do you remember that?

Judge KAVANAUGH. I do.

Senator WHITEHOUSE. And you answered as to whether he was in the contacts or saved calls or whatever. Just could you let me know for the record what you said then? I do not want to put words in your mouth.

Judge KAVANAUGH. I said, "yes."

Senator WHITEHOUSE. With respect to our earlier—

Judge KAVANAUGH. I have known him for 25 years.

Senator WHITEHOUSE. Yes. With respect to our earlier question about waiving source confidentiality with respect to reporters who you spoke to during the Starr investigation, I just want to make sure that I understand what you said because you kind of referred it to Judge Starr, and I do not want to be in a situation where I am getting the two of you going opposite ways. Do I correctly understand that you personally have no objection to reporters disclosing their conversations with you, you just do not want to speak for Judge Starr who you feel has equities here to the extent that you were working at his direction, or do you have a personal objection to the reporters disclosing those conversations?

Judge KAVANAUGH. I would want to think about that some more, Senator.

Senator WHITEHOUSE. Could you get back to me on that?

Judge KAVANAUGH. I can.

Senator WHITEHOUSE. Under advisement was one of the options I offered you, and you have taken it. Fair enough.

You have had a lot of conversation with all of us about the concern that you are basically a human torpedo being launched at the Mueller investigation, so that when it gets to the Supreme Court, you will knock it out. And the Law Review article has been talked a lot about that in the context of the President cannot be investigated, and your comment about *Nixon* being wrongly decided has

been talked about a lot. And how you have pushed back on that has been to assert that *United States v. Nixon* is one of the four best decisions in the Court's history.

Judge KAVANAUGH. I have said that before.

Senator WHITEHOUSE. Yep. So, here is my concern, because virtually every time, if not every time, that you have mentioned *United States v. Nixon*, you have dropped in to your description of the holding that it was a trial court subpoena.

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE. And I do not know if you drop that in just as a factual observation because that was, in fact, a 17(c) trial subpoena, or whether that was a loophole, an escape hatch so that when that comes, you are in a position to say, well, I told the Senate that because that was a trial court subpoena, but Mueller is going to be coming with grand jury subpoenas, and they are different, and so nothing that I said in that hearing should interfere with my ability to stop Mueller's subpoenas. What in that context is your view of the trial court subpoena part of *U.S. v. Nixon*? Was that essential to the holding, or were you just using that to describe one of the facts in the holding?

Judge KAVANAUGH. Senator, I appreciate that. I have been careful to describe the holding of the case, and—

Senator WHITEHOUSE. Does it apply to a grand jury?

Judge KAVANAUGH. Well, that is—so, I figured I would get lots of hypothetical questions about this, that, or the other thing, and as a sitting judge I need to be careful about—

Senator WHITEHOUSE. I know, but you are the one who has been dropping this trial court phrase in, and I think it is fair to ask you are you simply using that as a factual observation or is that the escape hatch to be able to discard *U.S. v. Nixon* in this context and say, oh, yes, it is still a great decision, but it has no relevance to the ongoing investigation of the President—investigations of the President.

Judge KAVANAUGH. I understand the question—

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. And appreciate the question, but what I have done is describe the holding as I have described it in this hearing because I think it is important not to be answering hypotheticals—

Senator WHITEHOUSE. Yes, but you are the one who chose to use it as a counterpoint or as evidence against concerns that you are going to basically, like I said, be the human torpedo to take out anything that Mueller brings to the Supreme Court.

Judge KAVANAUGH. What I was trying to do was merely reiterate what I had said in a variety of forums over 20 years as against one 1999 excerpt that I thought was a serious and severe misunderstanding of my longstanding position about the case.

Senator WHITEHOUSE. But since you have been the one who put your regard for *United States v. Nixon* into play as a data point in the conversation about whether you are going to tank the Mueller investigation at your first chance, I think it is fair for us because you have opened the door by using it that way, to ask whether you believe that the central holding of *Nixon*, which is that "a President has to answer a subpoena applies equally to a trial court and a

grand jury subpoena alike,” because if it does not, I am going to feel very misled by the way you have used this.

Judge KAVANAUGH. Right. So, I have tried to describe in summary fashion exactly what the Supreme Court said in the *Nixon* case, and it is a very important opinion and it is very—but I have tried to describe just what they said and not go beyond what they said in themselves in that opinion.

Senator WHITEHOUSE. Yep. And so, why did you use it in the context of a grand jury investigation if you did not mean it that way?

Judge KAVANAUGH. Well, I was—you mean when I was in the Independent Counsel Office?

Senator WHITEHOUSE. No, no, no, when we were in this conversation right here. We have had a lot of questions where we have been talking about is the President amenable to investigation, is the President amenable to indictment, is the President amenable to subpoena. And you have constantly referred back to *U.S. v. Nixon*, and if that is not a real assurance because in the back of your mind, which you did not tell us, is that that is only limited to trial subpoenas and I am still cool with taking out grand jury subpoenas, I think that would be a very unfortunate way to have dealt with the Senate on that question.

Judge KAVANAUGH. I understand. I understand your point on that, Senator. What I have tried to do is describe the holding of the case, what I have said before about it, and I have been getting a lot of questions, a real lot of questions about a 1999 excerpt that I think that was a severe distortion of what I have said for many years.

Senator WHITEHOUSE. Yes, but this is very different. This is whether you in this hearing have been essentially playing a trick on the Committee by using *United States v. Nixon* in this way without telling us that while you are using it in this way, all you intend is that its application is to a trial subpoena, and that a subpoena from the Mueller investigation or from anybody else to the President—“Olly, olly, in come free”—you can knock those out to your heart’s content.

Judge KAVANAUGH. I appreciate the question, but if you read the opinion, all I am doing is describing what the opinion said.

Senator WHITEHOUSE. I will let it go at this point because I am obviously not going to get an answer, but I assert that you did more than that by putting this decision in play as a statement or as a signal to us that we should take a little bit—have a little bit of a pause, if you will, about the—*U.S. v. Nixon* should be looked at again, and the President cannot be investigated points that we addressed.

Judge KAVANAUGH. Well, Senator, I think other people have been putting it in play repeatedly based on one excerpt that was a distortion—I am not saying it is intentional.

Senator WHITEHOUSE. Okay, never mind. One last question.

Judge KAVANAUGH. Yes.

Senator WHITEHOUSE. In the *Bluman* decision, your decision, it would be legal for Vladimir Putin to come to the United States and buy issue ads.

Judge KAVANAUGH. Can you repeat that?

Senator WHITEHOUSE. Under your reading of the *Bluman* decision, which says that foreign nationals can buy issue ads under election law, Vladimir Putin would be able to buy issue ads in American elections. Does the recent activity of Russia hacking our last election, interfering with our last election, and helping to elect Donald Trump give you any pause about the wisdom of a judicial construction that would allow foreign nationals to buy issue ads in American elections?

Judge KAVANAUGH. Three quick points, Senator. First, my decision for a unanimous panel in that case, which in turn was unanimously affirmed by the Supreme Court—

Senator WHITEHOUSE. Not unanimous on that point, though, I do not believe, but go ahead.

Judge KAVANAUGH. It was unanimous affirmed summarily by the Supreme Court. The upheld limits on contributions by foreign nationals, summarizing briefly there. Justice Stevens, the dissenter in *Citizens United*, has subsequently repeatedly and explicitly praised my decision in *Bluman* in various speeches he has given. Third point is, that the case did not involve expenditures, and Congress, of course, is free to put in laws that ban expenditures by foreign citizens and those—

Senator WHITEHOUSE. But you did specify issue ads.

Judge KAVANAUGH. I was talking about what the statute said. Congress is free, subject to, of course, challenge, to put some—

Senator WHITEHOUSE. My time is up.

Judge KAVANAUGH. Law in place.

Chairman GRASSLEY. Senator Cornyn.

Senator CORNYN. So, just to reiterate, Congress writes campaign finance laws, not the Federal courts, correct?

Judge KAVANAUGH. That is correct, Senator.

Senator CORNYN. You were asked whether you were a human torpedo. Do you even know what that means?

Judge KAVANAUGH. I do not, but I understood the gist of the question.

Senator CORNYN. Well, with all due respect to my friend, Senator Whitehouse, he has got a very fertile imagination, it strikes me. And what does it prove that you have somebody's name in your phone directory? Somebody you have known for 25 years?

Judge KAVANAUGH. For 25 years.

Senator CORNYN. What does that prove?

Judge KAVANAUGH. It proves I have known someone for 25 years. You know, it might be more than 25 years, but in any event, for a long time.

Senator CORNYN. That sounds about right. That is nothing more, it strikes me. That great legal sage unfortunately is not here, so I—

Senator KENNEDY. I deny everything.

[Laughter.]

Senator CORNYN. That great legal sage, and I am not talking about Oliver Wendell Holmes, Jr. Senator Kennedy said something that really struck me is right on. He said the Bill of Rights is not an a la carte menu, and I would like to know whether you agree with that. Can you pick and choose which of the Bill of Rights is

more important than another, or whether you can ignore some and recognize others? How do you, as a Federal judge, address that?

Judge KAVANAUGH. As a sitting judge, I try to apply all the provisions of the Constitution and all the precedents of the Supreme Court without picking or choosing which precedents or which pieces of precedents that I might favor, which pieces of the Constitution or the laws passed by Congress, apply them all.

Senator CORNYN. So, are any one of the Bill of Rights more important than another?

Judge KAVANAUGH. Senator, I think they are all important, all the provisions of the Constitution, and the structural provisions, of course, are essential, or the Bill of the Rights would not be nearly as meaningful because we would not have the structural protections to ensure an independent judiciary to protect them.

Senator CORNYN. Our friend, Senator Durbin, asked you to apply common sense when interpreting the Second Amendment. I am tempted to say common sense is not all that common, but is that a basis upon which to construe the provisions of the Second Amendment, just to apply your common sense?

Judge KAVANAUGH. The rules—you apply the precedent of the Supreme Court interpreting the Second Amendment, which in turn interpreted the words, history, structure, historical practice of the Second Amendment, and as a lower court judge, it was incumbent on me to apply that precedent as faithfully as I could. And I explained in very painstaking detail, and I really encourage anyone who is interested and has some time because it is long, to read that dissent. I am—the analysis in there is carefully laid out, and then at the end I describe that I understand the real-world consequences of this and the real-world issues, and where I have grown up and what I have experienced. But I explained it in great detail.

Senator CORNYN. Thank you. Thanks, Mr. Chairman.

Chairman GRASSLEY. Senator Coons, you have about 9½ minutes.

Senator COONS. Great. Thank you, Mr. Chairman. I ask unanimous consent that letters from eight different groups, organizations, individuals be entered into the record.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Senator COONS. Thank you. Judge Kavanaugh, we are at the end of a long day, and I would like to take a few minutes and just explore with you a speech you gave last year, a speech at the American Enterprise Institute entitled, “The Constitutional Statesmanship of Chief Justice Rehnquist.” There you called Rehnquist your first judicial hero, and you went on to discuss at length the 1997 case, *Washington v. Glucksberg*, in which the Supreme Court rejected a fundamental right to physician-assisted suicide.

In *Glucksberg*, as you know, Rehnquist explained his belief that the only liberties protected by the Due Process Clause are those that are “deeply rooted in the Nation’s history, legal tradition, and practice.” You praised Rehnquist’s opinion. You said, and I am quoting your speech here now, “The *Glucksberg* case stands to this day as an important precedent limiting the Court’s role in the realm of social policy and helping ensure the Court operates more as a court of law and less as an institution of social policy.” Fur-

ther, “Rehnquist is a Justice who”—I think I am quoting here—“was successful in stemming the general tide of freewheeling judicial creation, enumerated rights that were not rooted in the Nation’s history and tradition.”

The only conclusion I can draw from your praise in this speech last year of Rehnquist substantive due process jurisprudence in his *Glucksberg* opinion is that you endorse this so-called *Glucksberg* test, which asserts the only due process rights protected by the Due Process Clause—excuse me—are those objectively rooted in American legal history and tradition. You even said yesterday in a similar exchange here that “all roads”—all roads—“lead to the *Glucksberg* test.”

So, let me in the few I have left, ask a few quick questions about the implications of applying the *Glucksberg* test in a principled fashion—

Judge KAVANAUGH. Can I say one thing first?

Senator COONS. I want to get a couple of questions quick, and then depending on the grace of the Chairman, we may have an exchange—

Judge KAVANAUGH. I said the same thing that Justice Kagan said when she was in this chair, about *Glucksberg*.

Senator COONS. And here is the most important thing about Justice Kagan’s jurisprudence. She did not apply the *Glucksberg* test in *U.S. v. Windsor*, in *Obergefell*, or Whole Women’s Health. So, the question I want to get to is what would it mean to go and apply this test in a range of settings? So, first, is judicial protection of the fundamental right to access and use contraception consistent with the *Glucksberg* test? It is a simple “yes” or “no” question, Judge.

Judge KAVANAUGH. I disagree that it is a simple “yes” or “no” question. What I have said here is, that the precedent of the Supreme Court on that question, what Justice Alito and Chief Justice Roberts said about those precedents, Justice White’s concurrence in *Griswold*, is persuasive application of precedent. What is important to know about *Glucksberg* is it is cited in *Planned Parenthood v. Casey* as authority—

Senator COONS. Yes.

Judge KAVANAUGH. As authority—

Senator COONS. But on the specific issue of—and I appreciate your having said those were correctly decided. I am just trying to get clarity about if it were the *Glucksberg* test, well rooted in our history, legal tradition, and practices, would the Court have ever reached those results on a fundamental right to access and use contraception, given the long history of States having statutes that prohibited access to contraception? I think it is a simple “yes” or “no.”

Judge KAVANAUGH. Well, as Justice White explained in his concurrence in *Griswold* actually, those laws had not been enforced for decades. But put that aside, the test in *Glucksberg*, as Justice Kagan explained when she was sitting in this chair, is a test that is guiding the Supreme Court going forward and has been cited in the precedent. It did not disturb any preexisting precedent, indeed cited *Casey* as authority.

Senator COONS. It did. So, let us move on then to abortion, which was really centrally at issue in *Casey*. Is judicial protection of abortion rights consistent with the *Glucksberg* test, something deeply rooted in our history, legal tradition, and practices?

Judge KAVANAUGH. Again, I think it is important to underscore that the *Glucksberg* decision written by Chief Justice Rehnquist cited *Planned Parenthood v. Casey* as authority, which in turn reaffirmed *Casey*, reaffirmed *Roe v. Wade*.

Senator COONS. But had it been the test at the time, the Court would not have reached that result. In fact, you said at the AEI lecture “Even a first-year law student could tell you the *Glucksberg* Court’s approach to unenumerated rights was not consistent with the approach of the cases, *Roe v. Wade*, *Planned Parenthood v. Casey*.” So, we know the *Glucksberg* test, had it been applied, would not have reached that same result.

Let us move, if we could, from contraception, abortion, to intimacy. Is the *Glucksberg* test consistent with the Court’s historic decision—Justice Kennedy’s decision in 2003, *Lawrence v. Texas*, which the Court held the Constitution protects intimacy, including same-sex intimacy, between consenting adults?

Judge KAVANAUGH. Well, as the Supreme Court said last year in a broad majority, under the precedents that now exist, the days of treating gay and lesbian Americans as second-class citizens—gay and lesbian couples—or as inferior in dignity and worth, are over. That was Justice Kennedy joined by Chief Justice Roberts, Justice Alito, Justice Gorsuch, Justice Breyer, and Justice Kagan. Statement for the Supreme Court summarizing, in essence, *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

Senator COONS. But had the *Glucksberg* test been—the sole test being applied during *Lawrence*, Justice Kennedy would not have reached the result he did.

Judge KAVANAUGH. Well—

Senator COONS. Let us move to the right to marry, if we could, for a moment.

Judge KAVANAUGH. One sentence—

Senator COONS. It is the last case we are going get through.

Judge KAVANAUGH. *Windsor*—

Senator COONS. The right to marry is clearly rooted in our history of legal tradition and practices, yes, Judge? And we both know the landmark case, *Loving v. Virginia*, distinguishes marriage is clearly deeply rooted in our history, legal tradition, and practices, but interracial marriage was not. In fact, it was barred in many States, probably longest in Virginia. And the Supreme Court struck an important blow in 1967 in striking down anti-misogynation statutes.

Last, what about same-sex marriage? If the *Glucksberg* test were the test applied, is a right to marriage regardless of gender deeply rooted in our history, legal tradition, and practices?

Judge KAVANAUGH. A couple things, Senator. I think *Windsor* and *Obergefell* talk about equality as well, so there is an equality principle. And as the Court said in *Masterpiece Cakeshop*, summarizing all those decisions, a line of five decisions all written by Justice Kennedy—*Romer*, *Lawrence*, *Windsor*, *Obergefell*, and *Masterpiece Cakeshop*.

Senator COONS. Were they all correctly decided?

Judge KAVANAUGH. They are all—none of the eight currently sitting Justices have answered questions about any of those cases. As Justice Kagan said, no thumbs up or thumbs down on those recent cases. But they—but what the Court said in *Masterpiece Cakeshop* is the most recent statement of the Supreme Court for a broad cross-section, a broad—large number of Justices on the Supreme Court. And I think I will leave it by referring you to that statement from the Supreme Court.

Senator COONS. Here is my core concern. This quote—this quote—what you chose to do in a speech last year in front of AEI was to lift up this *Glucksberg* test. What you chose to say yesterday, “All roads lead to the *Glucksberg* test,” gives me pause and concern. If you feel I have somehow misquoted you in the American Spectator article, if you feel I have somehow misquoted you here, I expect we will have a chance through some written exchanges to give you an opportunity to further clarify that, given the limitation on my time.

But in what I have read about how the *Glucksberg* test has or has not been applied, the ways most critically in which Justice Kennedy himself rejected the *Glucksberg* test in his opinions in *Casey*, in *Lawrence*, in *Obergefell*, I think the *Glucksberg* test is better at rejecting claims of constitutional rights than it is at accepting them, and I think it is a blunt instrument. And I am concerned that it may reveal an enthusiasm for a test that would permit the continued exercise of government power in ways that, frankly, would blow up all modern substantive due process. If applied rigidly, it would blow up precedent in contraception, abortion, protection from sterilization, marriage, a whole range of areas.

These are settled precedent, but those of who sit trying to decide whether you should be the next Justice and take Justice Kennedy’s seat have to ask ourselves what your views would be. And in this recent speech where you cite your first judicial hero, Rehnquist, in articulating the *Glucksberg* test, I worry that you reveal you do not share the view of our Framers, in particular, the Fourteenth Amendment Framers, who understood constitutional rights to exist in significant part to right historical wrongs, not to ignore them or entrench them.

Our Constitution’s protection for people who are vulnerable or marginalized or just different from the majority is what makes us a beacon to the rest of the world where there are so many countries, where minorities or those who dare to live their lives differently are marginalized or oppressed. And it is exactly this *Glucksberg* test that worries me most because it excludes all such people from the circle of constitutional concern and protection.

I am troubled, Judge Kavanaugh, if you do not understand that is the driving, animating force of our constitutional culture. And this is a test that, in my view, is just not up to the task of vindicating our country’s greatest ideals. Thank you.

Chairman GRASSLEY. If you feel you want to comment, go ahead, and then I will call on Senator Lee.

Judge KAVANAUGH. Two points. Justice Kennedy joined *Glucksberg*. Justice Kagan cited *Glucksberg* repeatedly when she was in this chair.

Chairman GRASSLEY. Senator Lee.

Senator LEE. So, *Glucksberg* is precedent, right?

Judge KAVANAUGH. It is, and it is precedent that Justice Kennedy joined.

Senator LEE. And so, it is settled law. I mean, it is established. It is entitled to the same respect as other precedent, including other precedent mentioned by Senator Coons.

Judge KAVANAUGH. It is an important precedent of the Supreme Court. It has been discussed by other Justices over time.

Senator LEE. And nothing in *Glucksberg* or in those other cases suggest that *Glucksberg* is incompatible, suggests that it cannot—suggests that it is somehow incompatible with those other precedents.

Judge KAVANAUGH. It cited *Casey* as authority.

Senator LEE. Thank you.

Mr. Chairman, I have a letter that I would like to offer into the record. This is signed by David Levi. He is one of our Nation's foremost legal scholars.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator LEE. He served until about a month ago as the dean of Duke Law School. Prior to that he served as a U.S. District Judge in the Eastern District of California. He shares some great personal information in here about his interaction with Judge Kavanaugh and about the fact that Judge Kavanaugh came to Duke Law School. And, as it is becoming a theme in this hearing, he describes how Judge Kavanaugh was a mentor to these students who participated in moot court competitions, answered their questions, gave advice to the participants and all the other students there. And I offer that into the record. Thank you, Mr. Chairman.

Chairman GRASSLEY. Second one?

Senator LEE. Just this one. You have already admitted it. I am just thanking you now for doing it.

Your phone, the contents of your phone, the question you received from Senator Whitehouse, the contents of your phone in light of *Carpenter*, he cannot really ask you that, right?

[Laughter.]

Senator LEE. I want to echo something that Senator Crapo mentioned a few minutes ago with regard to western lands. I am not going to make you answer any questions regarding this, but there are significant issues that frequently do not get addressed as a result of the fact that there are just few States where the Federal Government owns most of the land. In every State east of the Mississippi, the Federal Government owns less than 15 percent of the land. In many of those States, it is in the low single digits. In every State west of Colorado, the Federal Government owns more than 15 percent of the land. In many States like my own, it is most of the land. The Federal Government owns two-thirds of the land in the State of Utah, even more in Nevada.

As a result of this, our local communities are severely impaired in terms of their ability to manage their own affairs, to authorize the most basic of economic activities going on on their land. Our local communities cannot tax the land, and property taxes are where in most States, including my own, a lot of the money comes

from to fund schools, to fund basic services like search and rescue, police, fire suppression, and so forth. As a result of the fact that the Federal Government owns all that land and controls what activity can occur on it, these States are locked out. They are thwarted in development. Cannot do anything on that land without a mother may I. And in States like mine, you almost cannot even access a lot of property without crossing Federal land, and you have to get a permit for it.

In many respects, this puts the States on equal footing, one as compared to another. But in many respects, I think this runs into conflict, at least potentially, with some language put into the Enclave Clause into Section—in Clause 17 of Article I, Section 8, that talks about how if the Federal Government is going to be the sole sovereign lawmaking authority on Federal land within a State, it is supposed to be acquired by and with the consent of the host State's legislature.

That was—that language was put in to the Enclave Clause as a result of a concern expressed by Elbridge Gerry, who expressed in early September of 1787 as the Convention was drawing to a close that unless this clause was put in there, the Federal Government might acquire a whole land in a lot of these States and use its exclusive lawmaking power under the Enclave Clause to compel the States to a humble undue obedience to the general Government. And yet this has been overlooked for a long time, since the late 1970s.

Many have improperly conflated the Enclave Clause authority—that is, the Federal Government's sole sovereign lawmaking capacity relative to Federal lands—its property clause authority under Article IV, Section 3, Clause 2, which is really a proprietary interest, authorizing Congress to sell and otherwise dispose of territory and other property owned by the Federal Government.

There are two different things. In order to exercise the Article IV power, Congress just acts because it can dispose of land. In order to exercise the Article I, Section 8, Clause 17 power, to be the exclusive sole sovereign lawmaking authority within a State as to that Federal land, that land has to have been acquired by and with the consent of the host State's legislature.

The Court has not been careful to distinguish between those two, in part because of some, what I believe, was over generalization in the case called *Kleppe v. New Mexico*. This is of concern to my State, and I felt the need to make that point to you today. You do not have to respond to it.

I do, however, have a very important question for you. Why do you—I notice that you take a lot of notes, and I respect that because I can tell you are paying close attention. You use a Sharpie, and it is not a fine-tipped Sharpie.

[Laughter.]

Senator LEE. It is a regular Sharpie that might smudge and make—why do you prefer that pen? I am just dying of curiosity.

Judge KAVANAUGH. So, I can see it.

[Laughter.]

Judge KAVANAUGH. It is nothing scientific.

Senator LEE. That is the perfect mic-drop moment, and with that, Mr. Chairman, I reserve the balance of my time. Thank you.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Okay. That is going to be really hard to follow, but I will try my best. So, Judge, we talked a lot about some big issues, *Times v. Sullivan*, Executive Power, and I want to get back to where I started. You have talked over the last few days about what matters is real things, real people, and I want to bring it back to that and some of the issues that are dense in terms of legal issues, but in the end mean things to people.

And one of the things we have talked about is the net neutrality rules, and we know that those were the protections that were put in place by the FCC a few years back to prevent internet service providers from blocking and slowing traffic so that people would have equal access to the internet. And the case came before the D.C. Circuit, and they were against you. The rules were upheld by a panel of judges appointed by Presidents of both parties. We talked about this yesterday. I do not want to go over your theory again on major rules, which I disagreed with.

But there was something we did not talk about yesterday, and that was that you went actually beyond the bounds of what the parties had argued to reach a constitutional issue in that case. You found that the First Amendment protects internet service providers' right to exercise editorial discretion, even though neither of the principal parties had raised a First Amendment argument at all. Why did you go out of your way to address that constitutional issue?

Judge KAVANAUGH. That issue was raised in some of the briefs in the case, point one. Point two, I followed the *Turner Broadcasting* approach that was the majority opinion of the Supreme Court in 1994 of Justice Kennedy in the Cable Operator context, which, as I explained in the opinion, seemed to apply very closely in this situation. It is something I have written prior opinions on as well about how Justice Kennedy's opinion in *Turner Broadcasting* applies in other contexts. And it seemed—

Senator KLOBUCHAR. But were you the only judge that went that far to take on the constitutional issues?

Judge KAVANAUGH. I may have been, but I was applying *Turner Broadcasting*. It is a precedent of the Supreme Court that seemed on point, and it was raised in the case by a party, and I thought important to explain.

Senator KLOBUCHAR. But you have said that the canon of constitutional avoidance, which says courts should avoid reaching constitutional questions, that are not necessary to decide a case, is something you would "consider jettisoning all together." I think you said that in a 2016 book review. Is that right?

Judge KAVANAUGH. Well, I would talk about—I talked about the problem of ambiguity as a trigger for certain canons of statutory interpretation because, at least in my practice over the last 12 years, that has been one of the sources of disagreement among judges that is hard to grapple with and figure out what is the—how to bridge that divide when one judge says I think this is ambiguous and another one says, no, it is not. Justice Scalia—Justices Scalia and Kagan have both talked about that as being an issue, and that is one of the reasons I talked about it in that Harvard Law Review article. That was a Law Review article, however, and

not a case or decision of mine where I was just identifying my experience and talking about ideas.

One thing about the First Amendment issue I want to make clear, I pointed out there if a company has market power under *Turner Broadcasting*, then the Government does have the authority to regulate. If a company does not have market power, *Turner Broadcasting* says no, but it does not bar all regulation by any stretch, not even close.

Senator KLOBUCHAR. It just would seem that there is First Amendment rights of individuals to use the internet and express their own views, and if it gets too expensive for them to use it, you basically said that the companies have these First Amendment rights, not looking at the issue that I think a lot of us as policy-makers see, is that unless you have some rules of the road in place, it is going to make it very hard for individuals and small businesses to access.

Judge KAVANAUGH. I think that is a fair point. An argument like that was raised in the *Turner Broadcasting* case in 1994 when it was argued to the Supreme Court. That was the term I clerked. And that is not the argument that the Supreme Court accepted at that time.

Senator KLOBUCHAR. Okay. You mentioned Justice Scalia, and I wanted to end with when we talk about the effects of things. And he actually was a champion of the *Chevron* case, which, of course, was the Supreme Court ruling that allowed agencies' decisions on health and safety protections to stay in the book. It has been referenced in more than 15,000 decisions.

But you said it was a precedent to me yesterday, but your writings—in your writings you have called it “an atextual invention of courts and a judicially orchestrated shift of power.” You have said that “Instead of applying *Chevron*, courts should simply determine the best reading of the statute and no longer defer to agency interpretations.” Does this not mean you really would prefer de novo review for those that are still watching this at home? That would mean that the courts would act as if they are considering questions of law for the first time so that they would not defer to the agency.

And you have—the way we have set this up here is, Congress passes laws, agencies often do the fine work with experts of figuring out what those rules are. So, this is what I am so concerned about for people's drinking water, for safety reasons. If you would then go and go to de novo review or change this, and I think it is a very big deal when you look at 15,000 decisions and the fact that Justice Scalia supported this and you appear to be itching toward the other side.

Judge KAVANAUGH. What I have done is identify some of the issues that arise when you are applying the doctrine, but I also pointed out in that same article that it is—it has overlapped with—not to get too into the weeds here—but with the *State Farm* doctrine. And so, when there is a statutory term such as “reasonable,” “feasible,” those—“appropriate,” those kinds of statutory terms that judicial deference is appropriate.

Senator KLOBUCHAR. Mm-hmm. Do you think a judge that does not have a technology background is better deciding this than, say,

experts at the FCC when you have rules—or, someone with no scientific background better to decide some of these things than people who are scientists.

Judge KAVANAUGH. So, I have a number of cases where the statute gives discretion to the agency to exercise those expert scientific judgments where I have said courts should not second guess those in the clean air context where I have upheld emissions limited. The NACS, I have written—the air quality standards. I have written opinions saying courts should not second guess what EPA—where EPA sets the limit within the NACS. So, too, in a case called *American Radio Relay League*, I made clear that courts should not unduly second guess agencies.

It is all about the statute that you write. If it has discretion built into it, I am one who does not think courts should add requirements that you have not put in. If you have written a really tightly confined statute, at the same time of an agency pushes beyond those boundaries, the courts are there to draw the line, and that is how I have tried to be even handed in how I have applied—

Senator KLOBUCHAR. And, again, and we went over this yesterday, but just the finding of unconstitutionality with the Consumer Financial Protection Bureau. And then the internet rules where, again, you are the only one saying this, and now you would be on the highest court of the land if you are to be confirmed. And just for me, these rules, it is not just some law on the books, it is personal. We are proud of our clean water, and clean lakes and rivers in Minnesota. Those are safety rules.

My grandpa worked 1,500 feet underground in the mines his whole life. Went down there in a cage, and the sirens would sound and people would run because they did not know who was killed in the mine that day. And my dad still remembers those coffins in the Catholic church up in Ely, Minnesota, and it was those safety rules that came in place, many of them implemented by agencies that got us to where we are. And it really concerns me if we overturn all of that and just leave it in the hands of Congress to have to mete through all these minute details when we cannot even get through 42,000 documents, so.

Senator CORNYN [presiding]. Senator Blumenthal.

Judge KAVANAUGH. Can I say two quick points?

Senator CORNYN. Oh, sure. I did not know there was a question.

Judge KAVANAUGH. One, I have a large number of cases, particularly in the EPA context, where I have upheld EPA rules that have done things and in other administrative agency context. It is all about—and I understand what you are saying about the people affected by the rules, and in each of the cases I have written, I have tried to make that clear. Ultimately, my approach to statutory interpretation is rooted in respect for Congress.

Senator CORNYN. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Good evening. Judge Kavanaugh, I would like you to tell me that I am wrong, and I would like you to tell me that you would put aside your *Heller II* dissent, and as a member of the United States Supreme Court, if confirmed, you would uphold a ban on assault weapons.

Judge KAVANAUGH. Senator, as a sitting judge, I cannot make a commitment about a future case.

Senator BLUMENTHAL. Well, let me put it this way. In your view, a ban on assault weapons in your dissent you voted to strike down because it was not longstanding, and it applied to weapons in common use. Is that correct?

Judge KAVANAUGH. I applied the precedent of the Supreme Court, which made clear that machine guns can be banned. Machine guns can be banned. The Supreme Court said that explicitly, and I said it as well.

Senator BLUMENTHAL. But assault weapons are equally destructive, and the evidence for them is equally compelling, that is, the evidence for a ban on assault weapons, which is what the majority in *Heller II* in your court found, did it not? In fact, the court said that it was upholding the ban on assault weapons because, "Our role is narrower, to determine whether the district has presented evidence sufficient to establish the reasonable fit we require between the law at issue and an important or substantial governmental interest." Governmental interest, public safety never figured into your test on *Heller II*, did it?

Judge KAVANAUGH. Senator, the precedent of the Supreme Court, which I applied, says that the Government can ban machine guns. I encourage—I explained in detail how I interpreted *Heller*. In the *Staples* case from 1994, which I cited, referred to these kinds of guns as in common use, so I would encourage you to—at least if you are thinking of me, I have to apply precedent. Take a look at that *Staples* case and—

Senator BLUMENTHAL. I have taken a look at the *Staples* case, but more compellingly, I have taken a look at what assault weapons can do.

Judge KAVANAUGH. I understand that, but I also—

Senator BLUMENTHAL. And I thought about bringing some posters here today showing what happened at Sandy Hook when 20 beautiful children and six wonderful educators were gunned down, just as has happened in countless places across the country, including Sutherland Springs in Texas, Parkland in Florida, Las Vegas in Nevada, Orlando in Florida, Virginia Tech, San Bernardino, most recently in Florida, of course. Assault weapons were designed to kill people, were they not?

Judge KAVANAUGH. Senator, the end of my *Heller II*, opinion, I understand and, of course, detest all school violence or gun violence, and I said that at the end of my *Heller II*—

Senator BLUMENTHAL. I am sure all of us detest school violence.

Judge KAVANAUGH. But I—

Senator BLUMENTHAL. I am asking you to look at the real world—

Judge KAVANAUGH. And I did that—

Senator BLUMENTHAL [continuing]. With real impacts, and I am asking you to reconsider your dissent in *Heller II*, and look at the impacts on children, young children who have their whole lives ahead of them as did those 20 first-graders in Sandy Hook, and a ban on assault weapons might well have saved them. There is no knowing for sure, but they might be alive today if there had been a ban on assault weapons, and high-capacity magazines, and better background checks.

And now we face the specter of a new kind of weapon, 3-D blueprint design guns that are untraceable and undetectable by and large. They are not in common use yet, but they will be if they are not banned. There is no traditional ban on them. They were unimaginable in 1789. The test that you are imposing here is out of touch with the real world and the impact on real lives, and I would just suggest that, with all due respect, you give us the benefit of saying here that you will reconsider a test that is out of touch with reality.

Judge KAVANAUGH. Senator, I appreciate what you are saying. If someone came to me and argued that the test was wrong, I will, of course—of course, I always would listen and try to understand. What I did there at the end of my opinion, I am from this area, and this—

Senator BLUMENTHAL. And I know you have lived in the gun or gun violence capital of the world. I have heard you say it a number of times, and I—

Judge KAVANAUGH. But I grew up in it. I mean, I—you know, I do not want to overstate that, but, I mean, I grew up in an urban/suburban environment where it was—there was a lot of gang and gun violence in the 1980s in the District of Columbia, and I talked about Police Chief Kathy Lanier's goals, at the time Police Chief Kathy Lanier.

Senator BLUMENTHAL. But all of that experience is not reflected in the test that you are imposing here, despite your claim that you look to the real world and impacts on real people, nor is it reflected in the test on Presidential power that you are going to impose, which says, in effect, a President can strike down the Affordable Care Act. Donald Trump can strike it down if he deems it, and he alone unilaterally believes it to be unconstitutional, even after your court, the D.C. Circuit, even after the United States Supreme Court, even after President Obama, and the Congress of the United States all deem it constitutional. That gives the President virtually unchecked power. And in this real world, that is a dangerous prospect for us, is it not?

Judge KAVANAUGH. Senator, two things. One, on the Second Amendment issue, I did explain as best I could why I felt the President controlled and set forth that test. I did point out that the test that I understood the Court to be setting forth would allow potentially more gun regulation depending on how it was applied than, say, strict scrutiny would depend. But I pointed that out. And I pointed out what the Supreme Court said about banning machine guns. On the Presidential power, I referred you before on prosecutorial discretion, what the limits are of that being tested in court, and I have said that in my Marquette speech in 2015. The concept, of course, is, as you know, well established in Supreme Court precedent of prosecutorial discretion in the *Heckler v. Chaney* case.

Senator BLUMENTHAL. Judge Kavanaugh, I was at Sandy Hook the afternoon of that massacre. I do not know whether you have been at these kinds of scenes. I do not whether you have seen the pictures of what assault weapons can do. They were designed for the sole purpose to kill and maim human beings. They are very good at it. They were one of the most effective and efficient weapons known to man. And I would urge you to reconsider. I think the

test that you are imposing is out of touch with the reality of what assault weapons do, and I think it reflects a broader shortcoming in the way you are applying law to facts in trying to meet an ideological standard rather than a test for the real world.

Senator CORNYN. Judge, if you care to respond, you can respond.

Judge KAVANAUGH. I just wanted to thank Senator Blumenthal for sharing that perspective, and I thank you for sharing it, appreciate it, and will take it into account and consider it and remember what you said here. Thank you.

Senator CORNYN. Your Honor, would you care to take a 5-minute break?

Judge KAVANAUGH. Yes, please.

Senator CORNYN. We will be in recess for 5 minutes.

[Whereupon the Committee was recessed and reconvened.]

Senator CORNYN. I understand Senator Blumenthal will have a unanimous consent request with regards to some documents. If he has that when he comes back in, we will recognize him. Senator Hirono, I believe you are next.

Senator SASSE. I think I am next.

Senator CORNYN. I am sorry. Senator Sasse—

Senator SASSE. Go ahead. Go ahead, that is fine.

Senator CORNYN. Senator Hirono and then Senator Sasse. Thank you.

Senator HIRONO. Oh, I am sorry. I thought we were going to—

Senator CORNYN. I beg your pardon. Senator Hirono, you are recognized. Thank you.

Senator HIRONO. Thank you very much, Mr. Chairman, and Senator Leahy. And any time that I do not use, of my 16 minutes, I would like to have that time go to Senator Booker.

Judge Kavanaugh, as you know, this June, the Court delivered a blow to millions of public sector workers with its decision in *Janus v. AFSCME*. In a 5-to-4 decision, five of the Justices overturned decades-old precedent, a case called *Abood* that workers around the country depended on for fair salaries and basic rights. The *Janus* decision is important here because it shows your nomination fits in a larger campaign that groups like the Federalist Society and the Heritage Foundation have been waging for decades. Decades. Their goal is to undermine well-established Supreme Court precedent that protects workers, women, and everyday Americans.

In *Janus*, five Justices overturned *Abood* “because they wanted to.” Those were Justice Kagan’s words, not mine. Although the five Justices went through the factors that—for overturning precedent, it identified another, what they referred to as a very strong reason for not following precedent, and that reason was “fundamental free speech rights are at stake.” In fact, the five Justices said the rule for following precedent, also known as *stare decisis*, applies with perhaps least force—least force—to decisions that wrongly deny First Amendment rights. So, it sounds as though the Court is saying that First Amendment takes precedence.

So, why is this important is because of the larger political campaign by groups like the Federalist Society and the Heritage Foundation that I mentioned earlier. So, with the help of these groups, the Supreme Court, as Justice Kagan put it, has been “weaponizing

the First Amendment in a way that unleashes judges now and in the future to intervene in economic and regulatory policy.” And, in fact, just this past year, the First Amendment was used to advance the political agenda against workers’ and women’s health and reproductive rights. Judge Kavanaugh, do you agree with the five Justices in *Janus*?

Judge KAVANAUGH. Senator, that is a precedent of the Court that, of course, because it is one of the recent cases, I cannot comment on whether I agree or disagree with it. But it is a precedent that is now part of the body of the Supreme Court case law.

Senator HIRONO. And, of course, should you get on the Supreme Court, you can either follow that precedent or overturn it. But basically, the Court in *Janus* said that—they come up with a very strong reason for overturning even decades-old precedent if First Amendment rights are at stake. So, based on the answer you just gave me, then that kind of rationale would also be the precedent of the Court now.

So, the Supreme Court sets precedent, of course, and all it takes is five votes to overturn precedent, as happened in *Janus*. Five votes. And I am particularly troubled that the five Justices in *Janus* claimed, “It did not matter that public sector unions have relied on the *Abood* case for decades.” And yesterday when you talked about the role of precedent, you talked about—you used words such as how people rely on the precedent, whether it creates stability, there is predictability, but the five Justices in *Janus*—the fact that public sector unions have been relying on the *Abood* decision for 41 years did not matter.

So, five Justices also claimed that “they could overturn *Abood* as a well-established precedent because public sector unions were on notice”—this is quoting the Court—“notice for years regarding this Court’s misgivings about the *Abood* case.” But as Justice Kagan explained, this so-called notice was actually Justice Alito’s 6-year campaign to reverse *Abood*. So, I will not go over his 6-year campaign, but suffice it to say that Justice Alito made it very plain to potential litigants out there who wanted to undo the *Abood* decision, basically he said, come on over because I want to be in a position to be able to reverse *Abood*.

And the only reason in an earlier case, called *Friedrichs*, said that *Abood* was not overturned was because of the death of Justice Alito, and then after that, Justice Gorsuch was confirmed, and Justice Gorsuch was going to provide the fifth vote, whereas in the previous vote because of the death of Justice Scalia, the earlier case of *Friedrichs* ended in a 4-to-4 tie. But then along comes Justice Gorsuch, and the fifth vote was there, and *Abood* is overturned, and *Janus* is now the precedent case.

So, to the extent the Court in *Janus* said, well, you know, by the way, all you litigants who are—all you people out there who are relying on this precedent, you had notice that we were thinking of overturning this case.

So, do you believe that a Justice should be able to make it easier to overturn or even—overturn even well-established Supreme Court precedent by simply giving notice that he or she has concerns about that precedent, because that is exactly what Justice Alito did?

Judge KAVANAUGH. Senator, I think the factors that the Court considers is whether the prior decision was grievously wrong, whether it is deeply inconsistent with subsequent precedent that is developed around it, the real-world consequences, the workability of the decision, as well as reliance interests—

Senator HIRONO. Well, on the other hand, Judge Kavanaugh, can you call a 5-to-4 decision as reflective of the prior decision having been grievously wrong, not to mention that in the case that came before *Janus*, ended in a 4-to-4 tie because of the death of Justice Scalia? So, by one vote. The Court looked to the notice provided by a Justice as one of the justifications for overturning this 41-year-old precedent.

So, my next question is, do you think the prior writings of someone before becoming a Supreme Court Justice can count as notice, that Americans cannot rely on the protections entrenched in well-established precedent? For example, if someone like you did some writing that questioned a precedent, would that suffice as notice for the Supreme Court to overturn precedent?

Judge KAVANAUGH. Senator, I think the factors that the Supreme Court considers in applying *stare decisis* are established. If you look at the prior decision, whether it was grievously wrong, deeply inconsistent with subsequent precedent, the real-world consequences, and the reliance interests. And, I understand that you disagree with how those factors were applied, and Justice Kagan, of course, in dissent disagreed with how they were applied. But, and I understand—

Senator HIRONO. It was a very strong dissent, and it was a split decision, and suddenly we are talking about strong reasons being the First Amendment rights, which Justice Kagan said is now being weaponized. And you can see the trend of the 5-to-4 decisions that weaponizes First Amendment. We are already seeing that. The Court said that where the First Amendment rights are concerned, that *stare decisis*, meaning precedent, applies with the least force. Going on. So, basically, the concern I have about the reasoning in the *Janus* Court is, that we will see many more 5-to-4 decisions where precedent can be overturned if a Justice has given notice as Justice Alito did, or if First Amendment rights are concerned.

Let me turn to the issue of guns. You were asked some questions about this, about your position on basically *Heller II*. The Brennan Center for Justice reported that as of August 20th, 2018, outside groups had spent almost \$3.5 million to campaign for your confirmation, and I think we have all seen those ads. By contrast, groups opposing your nomination had spent a less than a quarter of that amount. And one of those groups spending hundreds of thousands of dollars to get you confirmed to the Supreme Court is the National Rifle Association.

And the NRA makes clear in their commercials what is at stake with your nomination. In fact, they highlight that there are currently four Justices who favor gun control and four Justices who oppose gun control. They then explain, and I am quoting their ad, "President Trump chose Brett Kavanaugh to break the tie." They urge your confirmation pointing out that the viewers' access to guns depends on your vote, Justice Kavanaugh.

So, you had mentioned earlier that the Supreme Court had in the past said concealed weapons, guns in schools, machine guns could be banned, but, you know, you can provide that fifth vote to undo these earlier Supreme Court precedents. So, why do you think—this is part of their ad: “Your right to self-defense depends on this vote.” This is based on—it is part of the NRA’s million-dollar campaign to get you onto the Court. Why do you think the NRA is spending so much money to ensure that you get confirmed as a Supreme Court Justice?

Judge KAVANAUGH. Senator, there are a lot of ads for and against me, and I have seen—

Senator HIRONO. Well, I am asking specifically about the NRA ad. Why do they think you are going to provide the crucial fifth vote to—they obviously think that you are on their page.

Judge KAVANAUGH. Senator, there are a lot of ads by groups against and for. That is the right of people to express their views. I understand that, again stand for. And I am independent judge, and I for 12 years have a record of being an independent judge.

Senator HIRONO. Well, obviously the NRA does not think you are so independent when it comes to gun legislation because they are spending a lot of money to tell everybody that you are going to provide that crucial vote to their liking. So, you know, I think it is—these ads speak for themselves of why they think you are the critical person to be on that Court.

And I want to follow up one more thing, something you told Senator Feinstein yesterday regarding your views on guns. You seem to indicate that your view on Supreme Court precedent is that a type of gun could not be banned, and I will quote you to her, what you said yesterday, “if a type of firearm is widely owned in the United States.” So, did you mean to say “widely owned” as opposed to “widely used” in your response to Senator Feinstein?

Judge KAVANAUGH. I think I referred to the dangerous and unusual test that the Supreme Court has articulated, and referred to how I had applied that test in the *Heller*—my *Heller* opinion.

Senator HIRONO. Well, you did say that if a type of firearm is widely owned in the United States, you would deem any limitation on widely owned guns to be unconstitutional. So, is it your view that a large enough number of people downloaded designs for 3-D guns and printed them, and, therefore they own them, that the States and the Federal Government could not ban them because now they are widely owned.

Judge KAVANAUGH. Senator, I cannot talk about a hypothetical case.

Senator HIRONO. I think that is another reason that the NRA is so adamant that you get on the Court. I would like to cede the rest of my time to Senator Booker.

Senator CORNYN. I understand, Senator Blumenthal, you have a unanimous consent request to offer some documents?

Senator BLUMENTHAL. I do. Thank you very much, Mr. Chairman. I would like to enter several letters from outside organizations into the record. These organizations have voiced some of the real-world consequences of Judge Kavanaugh’s appointment, and they come from the National Council of Jewish Women, the National Abortion Federation, various faith organizations and commu-

nities, the National Center for Transgender Equality, the American Public Health Association, and the Center for Public Representation. I ask that they be made a part of the record.

Senator CORNYN. Without objection.

[The information appears as submissions for the record.]

Senator CORNYN. The Chair recognizes Senator Sasse.

Senator SASSE. Thank you, Mr. Chairman.

Judge, you are in the home stretch. Some of us are way beyond bed time. I just snuck out and did a goodnight call with my kids, and my 7-year-old was so groggy, he asked what I was up to, and I told him, and he said—he was curious if you were scared of poisonous spiders.

[Laughter.]

Senator SASSE. I will protect you from having to answer his question. Mike Lee already asked you about Sharpies, so we will not ask you about your phobias related to the outdoors.

I would like to talk a little bit about the First Amendment. I am worried about the Liberal Project in the grand sense. I think what is happening on campuses right now is really dangerous, and I think what happens on campus will probably not stay on campus. We have got lots of data that shows high school kids do not know our history, do not know basic civics. One of the most frightening numbers is that Americans under 35, 41 percent of them tell pollsters they think the First Amendment is dangerous because you might be able to use your free speech to say something that would hurt someone else's feelings. So, I would love to explore a little bit where we are in the First Amendment.

So, can we go to history first? What is the core purpose of the First Amendment? Why do we have it?

Judge KAVANAUGH. We have protected so individuals can express their views in speech and in writing. The idea is that there is no such thing as a true idea that is dictated from above or by the Government, and that individuals can say what they think in speech and writing and help—it is both an individual idea that they can express their own opinions and their own beliefs, and it is also—I think there is also an idea that truth develops through debate, and more informed judgment, the more perfect union develops through debate when we have different perspectives that are shared.

And a lot of—a lot of ideas began as unpopular ideas, and then people, they take hold over time, and it is important to protect the ability of people to speak both for their individual rights and for the idea of the betterment of society over time through debate and improvement and more perfect union.

Senator SASSE. Thanks. I am encouraged. I was hoping that we would hear both sides of that. We need a First Amendment because it is required for individual liberty, and we need it structurally because society, and particularly a republic, needs that discourse. You never really have a great idea of what you think if it is just bouncing around inside your head. It needs to be dialogued with others, and a free republic, a free people need that debate to advance a structure of liberty.

Why are there five freedoms in the First Amendment? Why do we have speech, press, religion, assembly, protest, redress of griev-

ances? Why would we not have a different amendment for each one? Why is there not just free speech and maybe the two clauses of religion, but why are they all together in an amendment? And this is not supposed to be some grand “gotcha” question.

[Laughter.]

Senator SASSE. I am abusing you for private tutorial.

Judge KAVANAUGH. I think the rights—when they go to New York in 1789, James Madison, after going through the ratifying conventions and hearing—getting a lot of heat, frankly, for why is there not protection in a Bill of Rights, something that George Mason and others who were concerned about, what the original Constitution. So, when they got to New York, you know, he was busy working on this, writing out a draft of the rights that he thought should be protected in a Bill of Rights, and drew on a lot of the State constitutions. I know I have talked with Senator Kennedy about some of that. And I do not have a clear answer for why the grouping ended up in that fashion.

Senator SASSE. Well, is it fair to say that if we did not have a First Amendment, would people not have these right? I mean, was the Constitution not completed without a Bill of Rights because we do not think Government gives us rights? We have rights by—because people are created by God with dignity, and so the rights are—they belong to people because of the nature of humans, and humans are created in the image of God and they have dignity. And so, the Constitution stops before the Bill of Rights, and then Bill of Rights sort of clarifies a whole bunch of things that we believe about people.

And when you run through them, it is kind of amazing that we end at the Ninth and Tenth Amendment, which in a way—well, the Ninth Amendment—I want you to tell me what they mean. But if I am teaching it to my kids, what I say the Ninth and Tenth Amendment mean is, oh, you do not actually need a list that might end because if you think that you only have the rights that Government decrees for you, then you might think when the Government stops talking, you do not have any more rights.

And it seems to me what the Ninth and Tenth Amendments say, oh, by the way, if you do not—if we do not have a list of rights that continues, you still have all the ones we did not name. And State and local governments, if the Federal Government has not said this is a power uniquely enumerated for the Federal Government, States and locals, you are the only governments that still have these remaining powers. Is that fair? Or correct me.

Judge KAVANAUGH. I think one of the ideas at the Convention, and they did talk a bit about Bill of Rights there or individual rights, and they do have some in Article I, Section 9, Article I, Section 10. We forget those rights. I hate to take an aside here, but I want to underscore the ex post facto bill of attainder provisions are critical to individual liberty. Ex post facto is the very definition of a tyrannical government when what you did yesterday is made illegal tomorrow and you are promised for what you did yesterday when it was not illegal then. And so, those were some of the foundational individual liberties.

But the idea I think they had, and it was maybe a bit of a political miscalculation at the Convention, was because the Federal

Government was only given certain specified powers, we did not need to put in a Bill of Rights because the Federal Government would not have the power to do these kinds of things in the first place. Well, that did not go over so great in some of the ratifying conventions, and some of the promises that were made were instead of amending the existing structure, let us get to work as soon as we get to New York in 1789 on a Bill of Rights. And there were a variety of discussions, and so that is what Madison did when they got to—got there in 1789.

So, I think your point is correct with respect to thinking about where rights come from, but I think in the practical politics of the day, the initial idea was the Federal Government will not have the power to do that, and then people said what are talking about, there are lots of powers in this Constitution. Even if you think that—

Senator SASSE. Clarify.

Judge KAVANAUGH. Let us belt and suspenders and make sure that the Federal Government cannot infringe these core liberties, which are part of what we think are fundamental to being—being an American.

Senator SASSE. Why is there not an exception written into the First Amendment against hate speech? What is hate speech, and who gets to decide what it is?

Judge KAVANAUGH. Senator, I think the principle of free speech that the Framers put into the Constitution encompassed the idea that there would be, as the Supreme Court has subsequently said in a variety of cases, unpopular ideas that would be expressed. And that, as we said earlier, it is important for individual liberty to have the ability to express your thoughts and your words, and it is important for societal development, the development of America for the people to be able to express their ideas so that we can improve over time.

And a lot of the ideas we hold dear were unpopular, some of them not so long ago. And we developed those ideas over time, and part of free speech helps us build a better America.

Senator SASSE. Yes.

If we had to unpack American political philosophy in one word, I think it is anti-majoritarianism. You never would want the Majority to get to define what the Minority cannot hold in an unpopular position.

The Chairman is going to take my gavel, take my microphone, but I would love to ask you if speech can ever be called violent.

Judge KAVANAUGH. I would just add one sentence to the anti-majoritarianism point. We think of the individual liberty specified in the Constitution as supporting that, but the structure, as I made clear, the structure, the separation of powers and federalism, is part of that same overall idea, which is protection of individual liberty against majoritarian rule, and the whole document tilts toward liberty.

Senator SASSE. Thanks.

Chairman GRASSLEY. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman.

Judge, you do not need to answer this because we all know your answer anyway, but will you allow me to ask you a series of questions leading to a question that I do not know your answer to?

A simple question. Again, we all know your heart, but just a question so I can lead someplace. You would not fire somebody because of the color of their skin. Obviously, no. Right? You would not fire somebody—

Judge KAVANAUGH. Right, right.

Senator BOOKER. I know that is a snappy answer. I just want you to say “no” to that.

Judge KAVANAUGH. No.

Senator BOOKER. Yes.

Judge KAVANAUGH. I have made clear—

Senator BOOKER. You have made clear because you have hired interns, you have talked to me about friends. I know that is the case. And, forgive me, I am not even questioning that. You would not fire somebody because of their gender, obviously. Right?

Judge KAVANAUGH. So, I have made clear my efforts to achieve, as best I can, in the ways I can as a judge—

Senator BOOKER. Sir, just because of my time, I heard about numerous of my colleagues, even on the other side of the aisle, asked you to go through your hiring, and I just know that is your heart. I am not challenging that. I am not asking that. I am just trying to lead someplace, if you will allow me.

So you know it would be wrong for someone else to fire somebody just because of the color of their skin. Right? It would be morally wrong.

Judge KAVANAUGH. Of course.

Senator BOOKER. It would be morally wrong. It would be morally wrong. Right?

Judge KAVANAUGH. In the civil rights laws—

Senator BOOKER. If I could just ask you person to person, human being to human being, the dignity of a human being, it would be wrong to fire somebody because of the color of their skin.

Judge KAVANAUGH. And I understand that. I think my record—

Senator BOOKER. It clearly states that, it echoes that—

Judge KAVANAUGH. Yes.

Senator BOOKER [continuing]. As it has been stated numerous times. I am not challenging that at all.

Would it be wrong to fire somebody if the person found out, hey, I just found out this person is gay? Would it be wrong to fire that person?

Judge KAVANAUGH. Senator, in my workplace, I hire people because of their talents and abilities. All Americans, all Americans—

Senator BOOKER. So maybe I can shift, then. Morally, you think it is right to hire people, it does not matter their background. For someone to fire someone just because they are gay, let us shift to the law now. Do they have a legal right to fire somebody just because they are gay, in your opinion?

Judge KAVANAUGH. Senator, the question, as I am sure you are aware, of the scope of employment discrimination laws being litigated right now, and therefore while I would like to talk to you

about this more, because that issue is in a variety of cases right now, it would be inconsistent, as I am sure you are going to understand—

Senator BOOKER. Right. And I guess Senator Harris, Senator Coons, have all brought up these issues. *Loving v. Virginia* has been mentioned, the *Obergefell* case has been mentioned. I think there are a lot of folks who have real concerns if you get on the Court, folks who are married right now really have a fear that they will not be able to continue those marital bonds, and we still have a country where, if you post your Facebook pictures of your marriage to someone of the same sex, we still have a majority of States where if that employer of yours finds out that you had a gay marriage and that you are gay, in the majority of American States you can fire somebody because they are gay.

I guess you are not willing to tell me whether you personally morally now think that that is right or wrong.

Judge KAVANAUGH. Senator, I am a judge, and therefore with the cases that you are well aware of pending in the courts about the scope of the civil rights laws, the employment discrimination laws—of course, Congress could always make those clear—

Senator BOOKER. That is what I want to get to, the point that you will not give me a moral answer because of the pending cases, and I have heard that before.

Judge KAVANAUGH. Right, and I do not want to in any way—

Senator BOOKER. So, maybe I can ask you about your concern when you were in the Bush White House. Did you have any involvement in Bush's effort to support a constitutional amendment to ban same-sex marriage?

Judge KAVANAUGH. So, Senator, when I was in the White House, that was part of something that he talked about. Of course, at that point in time—

Senator BOOKER. Did you express an opinion then about it yourself?

Judge KAVANAUGH. As staff secretary, things related to that, speeches he gave went across my desk, as I have discussed before.

Senator BOOKER. I am not privy to your documents at that time.

Judge KAVANAUGH. Right.

Senator BOOKER. Did you ever express your opinions about same-sex marriage in those documents that I am not privy to, that will one day come out?

Judge KAVANAUGH. I do not recall. Of course, at that time, as you are well aware of, Senator, there has been a sea change in attitudes in the United States of America, even since 2004, as you are well aware.

Senator BOOKER. But you are not willing to tell me your attitudes then? I mean, we can change. We had President Obama evolve on that issue.

Judge KAVANAUGH. Right.

Senator BOOKER. So will you tell me your attitudes then about it?

Judge KAVANAUGH. I will tell you that there was debate in the White House. Vice President Cheney came out, one of the few times he came out and publicly disagreed—

Senator BOOKER. I do not need to know Cheney's opinions. I want to know your opinions on the issue.

Judge KAVANAUGH. I am sorry, Senator. I did not mean to interrupt. But there was debate in the White House about what President Bush was doing. Of course, as you said, President Obama—

Senator BOOKER. That was his word, "evolved" on the issue. But in your opinion—I do not need Obama, Cheney. Just, will you express to me your opinion on same-sex marriage?

Judge KAVANAUGH. I do not recall—

Senator BOOKER. I am not asking your opinion then. I am asking your opinion now. Do you recall your opinion now on same-sex marriage?

Judge KAVANAUGH. Well, the Supreme Court in *Obergefell*—

Senator BOOKER. Your opinion. I do not know, maybe I did not get the record. I do not know if you have conducted gay marriages. I do not know if you have been to gay marriages. What is your opinion?

Judge KAVANAUGH. I am a judge. I apply the law. I apply the precedent.

Senator BOOKER. Have you conducted a gay marriage?

Judge KAVANAUGH. Have I conducted one?

Senator BOOKER. Have you presided over one, officiated a gay marriage?

Judge KAVANAUGH. I have not.

Senator BOOKER. Okay. But you do not want to tell me your opinion on that issue.

Judge KAVANAUGH. I apply the law. The law of the Supreme Court—

Senator BOOKER. I want to move on as quickly as I can.

Judge KAVANAUGH. The law of the land protects that right, as dictated by the Supreme Court.

Senator BOOKER. Right. I just want to turn really quickly to your views on the criminal justice system. A lot of my colleagues heard this speech last summer at a conservative think tank. You called Chief Justice Rehnquist, and I quote, your "first judicial hero." Rehnquist was one of the most conservative Justices. You said about him, quote, "Rehnquist fervently believed that the Supreme Court had taken a wrong turn in the sixties and seventies when the Court made a lot of really landmark decisions." *Gideon v. Wainwright*, about access to an attorney. You had the assurance that police officers cannot violate your constitutional rights and then turn around and use that improperly to gain information. The exclusionary rule. The requirement that police officers taking you into custody read you your Miranda rights.

You praised Rehnquist's efforts to "limit and halt"—that is your quote—halt these critical protections. You said that it "righted the ship of constitutional jurisprudence."

So, do you think we had taken a wrong turn by establishing those rights?

Judge KAVANAUGH. No, that is not what I said, Senator, and the fact that we have not discussed exclusionary rule and *Miranda* over the last 24 hours is a sign of success of Chief Justice Rehnquist in helping the Supreme Court achieve a middle ground

that has endured, that has endured and that is not really controversial.

Senator BOOKER. Well, I think we have not discussed it, at least I have not had a chance to ask you about it yet, and my time is running out. So just tell me if any of these were wrong turns. The exclusionary rule. A wrong turn or not?

Judge KAVANAUGH. Supreme Court—

Senator BOOKER. Your opinion. The exclusionary rule. A wrong turn or not? Is that settled?

Judge KAVANAUGH. I apply the precedent—

Senator BOOKER. You cannot tell me it is settled.

What about the Miranda warning? Settled or not?

Judge KAVANAUGH. The Court—can I get two—

Senator BOOKER. No, not unless you tell me your opinion. I know what the precedent is. I know this law very well.

Senator CORNYN. Senator, I think the witness is entitled to answer the question.

Judge KAVANAUGH. In *Dickerson*, the Court reaffirmed that is precedent on precedent.

Senator BOOKER. Sir, he has been allowed 6 minutes at the end of my time. I know he is going to get a chance to answer my questions. I am just trying to get them all out so when he has his 6 or 7 minutes at the end.

You said Rehnquist made our criminal laws more workable. But the question really is—this is a quote from you, sir.

Judge KAVANAUGH. Criminal law, singular, I think.

Senator BOOKER. Criminal laws, but maybe criminal law in general. I have a real question about workable for who, and you understand the disparities in our criminal justice system.

Judge KAVANAUGH. Yes.

Senator BOOKER. You understand that we have—all the data show that people, based upon their financial status, based upon the color of their skin, often have different experiences in the law. Do you understand that?

Judge KAVANAUGH. Absolutely, Senator.

Senator BOOKER. Yes, you know that. I know you know that.

Judge KAVANAUGH. We have talked about that.

Senator BOOKER. Yes. Bryan Stevenson says, “We have a system of justice that treats you better if you’re rich and guilty than if you’re poor and innocent” We have a real issue with that. You and I have discussed this.

Judge KAVANAUGH. Yes. That was a good conversation.

Senator BOOKER. I appreciated that. And I have 2 minutes left for this conversation, so let me just really quickly get this out, because I am going to then let you respond.

And that is the challenge for a lot of Americans right now, which is that they really believe that the scales are different. We have a system now where we do not even really have jury trials in criminal cases anymore, and that was something that was really fundamental to our criminal justice system, is the jury trial. But the scales have shifted so much that you see now—in fact, there is a great book. I did not know Senators were going to give me books; I would have given you a number for them.

[Laughter.]

Judge KAVANAUGH. I am happy to get them.

Senator BOOKER. I will. I will give you “The New Jim Crow” by Michelle Alexander.

Judge KAVANAUGH. Yes, I clerked with Michelle Alexander.

Senator BOOKER. I am grateful to give you these books. But let’s keep going on because you were doing a good job of allowing me not to get to my question, and I have a very, very diligent Chairman who is going to cut me off in 1 minute and 10 seconds.

So, you know right now that we have a system that seems to be shifting away. “Why Innocent People Plead Guilty” is another book that is worthy of reading, because of criminal defendants and the power shifting. So that is what raises that question to me about the rights of criminal defendants. And it seems to me that you were indicating that you were in favor of what Rehnquist said, that those rights of criminal defendants somehow got out of control, that they are making them more workable. And the question I have is workable for who?

It seems that when I look at a lot of these issues, as a guy—you and I both have talked—you talked a lot about your city of violence. I was the mayor of a big city, every single day working to try to keep my city safer. So I know about public safety, as you do, and I believe that these systems, these laws are making us less safe. They are destroying communities, because at Yale, they were not stopping and frisking kids on the way home from parties at The Toad looking for drugs. They were not getting the same treatment, those kids, and there was a lot of drug use at Yale.

So I hear you saying you are praising Rehnquist, who is making these laws more workable, and I would just ask you, workable for who?

Senator CORNYN. Judge, do you want to answer any of those questions?

Judge KAVANAUGH. I will try to give about a 1-minute on this.

I understand we had a great conversation about racial disparities in the criminal justice system, and we talked about ensuring confidence of all Americans in the fairness of the criminal justice system and the American legal system and the court system and the Supreme Court, and I appreciated that conversation.

I would just note four things. The note I wrote in law school about detecting race discrimination in *Batson* hearings, my opinions on acquitted conduct that have been used to enhance sentences, my opinions of that, that it is often unfair when acquitted conduct is used to jack up sentences far beyond what the offense of conviction would be. Third, my opinion on mens rea in the *Burwell* case. I strongly would encourage you to take a look at that, because that is part of the fairness and due process case.

I understand your perspective, and I enjoyed our conversation, and thank you for that.

Senator BOOKER. And if I could get the same treatment that Senator Blumenthal got, can I just read some things?

Senator CORNYN. Absolutely.

Senator BOOKER. Thank you very much, sir.

Mr. Chairman, I am holding a number of letters in opposition to the nomination of Judge Brett Kavanaugh to be Associate Judge. They are letters from the NAACP, multiple health care groups

around the country, Voto Latino, the Women Lawyers On Guard. There are a number of very esteemed religious organizations, the AME Churches representations here, the Congressional Black Caucus, and others. I would like to submit those to the record.

And just in honor of Mr. Sasse, because I have a tremendous respect for him, and I actually agree with a lot of what he was saying about free thought and what is happening in this country, I just want to ask the person a friendly question, that I would love to read any book that he has to recommend, if the Judge would read any book I recommend. I make that offer just as an extension of good faith.

Senator CORNYN. Without objection, they will be made part of the record.

[The information appears as submissions for the record.]

Senator CORNYN. For the record, Senator Durbin is one of the most prolific book recommenders I know in the Senate.

[Laughter.]

Senator CORNYN. I have benefited greatly from his recommendations of fiction and non-fiction alike. So I would suggest—

Senator BOOKER. Is that—

Senator CORNYN [continuing]. Recommend we go back to Senator Durbin—

Senator BOOKER. Senator Cornyn, I would love to do a book exchange with you, sir, as well.

[Laughter.]

Senator BOOKER. Maybe that could help us this morning.

Senator CORNYN. Okay.

Senator BOOKER. Oh, God, please do not do that.

[Laughter.]

Senator BOOKER. In that case, just for the record, I retract my comments. That is pretty thick.

[Laughter.]

Senator CORNYN. We will go to Senator Flake.

Senator FLAKE. Thank you, Mr. Chairman.

Thank you, Judge. Appreciate your endurance.

Judge KAVANAUGH. Yes.

Senator FLAKE. It was noted before, you have done the Boston Marathon twice. How does this compare?

Judge KAVANAUGH. I feel good, Senator.

Senator FLAKE. Senator Booker represented Heartbreak Hill, I think. But you are beyond that and on the way down now.

I just wanted to make a couple of comments, and I will yield additional time to Senator Lee.

The cameras in the courtroom, I know you addressed it a little before. I raised it during the Gorsuch hearings. I am very much opposed to it. Not here. I am glad there are cameras here. They belong here. This is the Congress. This is the Senate. They belong here, and the protests here are people's right to free speech, and the country needs to see that. But I fear that it would politicize and be detrimental to the independence of the judiciary. I am glad that the cameras have been resisted in oral arguments. I know you cannot comment or will not comment on this, and if you want to, you can. But I certainly do not think it is in our interest to bring

the element of politics any closer to the judiciary. So I will make the same comments as I did with Judge Gorsuch's hearing.

I did Chair a Subcommittee hearing on the use of technology in the courtroom last summer. I have had a long interest in the topic, and I remain convinced, after the testimony that we received there and what I have observed, that we are better off having oral arguments the way they have been, and the Court has remained and I hope will continue to remain a bastion of independence. That is more difficult if there are cameras in the courtroom.

So with that, I will yield my remaining time to Senator Lee, as he might use it.

Senator CORNYN. Thank you, Senator Flake. We will go to Senator Harris and then come back to Senator Lee.

Can I ask? Senator Booker raised some issue about the reduction in the number of jury trials in criminal cases?

Senator FLAKE. Probably for plea bargaining.

Senator CORNYN. Oh, is that because of plea bargains?

Senator BOOKER. Yes, sir. The percentage of jury trials in this country has gone down dramatically.

Senator CORNYN. It is because of plea bargains, not because people are being denied their constitutional—

Senator BOOKER. I would say plea bargains are the result of mandatory minimum sentences, which have changed pretty dramatically.

Senator CORNYN. Okay. Thank you for that explanation.

Senator Harris.

Senator HARRIS. Thank you.

Judge, you have spoken about the President's unlimited prosecutorial discretion. Does that discretion allow him to target his political enemies for prosecution and spare his friends?

Judge KAVANAUGH. Senator, in the Marquette speech I gave in 2015, I pointed out that the question of the limits of prosecutorial discretion is a question that is unsettled and needs further study. The Supreme Court, of course, has referred to the concept and well-settled tradition of prosecutorial discretion in *Heckler v. Turner* and *Nixon*.

Senator HARRIS. And I actually recall you talking about that during the course of this hearing. And also I am reflecting on a conversation you had with Senator Flake yesterday where he raised concerns with you about a recent tweet by the President. In that tweet, the President attacked the Justice Department for indicting two Republican Members of Congress because it would hurt the Republican Party at the polls.

You said you did not want to assess comments in the political arena, so I will not ask you to condemn the tweet, even though I believe you should. But would you recognize and agree with the principle that a sitting President should not politicize the Justice Department?

Judge KAVANAUGH. Senator, I think that is asking me to wade into the political arena.

Senator HARRIS. So it is not a self-evident—

Judge KAVANAUGH. Three zip codes away from the political arena, Senator.

Senator HARRIS. Okay. Following up on Senator Booker's question from yesterday on an interview you gave in 1999 in connection with a case you worked on, you said that it was an inevitable conclusion within the next 10 to 20 years that the Court would say, quote, "We are all one race in the eyes of the Government." Would you agree that your statement suggests that the Government would no longer recognize racial differences? That is my reading of your words. Was that in the zone of what you intended?

Judge KAVANAUGH. So, I think I talked to Senator Booker about that yesterday.

Senator HARRIS. Yes.

Judge KAVANAUGH. That was certainly an aspirational suggestion, but I have said as recently as a couple of years ago that the long march for racial equality is not finished and racial discrimination is still a reality we see on an all-too-frequent basis. I said that in my opinions.

Senator HARRIS. So the conclusion I draw from that is that you would agree, and I certainly believe we have not arrived at that place yet.

Judge KAVANAUGH. There is still racial disparity, racial discrimination, of course, in American society. I have said that in my opinions.

Senator HARRIS. So my question is this: Why should it be up to the Court to decide when we arrive, whenever that moment comes? Why should it be up to the Court to decide?

Judge KAVANAUGH. I think that is a question of how to interpret the precedent of the Supreme Court, and it is not—it is different areas, as we have discussed. There is precedent in the higher education context. There is precedent in the contracting context in terms—

Senator HARRIS. And does that precedent dictate that it should be the Court that would make the decision that we have arrived at that place where we are basically all one race in the eyes of the Government?

Judge KAVANAUGH. The precedent does not necessarily lead to that conclusion. I think that is an open question going forward. You are familiar with Justice O'Connor's statement in the Michigan case about 25 years ago.

Senator HARRIS. Yes.

Judge KAVANAUGH. That clock is moving fast, but we still have, as I have said in my opinions, work to do.

Senator HARRIS. So I have just a few minutes left, but just to continue this conversation, if it were up to the Court to decide, just talking again to the natural conclusion, what you wrote, will it be the five Justices, then, of the Court, who will decide, or are you suggesting that it should be like *Brown v. Board of Education*, where there would be a unanimous decision that we have arrived at that point? Or could it simply be five Justices, a majority of the Court, deciding that we have arrived at that point?

Judge KAVANAUGH. I think a one-size-fits-all answer to the question is hard to give in this context.

Senator HARRIS. What do you imagine as being the ideal?

Judge KAVANAUGH. Well, the ideal for every case is that every case is unanimous. I realize that is naive, but that is the goal.

When I talk about joining a Team of Nine, that is the goal, and I think that is the goal of every Justice, and the Court has shown a remarkable ability on the most important cases in its history, like *Brown v. Board of Education*, like *United States v. Richard Nixon*, to achieve unanimity, and that is part of the reason those cases stand as such landmarks.

Senator HARRIS. Sure.

Judge KAVANAUGH. The decision, the independence, and the unanimity.

Senator HARRIS. And you and I have discussed that before, and you have mentioned that here. I agree with that.

But tell me, when the Court does make that decision, if that moment arrives, that we are one race, does that mean the Government should not provide Federal funding to Historically Black Colleges and Universities?

Judge KAVANAUGH. Senator, I think the Historically Black Colleges and Universities have, of course, been a critical part of the educational system in the United States.

Senator HARRIS. Pardon me. Because we recognize past restrictions on African-American students being able to have access to higher education. But do you imagine, though, that if we reach this point that you, I think, hope that we will achieve—I think that we all do, that we will all be equal—

Judge KAVANAUGH. I think we all do.

Senator HARRIS [continuing]. In every way, do you believe that that would mean, then, that we would end Federal funding for HBCUs?

Judge KAVANAUGH. Again, Senator, when we reach that point, it is hard to foresee what that would mean. But what I know about the Historically Black Colleges and Universities, of course, is the origins of them, that African Americans were denied access to higher educational institutions. What they have accomplished and produced, and what they continue to do, and the importance of those colleges and universities in the United States can continue to perform that educational function.

Senator HARRIS. Thank you. And how would the courts and agencies enforce laws like the Civil Rights Act of 1964 if the Government does not recognize racial categories? I am not clear about what you are imagining would occur.

Judge KAVANAUGH. Well, that is a question of what Congress has as the law. So long as Congress and, of course, a landmark civil rights law, the Voting Rights Act, those two from 1964 and 1965, two of the most consequential laws ever passed by Congress, ban discrimination on the basis of race, and so long as those laws are on the books, and one imagines that those laws will always be on the books, discrimination on the basis of race will be illegal under the civil rights laws and the voting rights laws in what they cover.

Senator HARRIS. So what would come of the Civil Rights Act of 1964 in that place that you imagined, at least in 1999, where we would arrive in 10 to 20 years from then, where we are all one race in the eyes of the Government? What would that mean for the Civil Rights Act of 1964? Because I am assuming that if you are actually confirmed, you will live a long life, as all of us do.

Judge KAVANAUGH. Thank you.

Senator HARRIS. So it is conceivable that during the course of your lifetime—conceivable; I do not know if it is probable, but conceivable that we will arrive at that place. So imagining that, and imagining that you will be still a member of the United States Supreme Court, what do you imagine would be your analysis as it relates to the applicability and relevance of the Civil Rights Act of 1964, if we arrive at that place that you describe?

Judge KAVANAUGH. Well, I am not—I think those might be two distinct issues, which one imagines it will always be on the books, the Civil Rights Act and the Voting Rights Act prohibit discrimination on the basis of race in employment, housing, and voting—so long as those are on the books, those will continue to be enforced by the Federal courts and discrimination on the basis of race would be something that will be unlawful and illegal.

Senator HARRIS. Thank you. My time is up. I appreciate it.

Judge KAVANAUGH. Thank you, Senator.

Senator HARRIS. And then, Mr. Chairman, I would like to also introduce letters into the record. I have first a letter from several of our Nation's leading civil rights organizations signed by the leaders of the National Coalition of Black Civic Participation, the Lawyers Committee for Civil Rights, the NAACP, the Legal Defense and Educational Fund, the NAACP, the National Urban League, and the National Action Network, all critical of this nomination and expressing concerns.

Second, I have a letter from 31 reproductive rights, health, and justice organizations, including Planned Parenthood Federation of America, NARAL, and the National Women's Law Center.

And finally I have letters from the Feminist Majority Foundation, the Disability Rights Education and Defense Fund, the American Network of Community Options and Resources, and the National Center for Special Education, if they could be admitted.

Senator CORNYN. They will be made part of the record, without objection.

Senator HARRIS. Thank you.

[The information appears as submissions for the record.]

Senator CORNYN. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair.

I am going to be real brief.

One, I thought Senator Booker did a very artful job of going down the path of questions that you could answer "yes" or "no" to in terms of who you would hire and who you would fire. So let me just make sure that I am also clear on something you cannot respond to.

But quite honestly, if firing someone because of their gender identification is immoral, it is also something that if anybody even suggested it that has ever worked in my organization, they would get fired before the sun set. I have been very passionate about this issue since 1997 when I set up a gay and lesbian recruiting practice at Price Waterhouse. That is becoming the norm. It is on us to fix it. It is not on the Judge to determine how we are going to get it done.

And as for HBCUs, I am also proud to have led the first HBCU recruiting practice at Price Waterhouse. It is critically important.

Again, if it comes under threat under the law, then let's do our job and fix it.

The last thing for you. Now you get to answer questions.

Judge Kavanaugh, there are about 350 lawyers at the Kasowitz firm. Is that right?

Judge KAVANAUGH. I do not know the number.

Senator TILLIS. I think that is right based on what we found in looking up the firm. Do you know all of them?

Judge KAVANAUGH. No.

Senator TILLIS. Are there any that you do know?

Judge KAVANAUGH. I know Ed McNally. He used to work in the White House Counsel's Office when I was in the White House.

Senator TILLIS. Have you ever talked with him about the Mueller investigation?

Judge KAVANAUGH. No.

Senator TILLIS. Do you know anyone else that works at the firm?

Judge KAVANAUGH. Not that I am aware of.

Senator TILLIS. Thank you. I again appreciate it, and it gives me one more chance to thank your family and all your friends and all these folks here who are probably going to have to go get back massages.

[Laughter.]

Senator TILLIS. So, thank you all. God bless you. I look forward to supporting your nomination.

Chairman GRASSLEY. Let me close and give the Committee the agenda for tomorrow, and then we will go to our closed session.

Judge, I am very pleased that the American people have finally had an opportunity to listen to you and to hear directly from you, because that is what these last 2 days have been all about, and I hope a lot of people in this country have formed very positive views of you, as I have.

It seemed to me that you made a powerful and convincing case for Senate confirmation, hours and hours of questioning, and your answers have been compelling and credible. Your 12 years of judicial experience on the most important Federal circuit court in America, 10,000 pages of judicial writings I think proves that unquestionably you are qualified to serve on the Supreme Court of the United States.

We also ought to be very impressed with you as a person, a lifetime of public service. In addition to serving as an outstanding judge, you have been a professor, coach, volunteer and, probably most importantly, I think you would see your position as a husband and dad as the most important thing in your life.

Tomorrow is the fourth and final day of this hearing. We will have four panels. On the first panel we will hear from two witnesses from the American Bar Association. Of course, everybody knows that Democratic leaders have called their judgment of somebody a "gold standard" of judicial evaluations, and they have rated you unanimously "well qualified" to serve on the Supreme Court.

We will then have three more panels after the ABA panel where we will hear from 26 additional witnesses, 13 from the Majority, 13 from the Minority, and many of these witnesses include Judge Kavanaugh's former law clerk students, friends and associates. I

look forward to hearing about their personal bonds with you, Judge.

Now, without objection, the Committee Members and Judge Kavanaugh will move into closed session in Dirksen Room 226.

This session is adjourned.

[Whereupon, at 10:12 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 3 follows Day 5 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

FRIDAY, SEPTEMBER 7, 2018

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m., in Room SH-216, Hart Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Graham, Cornyn, Lee, Cruz, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. Good morning, everybody. I welcome you to our fourth and final day of the Kavanaugh confirmation hearing.

Over the last 3 days, the American people heard directly from the Judge. He sat through hours and hours, and I think my staff calculated 32½ hours of our colleagues' statements and, of course, our colleagues' questioning. I think he made a very compelling case that he is one of the most qualified nominees, if not the most qualified, that we have seen for the Supreme Court of the United States. And I have seen, I think, 15 of them.

He demonstrated that his 12 years of exemplary judicial service on the Nation's second-highest court uniquely qualifies him for promotion to the Nation's highest court. In fact, on today's first panel, we will hear from two witnesses from the American Bar Association. The ABA, whose assessment, particularly by Democrat leaders—I like to quote that they refer to it as the “gold standard” of judicial evaluation—has rated Judge Kavanaugh unanimously “well qualified” to serve on the Supreme Court.

I am going to tell you a little bit now how today is going to evolve. Each ABA witness will have 5 minutes to make an opening statement. We will then have 5-minute rounds of Senators' questioning of the panel. We will have 3 more panels after the ABA panel, where we will hear from 26 additional witnesses.

Many of these witnesses include the Judge's former law clerks, students, friends, and associates. They will help make the case that

not only is Judge Kavanaugh one of the most qualified nominees that we have, Judge Kavanaugh is also an exceptional judge, teacher, coach, volunteer, and dad. And I am sure we will hear that.

Now I want to point out one person that is going to come on a later panel because he has deep Iowa roots. I am pleased and proud to hear from Professor Adam White—grew up in Dubuque, Iowa, graduated from Dubuque Wahlert High School, the University of Iowa, and Harvard Law School. And Adam's parents live in Bettendorf, Iowa. So he is probably not here yet, but I welcome Adam. And I hope to meet his parents as well.

We will divide the time equally between the Majority's 13 and the Minority's 13 witnesses. Each witness has 5 minutes to make an opening statement, then 5 rounds for Senators' questioning of each of the 3 panels.

Our first panel today will feature two representatives from the ABA Standing Committee of the Federal Judiciary: Paul Moxley and John Tarpley. I would like to have you folks stand now so that I can swear you.

[Witnesses are sworn in.]

Chairman GRASSLEY. Now before you give your testimony, I know a fine lawyer in Des Moines by the name of Mr. Brown who does a lot of what you are doing, and I know he spends a lot of time doing it and takes it very seriously. So let us—did you two folks—

Senator FEINSTEIN. Do I get to make a statement?

Chairman GRASSLEY. I am sorry. You do get to make a statement.

I apologize. Go ahead. You should make a statement, yes.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you. Thank you very much. Thank you, Mr. Chairman.

I do not have any questions for the two panelists, but I want to thank them both for all the hard work the ABA does, not just on the evaluation of Judge Kavanaugh, but on your evaluation of all of the district and circuit court nominees that come before the Committee.

I, in particular, pay special attention to the recommendation, and for me, speaking personally, it is very important. And I want you to know that, and I believe I speak for Members on my side as well.

For decades, the American Bar has provided an analysis of judicial nominations to provide the Senate and the American public with an important assessment of a nominee's qualifications. So thank you.

The kind of rating it is, is to some extent what colleagues know of colleagues, and I think it is important because we see one side of a person, but the ABA sees their professional side and hears about their professional side. And I think that is very important.

The rating is not determinative, and by no means is it the only consideration necessary to evaluate a nominee. It does provide the useful insight into whether the nominee has the legal competence, temperament, and integrity to be elevated to the Federal bench,

and I think it is critically important for the ABA to be allowed to follow its process and finish its work before a nominee has a hearing.

And I know I am, Mr. Chairman, speaking for our side on that point. Because this enables the Committee to ask questions of the nominee, especially if the ABA's evaluation suggests areas of concern in the nominee's record. So I hope we can return to such a process.

Once again, thank you for your hard work, and welcome today.

Thanks, Mr. Chairman.

Chairman GRASSLEY. Thank you.

Mr. Moxley, do you want to start for your group?

Mr. MOXLEY. Happy to.

Chairman GRASSLEY. Thank you.

STATEMENT OF PAUL T. MOXLEY, CHAIR, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, SALT LAKE CITY, UTAH

Mr. MOXLEY. Thank you, Mr. Chair and Ranking Member Feinstein. We are honored to be here today representing our committee and to explain our evaluation of Judge Kavanaugh.

We gave him the highest rating possible, which is unanimously "well qualified." For over 60 years, we have conducted thorough, nonpartisan, nonideological peer review of nominees to the Federal courts. We assess the nominee's integrity, professional competence, and judicial temperament.

The Standing Committee does not propose, endorse, or recommend nominees. We only evaluate the professional qualifications of a nominee to the courts.

I am from Salt Lake City. John Tarpley, to my left, is from Nashville, Tennessee, and in the gallery is Bob Trout. And we were also assisted by Pam Bresnahan, who was the chair of this committee in July when the nomination came in.

To be a nominee to the Supreme Court, one must possess exceptional professional qualifications. As such, our investigation of a nominee to the Supreme Court is much more extensive than the other Federal courts. First, all of the Circuit members of the committee, of which there are 14, participate in the evaluation. Every Federal Circuit in the country is covered by these 14 people rather than just the Circuit in which the nominee resides.

Second, while the Standing Committee independently reviews the writings of the nominee, we also commission three reading groups. In this instance, we had the University of Maryland, University of Utah, and a professional group. And in this group of people were approximately 48 law professors and distinguished practitioners.

Members of the reading groups independently evaluated factors such as the Judge's analytical abilities, the clarity of writing, knowledge of the law, application of the law to the facts, expertise in harmonizing a body of law, and the ability to communicate effectively. We contacted and solicited input from almost 500 people who are likely to have knowledge of his qualifications, including Federal and State judges, lawyers, and bar representatives. Some

of these people were identified in his Senate questionnaire, which you are also familiar with.

Also, our committee had a confidential evaluation performed on Judge Kavanaugh in the years 2003, 2005, and 2006 when he was nominated to the D.C. Circuit Court. We also, Mr. Tarpley and myself and Mr. Trout, met with the Judge for about 3½ hours in early August and, since then, have talked to him regularly on the telephone, had email exchanges, and the like.

We concluded that his integrity, judicial temperament, and professional competence met the highest standards for appointment to the Court. Our rating of unanimously “well qualified” reflects the consensus of his peers who have knowledge of his professional qualifications, and we reached out to a broad range of legal professionals, including almost 500 people, and we conducted about 120 personal interviews.

And with that, I conclude my opening statement.

[The prepared statement of Mr. Moxley appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Moxley.

Mr. Tarpley.

**STATEMENT OF JOHN R. TARPLEY, PRINCIPAL EVALUATOR,
AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON
THE FEDERAL JUDICIARY, NASHVILLE, TENNESSEE**

Mr. TARPLEY. Thank you, Mr. Chairman, Ranking Member Feinstein, and Members of the Committee.

Good morning. I am John Tarpley. As my colleague Paul Moxley reported, I am the lead evaluator of the American Bar Association’s investigation of Judge Kavanaugh’s nomination to the United States Supreme Court. It is my privilege to be here, and it is my privilege to present this testimony on behalf of the committee’s evaluation of Judge Kavanaugh’s professional qualifications.

Let me point out at the start the Standing Committee did not consider Judge Kavanaugh’s ideology, his political views, or his political affiliation. It did not solicit information with regard to how Judge Kavanaugh might rule on specific issues or cases that could come before the United States Supreme Court.

Rather, the ABA Standing Committee’s evaluation of Judge Kavanaugh was based on a comprehensive, nonpartisan, nonideological peer review of integrity, professional competence, and judicial temperament. In evaluating integrity, the Standing Committee considers the nominee’s character and general reputation in the legal community, his industry, and his diligence.

The Standing Committee found that Judge Kavanaugh enjoys an excellent reputation for integrity and is a person of outstanding character. It was clear from all of our interviews and other lengthy conversations that he learned the importance of integrity from a very early age and throughout his life.

Importantly, many of the lawyers, judges, and others interviewed praised his integrity. They said his integrity is absolutely unquestioned. He is a person of the highest morality and the highest ethics. He is what he seems, very decent, humble, and honest.

Another said, he always seeks to be fair. He is not result-oriented. He wants to do the right thing.

On the basis of our comprehensive evaluation process, the Standing Committee concluded that Judge Kavanaugh possesses the integrity for our highest rating, a unanimous “well qualified.”

Professional competence, this encompasses qualities such as intellectual capacity, judgment, writing, analytical abilities, knowledge of the law, and breadth of professional experience. A Supreme Court—must possess all of these exceptional qualities. Judge Kavanaugh’s professional competence easily exceeds these very high criteria.

One of the reading group members noted in reviewing his scholarly work, their view was that Judge Kavanaugh writes and analyzes the law and the application of the facts to law and that—with exceptional clarity and that his opinions are well organized, resulting in clear precedent. Another said Judge Kavanaugh is an excellent writer with a flair for making complicated facts very understandable.

Given the breadth, diversity, and strength of the positive feedback we received from judges and lawyers from all parts of the profession, the committee would have been hard-pressed to come to any conclusion other than that Judge Kavanaugh has demonstrated exceptional professional competence. Those with whom he has worked and those who have been involved in cases over which he has presided have applauded his intellectual acumen, his thoughtful discernment, and his written clarity. As a result, the ABA Standing Committee has determined that Judge Kavanaugh possesses sufficiently outstanding professional competence to be rated unanimously “well qualified.”

In evaluating judicial temperament, the ABA Standing Committee considers a nominee’s compassion, decisiveness, open-mindedness, courteousness, patience, and freedom from bias. Lawyers and judges overwhelmingly praised Judge Kavanaugh’s judicial temperament. They said, among other things, he is very straightforward. He maintains an open mind about all things.

He is an affable, nice person. He is easy to get along with and even has a good sense of humor. Can you imagine that? A judge with a good sense of humor? He is really a decent person. His temperament is terrific. He is thoughtful, fair-minded, always fair-minded in his questions to counsel. Thus, our highest rating in this category.

In conclusion, Mr. Chairman, I note that the ABA Standing Committee shares the goal of your Committee, to assure a qualified and independent judiciary for the American people. On behalf of the ABA’s more than 400,000 members from one end of the country to the other, I want to thank you for the opportunity to present this statement explaining our evaluation.

We are a very diverse group of lawyers and we agreed unanimously that Judge Kavanaugh meets our highest standards and rated him as unanimously “well qualified” to serve as an Associate Justice on the United States Supreme Court.

Thank you again for this opportunity, and thank you for your service.

Chairman GRASSLEY. I will not have any questions of you. I am going to start with Senator Graham. But before I do that, I just want to thank you not only for your testimony, but you and your

colleagues that did this review, we thank you very much for that part of your public service and your dedication to the rule of law.

Senator GRAHAM, and then Senator Feinstein.

Senator GRAHAM. Well, thank you, Mr. Chairman.

That was an incredible explanation and overview of a well-lived life. Do you agree with that?

Mr. TARPLEY. Absolutely.

Senator GRAHAM. He sounds like a great judge, but a lousy politician. He has no chance in my business.

What I would like to do is thank you because very seldom do we have moments like this in modern politics where you pick people outside the rim of politics to give us some insight about a person like you have done. Often—not often, but sometimes, we disagree with the ABA’s rating from a Republican point of view.

I am glad you do what you do. I want it to continue. When you reach a conclusion that I disagree with, it will not be because I do not respect your opinion. From this Committee’s point of view, I think this is a valuable input.

Some of us think you may be more left than right at times as an association, but that does not matter to me. What matters to me is the quality of your work, and I think you do the country a great service.

So just to sum up. Intellect, A-plus?

Mr. TARPLEY. Absolutely.

Senator GRAHAM. Do you agree with that, Mr. Moxley?

Mr. MOXLEY. Yes.

Senator GRAHAM. Integrity, A-plus?

Mr. MOXLEY. A-plus-plus.

Senator GRAHAM. Again, we have nothing in common, I do not, with Judge Kavanaugh, so far as an A-plus-plus. I think I have got integrity, but I am not going to—I am not going to put myself in the category of this man in terms of his ability to impress his peers.

Would you say he is mainstream in terms of being a judge?

Mr. TARPLEY. Absolutely. He is at the top of the stream.

Senator GRAHAM. Okay. Have you ever heard the word “radical” used when it came to Judge Kavanaugh?

Mr. MOXLEY. No.

Mr. TARPLEY. Not in—not in all of the evaluations that we have done, and we have communicated with more than 100 lawyers and judges who work with him on a regular basis.

Senator GRAHAM. If he is confirmed, do you think the Court will be in good hands if he is a member of it?

Mr. TARPLEY. We gave him our unanimously “well qualified” rating. It is our highest rating. Absolutely.

Senator GRAHAM. Do you agree with that, Mr. Moxley?

Mr. MOXLEY. Absolutely.

Senator GRAHAM. Are either one of you running for President?

Mr. TARPLEY. Oh, no.

[Laughter.]

Mr. TARPLEY. I will save that job for you, Senator.

Senator GRAHAM. Did not work out.

[Laughter.]

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. I have no questions, except to say that I think the report in writing is very helpful. I think the individuals' names that are down here who have participated in different aspects of it is very helpful. I think we have something that becomes part of the standing record.

Mr. MOXLEY. Yes.

Senator FEINSTEIN. And there has been some controversy about the ABA, as you probably know. And I think the way to really solve it are reports like this, which are thorough and contemplative and helpful.

So, thank you.

Mr. TARPLEY. Thank you.

Mr. MOXLEY. We understood we needed to make a motion for the admission of the statement as well?

Chairman GRASSLEY. I just think it is automatically accepted because we always say you have 5 minutes and a longer written statement would be included.

Senator Cruz or—go ahead, Senator Cruz.

Senator CRUZ. I do not have any questions, but I want to briefly enter into the record—

Chairman GRASSLEY. I should say that we do all this without objection. I do not hear any objection so that the report is received. [The report appears as a submission for the record.]

Chairman GRASSLEY. Go ahead.

Senator CRUZ. I want to briefly enter into the record a letter from the Solicitors General of 12 States, including the State of Texas. These SGs have written in their personal capacities “to express our strong support for the confirmation of Judge Brett Kavanaugh.”

They write, “The Solicitor General serves as the State’s chief appellate litigator. Thus, we represent our States in the U.S. Supreme Court, carefully study the work of the Court, and have a keen appreciation for the role that the Court plays in safeguarding the rule of law, including vital federalism and separation of powers principles. In our view, Judge Kavanaugh would make an outstanding addition to the Nation’s highest court. Throughout his distinguished career, Judge Kavanaugh has demonstrated an unwavering commitment to preserving the rule of law and advancing the legal profession.”

And so I would like to enter this into the record.

Chairman GRASSLEY. Without objection, it will be received.

[The information appears as a submission for the record.]

Chairman GRASSLEY. Senator Coons.

Senator COONS. Let me just ask both of you one question, if I might? Would it concern you if we proceeded to consider a nominee for a judicial post without taking into account the ABA’s advice? Paul.

Mr. MOXLEY. Yes.

Mr. TARPLEY. I will just add to that—Paul knows that I am the wordy one of this duo. But I will add to that, yes, I think it is an integral part of the process. It is an important part.

I am a lawyer. I am really interested in the kinds of judges that we have. All of our 410,000 members bring a unique perspective to this process. Our individual committee members bring a unique se-

rious perspective to the process. It is valuable work we believe that we do, and we think it is important to the process.

Mr. MOXLEY. What I would add to that is, that the thing that is hard to get your mind around is, that if you have practitioners from a particular district or circuit and they are well known to the courts, and you call the judges in your district or the lawyers in your district, they are going to be—because they know you, they are going to be more honest and candid with you, and since it is confidential. And part of our rule is, that if someone brings up negative information about a nominee, unless we take that information back to the nominee for them to rebut it, we do not use it. But it gives—it gives the work that we do more authenticity, at least in our minds it does. And obviously, we are doing this on a pro bono basis, and we think it is important or we would not be doing it. Because we are interested—

Senator COONS. Well, thank you.

Mr. MOXLEY. We are interested in having good courts, and we represent everyday people who are dependent on the courts.

Senator COONS. I consult and rely on the ABA ratings when I am considering district court, circuit court, and obviously Supreme Court nominations. I appreciate your input both on Justice Kavanaugh, but this is input that I look for every time we are doing a confirmation hearing and I think is valuable, and I think it ought to be part of our regular process.

I appreciate your appearing before us today.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you, Senator.

Senator CRAPO.

Senator CRAPO. Thank you, Mr. Chairman. I did not have a question, but now I do.

I, too, appreciate deeply the work that the ABA does and the ratings and reviews that it gives on all of our candidates. To me, that is not the question that this Committee has been struggling with.

The question is whether the ABA, or anybody for that matter, should be giving a blackball and be able to prohibit or ban a candidate from being considered by this Committee if it does not give it its approval. What are your thoughts on that?

Mr. MOXLEY. Incidentally, one of your fellows from Idaho was chair of this committee, Tim Hopkins.

Senator CRAPO. A great attorney. Good friend.

Mr. MOXLEY. Great, great lawyer and great man. I do not think that—we only see our part of the ball, and what we are familiar with is the competence of nominees, their integrity, and their judicial temperament. You may have other considerations that are not on our minds, and I do not think we blackball them. We just give our recommendation.

Senator CRAPO. Mr. Tarpley?

Mr. TARPLEY. I agree with that.

Senator CRAPO. Thank you. All right, thank you very much. And thank you for your testimony here today. I appreciate it.

Mr. MOXLEY. Thank you.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

I want to join in thanking you for your excellent work and the values that you uphold in this work, the highest traditions of our profession, which is advocacy for people regardless of their station in life, their status, their background, their race or religion. And for that kind of advocacy to work, we need judicial independence, and I want to thank you for making that a specific criterion in your report, and you remarked that you believe that Judge Kavanaugh would uphold judicial independence.

I hope that you join me in the very, very strong feeling that attacks by public officials, and I am not going to mince words—by the President of the United States—on our independent judiciary are a disservice to judicial independence and the integrity of our judicial system.

Mr. TARPLEY. I can respond quickly on that one, Paul. The ABA feels very strongly that a fair and independent judiciary is a linchpin of our society. The Founding Fathers set it up like that. It survived all these hundreds of years, and we feel very strongly about the fair and independent judiciary.

Mr. MOXLEY. What I would add to that is, that a Federal district court can declare an act, an Executive order as unconstitutional, enter injunctions, and that is also true for legislative bills. And that is an integral part of our legal system, the federalism and the fact that each branch of Government is coequal.

Senator BLUMENTHAL. But attacks on the courts that undermine the faith and confidence of the public in the credibility of our courts are a real blow to judicial independence, are they not?

Mr. MOXLEY. I do not disagree with that.

Senator BLUMENTHAL. I want to just note for the record that both of our guests seem to be in agreement with that proposition, and I thank you very much.

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

Gentlemen, thank you for being here. Do you have colleagues in the audience who worked with you on this effort?

Mr. TARPLEY. Certainly. We mentioned Bob Trout, a distinguished lawyer here in the District of Columbia, just immediately behind us, who was our local person on the ground, who did a tremendous amount of work.

And Denise Cardman, our staff representative from the American Bar Association. We are proud of both of them.

Senator KENNEDY. Mr. Chairman, with your permission, may I ask them to stand?

Chairman GRASSLEY. Yes, would you, please?

Senator KENNEDY. I want to thank all of you for your hard work and your input.

Mr. MOXLEY. Thank you.

Senator KENNEDY. Thank you for being here.

Chairman GRASSLEY. Senator Whitehouse, do you have a question?

Senator WHITEHOUSE. Sure. Gentlemen, your evaluation of the nominee related to his qualifications and produced a conclusion that he was “well qualified”?

Mr. TARPLEY. Unanimously “well qualified.”

Senator WHITEHOUSE. In the evaluation of the nominee's qualifications, did you have a chance to look at any patterns in his decisions on the court?

Mr. TARPLEY. We looked at a number of decisions. Our reading group examined every decision that he rendered. They read many of his writings. To be candid, I did not see a pattern in his decisions.

If there were a—if there is a pattern to the decision, it is what we saw was an allegiance to the law, a dedication to looking at the facts of each particular case and applying the law to the facts of that case, and a faithfulness to precedent.

Senator WHITEHOUSE. Did you make any effort to cross-reference who the parties, or amici, were in these cases in that review?

Mr. MOXLEY. Yes, I will answer that, Senator, and I am not sure if you were here during the beginning parts of our remarks.

Senator WHITEHOUSE. I was not.

Mr. MOXLEY. Yes. But we had—we had three different reading groups who participated in this evaluation, and there were two different law schools that participated—University of Utah and University of Maryland. And then we had a practitioners group. And this consisted of 48 people who broke the law into different areas and gave us a report on their—the opinions.

Senator WHITEHOUSE. And in that evaluation, did it take into account what amici, for instance, were appearing before the court?

Mr. TARPLEY. The amicus curiae that appeared before the court?

Senator WHITEHOUSE. Yes.

Mr. TARPLEY. I mean, that was a part of the record in every case.

Senator WHITEHOUSE. Obviously. But was that part of your analysis?

Mr. TARPLEY. We did not look at who the parties were to the case.

Senator WHITEHOUSE. Or who the amici were?

Mr. TARPLEY. We looked—when the cases were read, it was considered as to who the parties were.

Senator WHITEHOUSE. Yes.

Mr. TARPLEY. As well as who all the amicus curiae were.

Senator WHITEHOUSE. But in terms of looking for any pattern, there was no cross-referencing between decisions and who amici and parties were?

Mr. MOXLEY. Do not think so.

Senator WHITEHOUSE. Okay. Just wanted to check. Well, the reason I asked that question, to be totally up front about it, is that as we showed earlier, when certain amici come before the D.C. Circuit, amici who tend to be associated with and funded by very powerful, very wealthy right-wing interests, they seem to have a better than 90 percent win rate in front of this particular judge.

And I know that he says that he makes decisions based only on the quality of the legal work and the argument before him, in which case it seems that these particular amici seem to have some very superhuman lawyering going their way because a win rate above 90 percent, to me, is a bit of a signal that there may be something else going on to pursue. Since you never looked at that underlying statistic, presumably you drew no conclusions about it?

Mr. MOXLEY. That is correct.

Senator WHITEHOUSE. Okay. Thank you.

Mr. MOXLEY. But if it would be helpful to the Senator, we could have the reading groups look at that particular question.

Senator WHITEHOUSE. I do not know that we have time, but I will consider that. I will get back to you.

Mr. MOXLEY. Thank you, Senator.

Chairman GRASSLEY. Let us see, I guess all of my colleagues have asked the questions they want to ask.

So we thank you, and we will call the second panel. Thank you very much.

Mr. TARPLEY. Absolutely. Thank you so much.

Chairman GRASSLEY. We will wait just a minute while people get the right names up here, and then we will have the second panel come.

[Pause.]

Chairman GRASSLEY. I have indicated to the audience that we have three more panels, where we will hear 26 additional witnesses. Many of these witnesses include Judge Kavanaugh's former law clerks, students, friends, and associates.

Our next panel includes the following 10 witnesses, 5 for the Majority and 5 for the Minority. We have Congressman Richmond, Mr. McCloud, Ms. Garza, Ms. Garry, Ms. Weintraub, Mr. Olson, Ms. Baker, Ms. Sinzduk, Professor Murray, and Professor Amar.

I would ask if you would stand. And I should have said this before you sat down, I am sorry.

[Witnesses are sworn in.]

Chairman GRASSLEY. Thank you for your affirmation.

Now, when the Congressman comes, this will be his introduction. Cedric Richmond is a U.S. Representative, Second District, Louisiana. Currently serves as Chairman of the Congressional Black Caucus.

Luke McCloud served as law clerk for Judge Kavanaugh in 2013, 2014. He also served as law clerk for Paul V. Niemeyer, U.S. Court of Appeals, Fourth Circuit; Justice Sotomayor, Supreme Court; and he is an associate at Williams & Connolly.

Rochelle Garza serves as managing attorney of Garza & Garza Law, located in Brownsville, Texas.

Louisa Garry is a teacher at Friends Academy, Locust Valley, New York. She has known Judge Kavanaugh for 35 years.

Liz Weintraub is an advocate specialist at the Association of University Centers on Disabilities, Silver Spring, Maryland. She previously served as a fellow in Senator Bob Casey's office.

Ted Olson is a partner of Gibson, Dunn & Crutcher. He served as Solicitor General of the United States, 2001–2004, and as Assistant Attorney General in charge of the Office of Legal Counsel, 1981–1984. He has argued more than 60 cases before the Supreme Court.

Alicia Baker is a pastor of the Free Methodist Church in Indiana.

Colleen Roh Sinzduk is a senior associate, Hogan Lovells. She previously served as a law clerk for Chief Justice Roberts and Judge Garland on the D.C. Circuit. Ms. Sinzduk was a student of Judge Kavanaugh's at Harvard Law School.

Professor Melissa Murray, professor of law at New York University School of Law. She previously served as a law professor at University of California-Berkeley.

Professor Akhil Amar is the Sterling Professor of Law and Political Science at Yale University, where he teaches constitutional law in both Yale College and Yale Law School. After graduating from Yale Law School, the professor served as a law clerk to then-Judge Breyer on the U.S. Court of Appeals, First Circuit. The professor taught Judge Kavanaugh when he was a student at Yale Law School.

We will start with you, Mr. McCloud.

STATEMENT OF LUKE McCLOUD, FORMER LAW CLERK, AND ASSOCIATE, WILLIAMS & CONNOLLY LLP, WASHINGTON, DC

Mr. McCLOUD. Thank you, Mr. Chairman, Ranking Member Feinstein, Members of the Committee.

I am honored to speak with you today about my former boss and my current friend and mentor, Judge Kavanaugh.

I had the privilege of serving as one of Judge Kavanaugh's law clerks from 2013 to 2014. During that time, I worked closely with the Judge—day in, day out—helping him to prepare for arguments and draft opinions. I witnessed firsthand the Judge's approach to deciding cases large and small, and what I saw leaves no doubt that Judge Kavanaugh would make an outstanding Supreme Court Justice.

Judge Kavanaugh is a fair-minded and independent jurist. Regardless of the parties to the case or the issues being litigated, Judge Kavanaugh worked hard to understand every argument and perspective. There was always another opinion to read, another piece of the record to review, another angle to explore.

That was true even when a case turned on legal issues the Judge knew well. He never looked for an easy answer or assumed that he had considered all of the relevant points. Judge Kavanaugh pushed himself to master every aspect of the cases he worked on, and he expected his clerks to do the same.

To be sure, Judge Kavanaugh and I did not always see eye to eye on what the law required, but the Judge did not want clerks who reflexively agreed with him or who never offered a contrary opinion. Just the opposite, Judge Kavanaugh has made a point of surrounding himself with a diverse group of law clerks—diverse ideologically, diverse racially, and from diverse backgrounds—so that he can better understand all sides of a given issue.

I can vividly recall spending hours with my fellow clerks gathered around the Judge's desk, debating the meaning of some statutory phrase or the best way to understand a precedent. Invariably, the opinions that Judge Kavanaugh produced reflected his careful consideration of and respect for views other than his own.

Moreover, when we disagreed, I always knew that Judge Kavanaugh had come to his position honestly, based on a rigorous analysis of the strengths and weaknesses of the arguments before him. There was no hidden agenda or partisan axe to grind. Just the law, always the law.

These qualities have earned Judge Kavanaugh a sterling reputation for his work on the bench. But Judge Kavanaugh has also

shown himself to be a leader when it comes to his work outside of chambers. I especially admire Judge Kavanaugh's efforts as an advocate for those who are underrepresented in the legal profession. He regularly speaks to diverse law student associations to encourage their members to apply for clerkships. The Judge also actively mentors the minority students he teaches, helping them become future leaders within the law.

Judge Kavanaugh's commitment to promoting the careers of minority attorneys is also apparent from his own clerk hiring. Of his 48 law clerks, 13 are racial minorities, including 5 African Americans. These percentages are nearly unheard of amongst his peers.

Many of the Judge's minority law clerks have gone on to clerk for the Supreme Court, something that is still all too uncommon in these days. I am fortunate to count myself among them, but I would not have even applied for that position had it not been for the support and encouragement of Judge Kavanaugh.

Again and again during the year I worked for him, Judge Kavanaugh showed himself to be a model of judicial excellence. But even more than his intelligence and his diligence, it is Judge Kavanaugh's character, his fundamental decency and kindness, that inspired me then and continues to inspire me now.

Despite being one of the most prominent judges of his generation, Judge Kavanaugh remains humble and gracious. He is unfailingly polite to everyone he interacts with at the courthouse, from his colleagues on the bench, to litigants, to the court's professional staff. Judge Kavanaugh also volunteers regularly in his community and encourages all he knows to do the same. He is, in short, a dedicated public servant, in the truest sense of those words.

I will always be proud, incredibly proud, of the time I spent as Judge Kavanaugh's law clerk, and I am prouder still today to support his confirmation to the Supreme Court.

Thank you.

[The prepared statement of Mr. McCloud appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. McCloud.

Now, Ms. Garza.

**STATEMENT OF ROCHELLE M. GARZA, MANAGING ATTORNEY,
GARZA & GARZA LAW, BROWNSVILLE, TEXAS**

Ms. GARZA. Good morning. Thank you for the opportunity to testify in this hearing on the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States.

My name is Rochelle Garza. I am an attorney and managing member of Garza & Garza Law, PLLC, in Brownsville, Texas, along with my brother, and law partner, Myles R. Garza.

My practice is focused on working with children, immigrants, and victims of violence, including unaccompanied minor children, through the areas of immigration, family, and criminal law.

I am proud to have been the guardian ad litem for the young woman known as Jane Doe, an unaccompanied immigrant minor who the Trump administration attempted to block from accessing abortion, and I am here today to talk about what this experience was like for Jane and the impact that Judge Kavanaugh's ruling had on her life.

Jane was 17 when she left her home in Central America, where she was physically abused by her parents, and traveled thousands of miles to seek safety. In September 2017, she arrived in the United States after a long and dangerous journey. As she later said, “My journey was not easy, but I came here with hope in my heart to build a life I can be proud of.”

She was put into the custody of the Office of Refugee Resettlement and placed at a facility for immigrant children in the Rio Grande Valley. There, Jane learned she was pregnant. She immediately knew she did not wish to proceed with the pregnancy and expressed this to the facility staff, but as we were about to learn, Jane would face unprecedented obstruction by the Trump administration.

I will never forget meeting Jane for the first time. She was a petite, 17-year-old. But as I quickly learned, no one should underestimate her. Her resolve was strong, and she was very certain about her decision to terminate her pregnancy.

In Texas, minors seeking to terminate their pregnancies must obtain parental consent or a judicial bypass, which is an order from the court allowing the minor to consent to the procedure on her own. It was in that context that I was appointed Jane’s guardian ad litem.

A State court granted her bypass, and we scheduled her appointment and confirmed the medical costs would be covered by a private source. It was then that the Government stepped in and ordered the facility from going to her medical appointments.

The way that Jane was treated was unbearable. Even after she made her decision, she was forced to undergo biased counseling, including a medically unnecessary sonogram at an anti-abortion crisis pregnancy center. As Jane later said, “People I do not even know are trying to make me change my mind. I made my decision, and that is between me and God.”

Against Jane’s objections, they told her mother she was pregnant and wanted an abortion. And even though Jane disclosed that when her older sister became pregnant, her parents had beaten her until she miscarried. Jane was placed under constant surveillance and no longer allowed to leave on outings or exercise.

Despite all of this, Jane was strong. She was determined not to be forced to carry the pregnancy to term against her will. So we fought back on her behalf. We filed a lawsuit in Texas State court to require the facility to allow Jane to be transported. At the same time, the ACLU pursued a constitutional lawsuit in Federal court in DC on my behalf as Jane’s guardian ad litem.

Although the ACLU represents me, to be clear, I am testifying on my own behalf.

The ACLU obtained an emergency order from the district court to stop the Government from blocking Jane’s abortion, but the Government appealed. Judge Kavanaugh issued an order giving the Government 11 more days to find a sponsor for Jane, something they had already failed to do for the previous 6 weeks.

Furthermore, at the end of those 11 days, Judge Kavanaugh’s order would not have granted Jane—that Jane could finally get the care she needed. Rather, she would have to start her case all over again, and the Government could appeal. This could have taken

weeks and might have forced her to carry the pregnancy to term against her will, particularly because Texas bans abortion at 20 weeks, and Jane was already 15 weeks pregnant.

The pain that this caused her is impossible to describe. Throughout her ordeal, I saw her suffer. No politician or judge saw firsthand what she went through. As she later said, "It has been incredibly difficult to wait in the shelter for news that the judges in Washington, DC, have given me permission to proceed with my decision."

Thankfully, the full Appeals Court overturned Judge Kavanaugh's decision, and I was with her when she had her abortion. I saw the relief that she experienced when she was able to realize the decision that she knew was right for her. But at that point, Jane had been forced to remain pregnant against her will for an entire month and by the time—from the time she obtained her judicial bypass.

I am and will always be in awe of Jane. She possessed a profound strength of character. She believed that no other girl should have to go through what she went through. And, as she said, "No one should be shamed for making the right decision for themselves."

I can think of nothing more human or more American than what I saw in Jane. Knowing that she is now pursuing the life she hoped for gives me great pride. She may have been petite, but she ignited change. And just like she said, "This is my life, my decision."

It was an honor to represent her and to be by her side and to witness true perseverance and to share her story with this Committee today.

Thank you.

[The prepared statement of Ms. Garza appears as a submission for the record.]

Chairman GRASSLEY. Ms. Garry.

**STATEMENT OF LOUISA GARRY, TEACHER,
FRIENDS ACADEMY, LOCUST VALLEY, NEW YORK**

Ms. GARRY. Chairman Grassley and Ranking Member Feinstein, my name is Louisa Garry. I am a high school teacher and coach. So it is unusual for me to not be in the classroom with my students on the first Friday after Labor Day, but I am honored to be here to voice my support of my college classmate and longtime friend.

I met Brett Kavanaugh in 1983, almost exactly 35 years ago today. We were both incoming freshmen at Yale. Brett was standing under a tent with his parents, waiting to depart for the freshman outdoor orientation. I grew up in a small town in Ohio and was accustomed to saying hello to everyone. So I walked up and introduced myself. Brett warmly received my greeting and thus began a friendship that continues to this day.

Our enduring friendship might surprise some because in certain ways, we are quite different. I have been teaching and coaching high school students for the last 30 years while Brett pursued a high-profile career in law. Brett comes from a Catholic upbringing in a city and tends to have a conservative outlook while I would describe myself as a moderate Quaker who seeks out running trails and ocean beaches.

Our differences have allowed us to learn from each other and see things from a different perspective. We have maintained a close friendship based on our mutual respect, support, and trust.

One of the things Brett and I do have in common is an appreciation for competitive sports. We both have daughters, and we often talk about the benefits of youth sports in raising strong, independent girls and women with confident voices. Brett and I not only watch a lot of sports, we also run together.

We first started running together while Brett was in his first year of Yale Law School and I was working at Yale and training to compete in the 1988 U.S. Olympic trials for track. Brett was not much of a runner, but he could keep up with me on an easy warm-up.

After he ran his first three-mile race, Brett announced that he wanted to run the Boston Marathon in his third year of law school. He asked me to promise to train and to run it with him, and I agreed. Even though I was a competitive runner, I had never run anything close to a marathon in distance, but Brett's faith in my ability as a runner and coach gave me confidence to take on this challenge.

During the marathon, Brett waited for me through water stops and bathroom breaks, just as I waited for him through leg cramps and blisters. We ran together, step for step, for 26.2 miles and crossed the finish line at exactly the same time. We ran the Boston Marathon together again, step for step, two more times, in 2010 and most recently in 2015 in celebration of our 50th birthdays.

Four hours is a long time to spend with someone as you physically and mentally struggle through the miles, but I was lucky to go through it with Brett, whose humor, fortitude, and idealism elevates those around him.

Brett and I share an interest in the growth and development of young people. Many people have heard about Brett's basketball coaching expertise, but I believe even more students have benefited from taking a class with Brett at Harvard, Yale, or Georgetown. Brett is a bright, articulate, and engaging educator, and he is generous with the time and attention he devotes to mentoring others.

In November 2016, Brett welcomed juniors from my school to the Federal court for a field trip to learn about the judicial system. As we prepared for the visit, my students wanted to know, is Judge Kavanaugh conservative or liberal? I responded they should wait and determine the answer on their own.

Brett spent over an hour with my class, explaining his role as a judge, discussing current issues facing the Federal court of appeals, answering the students' questions, and listening to their voices. He spoke passionately about his belief in the judicial system and the importance of the separation of powers in Government. As we left the Federal court, a couple of students immediately remarked, "We could not tell. Is he conservative or liberal? Can you tell us?"

I responded, that is how it is supposed to be. The judiciary is supposed to be independent.

Brett has a wide circle of friends of diverse political viewpoints and often shows a willingness to step into potentially uncomfortable forums with a spirit of collegiality. At our 30th Yale College reunion, Brett joined a panel on free speech. The panel broadly rep-

resented the diverse perspectives of our classmates, and each of the panel members spoke respectfully about the challenges faced by universities in addressing issues of free speech.

When discussing how to balance a wide range of opinions, Brett quotes the character, Atticus Finch, from the book, “To Kill A Mockingbird,” and emphasizes how important it is to “stand in a person’s shoes.” Brett does not just speak words of empathy and tolerance, he listens and acts upon these words. His friends and colleagues describe him as a kind, thoughtful person and a good listener.

I leave it to others to speak to Brett’s judicial record. I am here to speak to his outstanding qualities, personal qualities as a life-long friend. Brett Kavanaugh will be a voice of fairness and integrity as a Justice of the Supreme Court.

Thank you.

[The prepared statement of Ms. Garry appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Garry.

Now, Ms. Weintraub.

STATEMENT OF ELIZABETH “LIZ” WEINTRAUB, ADVOCACY SPECIALIST, ASSOCIATION OF UNIVERSITY CENTERS ON DISABILITIES, SILVER SPRING, MARYLAND

Ms. WEINTRAUB. Thank you, Chairman Grassley and Ranking Member Feinstein and the Members of the Committee for believing that I have something important to say about Judge Kavanaugh.

Fifty-one years ago, I was born with cerebral palsy and an intellectual disability. I entered a world that had low expectations for me and people like me. Judge Kavanaugh has shown that he has the same low expectations, and I am here to tell you that he is wrong.

I have achieved more than many thought possible for someone like me. I work full time as a professional where I host “Tuesdays with Liz,” a weekly YouTube series where I talk to people about policy in a way that people with intellectual disabilities can understand. You are all invited to be my guest on “Tuesdays with Liz.”

Today, I live with my husband, who also happens to have a disability, and together, we make our own decisions. It has not always been this way. In my twenties, some professionals and my parents decided to put me into a private institution. My parents love me, but instead of treating me like an adult with opinions and preferences and asking what I wanted, they made the decision for me like I was a child.

This was wrong. In the self-advocacy movement, there is a saying that we hold very dear to our hearts, and that is, “Nothing about us without us.” This means that any decision that affects us should include us. We expect to be part of the conversation, even to lead the conversation. Self-determination is a basic human right for all people with disabilities. People with intellectual disabilities have opinions and preferences, and they should be recognized.

Judge Kavanaugh’s nomination matters to me. Reading the *Doe v. DC* case made me very upset that Judge Kavanaugh’s decision did not respect people’s rights and their freedom of choice. This is wrong. The lower court in *Doe* told the D.C. government that it

needed to ask people with intellectual disabilities if they wanted certain medical treatments. That requirement respects the civil rights of people with disabilities.

Judge Kavanaugh had a chance to stand up for the rights of the woman in the case, but he failed. He said that the D.C. government did not even need to ask them what they wanted but could decide for them what was going to happen to their bodies. Would this have been too hard to ask? Ask them what they wanted. Every adult deserves to be treated like a grown-up and have the right to be asked what they wanted, especially when it is about their own body. If they need support to understand and make an informed choice, then give it to them.

Our country is founded on liberty and justice for all. And all means all. I worry about a Supreme Court Justice who does not believe that we, as people with intellectual disability, can make decisions for ourselves.

If Judge Kavanaugh is confirmed, I am afraid that my right to make decisions for myself will be taken away. I ask you, for myself and my community, when you vote on Judge Kavanaugh, please do not vote to turn the clock back and take the rights that I and others have fought for.

Thank you very much.

[The prepared statement of Ms. Weintraub appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Weintraub.

I assume that if you are like everybody in the House of Representatives, you are always busy, and you would like to go—that is why you were probably on first. So I think I will go to Congressman Richmond. Welcome.

I previously had introduced you as a Congressman and Chair of the Congressional Black Caucus.

STATEMENT OF HON. CEDRIC L. RICHMOND, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF LOUISIANA, AND CHAIRMAN OF THE CONGRESSIONAL BLACK CAUCUS, WASHINGTON, DC

Representative RICHMOND. Thank you, Mr. Chairman, and we did have pending votes. So I want to thank you for the courtesy and apologize for being late. And I want to thank the Ranking Member, Senator Feinstein, for being here.

Earlier this week, my Senator argued that—or stated that, “It’s not the U.S. Supreme Court that is supposed to fix this country culturally, economically, socially, spiritually. Courts should not try to fix problems that are within the province of the U.S. Congress, even if the U.S. Congress does not have the courage to address those problems. Our courts were not meant to decide these kinds of issues.”

That logic would mean that African Americans would not be able to attend integrated schools, buy a home previously owned by a White person, or lodge at certain hotels. In many cases, the high court has acted when Congress had neither the courage, nor the will to act.

For nearly eight decades, African Americans have fought to secure historic legal victories that have significantly bent the moral

arc of the universe toward justice, even at times when progress felt incremental. Nonetheless, we know that reversing meaningful progress for decades to come would be profoundly devastating and an affront to all who courageously fought on the front lines, some of whom I currently represent as Chair of the Congressional Black Caucus.

President Trump has seized on this opportunity to pack the courts by selecting judicial nominees who lack pragmatism and are often strikingly unqualified and proven intolerant bigots. We are in the midst of a fundamental shift toward nominees that embrace ideology at the fringes of mainstream legal thought.

The current administration has nominated and, with help of Senate Republicans, has confirmed a range of nominees whose confirmation hearings portend a precarious legal fate for communities of color moving forward. Mr. Kavanaugh's confirmation would fortify a generation of destructive conservative ideology at a time when several historically significant legal challenges will come before the high court.

As Members of the CBC, we cannot overstate what is at stake for African Americans and communities of color across the Nation. Judge Kavanaugh, who relies heavily on the same textualist reading of the Constitution employed by former Justice Scalia, possesses a conservative judicial record that leads us to believe that voting rights, education, criminal law outcomes will be greatly endangered in the coming years. A careful, in-depth evaluation of his record, which has largely been shrouded in secrecy and withheld from public examination, uncovers writings that illustrate sparse commitment to equal protection under the law.

Additionally, Judge Kavanaugh's lack of deference to precedent is staggering and inconsistent with other conservative judges who currently preside on the D.C. Circuit Court with him. A judge who frequently questions key legal precedents represents a grave danger to many legal frameworks that have advanced the African-American community.

Voting rights. From Ohio to Wisconsin to Georgia, the vestiges of Jim Crow have resurfaced under a new cloak unchecked and unabated. While these States are no longer conducting literacy tests, the effects of their new policies have been implemented with staggering precision and efficiency.

By a 5-to-4 vote more than 5 years ago, the Court struck down Section 4 of the Voting Rights Act of 1965, making Section 5 of the law essentially unworkable. The decision has precipitated a myriad of voter suppression efforts across the country.

Most recently, the Randolph County Board of Elections and Registration in Georgia inexplicably considered a proposal calling for the closure of more than three quarters of the polling locations in the 60 percent Black county, including one location that is 97 percent African-American.

Despite the eventual rejection of this ill-fated proposal, the Federal Government never bothered to intervene and fulfill its statutorily obligated responsibilities. Simply put, there is no longer any active Federal mechanism dedicated to oversight and safeguarding an individual's constitutionally protected right to vote.

As I told you in January 2017, Jeff Sessions' record on civil rights is questionable and one that shows that he does not care about enforcing civil rights. It is within this context that we have grave concerns about Judge Kavanaugh's opinion in the 2012 case of *State of South Carolina v. Holder*.

In 2011, under the fully viable Voting Rights Act of 1965, the Obama administration blocked enforcement of South Carolina's State-issued photo ID law because it affected up to 8 percent of Black South Carolinians. In his ruling to uphold the law, Mr. Kavanaugh claimed it "does not have the effects that some expected and some feared."

Not only is this statement inexplicably tone deaf, it is also inconsistent with reality. These same real-life consequences reverberate to other elements of everyday life for Black families. On criminal justice, Judge Kavanaugh's record on criminal justice is entirely unsatisfactory for a country persistently struggling to hold law enforcement accountable for mass incarceration and police brutality. He has expressed a desire to overturn precedent that protects civilians from officers engaging in activities inconsistent with the Fourth Amendment. He suggested the probable cause standard should be more flexible, which would expose more African Americans to failed policies, police tactics like stop-and-frisk.

Additionally, Judge Kavanaugh's support for narrowing individuals' Miranda rights would hurt people of color, who are disproportionately subject to excessive law enforcement engagement in their respective communities.

And last, affirmative action. Mr. Kavanaugh's record on affirmative action is particularly disturbing and ripe for intense scrutiny. Almost 20 years ago, while in private practice he wrote that in the future, the Supreme Court would agree that "in the eyes of Government, we are just one race."

Given the Department of Justice's recent investigation into Harvard University's admissions practices, we are deeply troubled by the increased likelihood this will come before the Supreme Court in short order.

With that, Mr. Chairman, I will submit the rest of my testimony for the record, but I would just conclude by saying that with the cloud of criminality and lack of transparency, the Congressional Black Caucus—which is 48 Members—we represent 78 million Americans. And I just wanted to say for the record, of those 78 million, only 17 million are African-American.

We represent a vast variety of people. And we represent a collective conscience of this country—Black, White—in the spirit of Goodman, Chaney, and Schwerner, who gave their life to make this country a more perfect union, and to fight for civil rights, and to fight for justice. And it is within that spirit that we have grave concerns and oppose the nomination of Justice Kavanaugh.

And thank you for your time, and I know I went over.

[The prepared statement of Representative Richmond appears as a submission for the record.]

Chairman GRASSLEY. Thank you very much, Congressman.

Now, we go to Mr. Olson.

[Disturbance in the hearing room.]

**STATEMENT OF HON. THEODORE B. OLSON, PARTNER,
GIBSON, DUNN & CRUTCHER, AND FORMER SOLICITOR
GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF
JUSTICE, WASHINGTON, DC**

Mr. OLSON. Thank you, Chairman Grassley, Ranking Member Feinstein, and Members of the Committee.

I have had the privilege of practicing law throughout the United States for over 50 years in State and Federal appellate courts and 63 times before the United States Supreme Court. I have argued to 20 different Supreme Court Justices appointed by 11 Presidents, from President Eisenhower to President Trump, one-fifth of our Nation's Justices appointed by one-fourth of our Presidents.

My experience has given me firsthand exposure to the Justices numerous Presidents have selected for the Supreme Court, the qualities that these Justices have exemplified, and the standards they have established for themselves and for their successors. Each of these Justices has manifested the highest professional and jurisprudential standards, the qualities we expect in Justices appointed by Presidents of any political party.

I have won and lost my share of decisions from Justices appointed by Presidents of every political background. I can say that in every case, my clients and arguments were received with respect, understanding, and great care. Americans are rightly proud of the Supreme Court and its Justices, the envy of the world.

I will elaborate on five of the characteristics that I have seen in Supreme Court Justices. First, intelligence and learning. A Justice on the Supreme Court must understand the Constitution, the separation of powers, the Bill of Rights, the role of each of the three branches of Government, and Federal laws ranging from antitrust and patents to criminal procedure and the environmental. And I could go on and on.

The Court decides 75 cases each year involving an awesome range of complex subjects, demanding from each Justice an extraordinary breadth of understanding, experience, erudition, judgment, and insight.

Second, respect for precedent and judicial tradition. The Justices before whom I have appeared have uniformly manifested abiding respect for the role of the judiciary and past decisions of the Court. Not every precedent is inviolate, of course. As Justice Breyer has explained in his book, "Making Democracy Work," the Court has occasionally been mistaken or wrong, but its errors have generally been corrected over time.

The Justices are mindful of the importance of stare decisis and the public's reliance on past decisions, but within the context of an overarching fealty to the meaning and intent of the Constitution and the rule of law.

Third, open-mindedness and independence. Justices, of course, have their individual histories, predilections, and past writings. But each Justice must examine every case on the merits, carefully review precedents, briefs and oral argument, and the views of their colleagues, and only then come to a decision. Any other approach—

[Disturbance in the hearing room.]

Mr. OLSON. Any other approach would, as Justice Ginsburg has explained, “display disdain for the entire judicial process.”

Fourth, integrity. The Justices of our Supreme Court, like our judiciary in general, reflect rock-solid integrity. We may strongly disagree with the Court’s decisions from time to time, but no credible critic would suggest that the Court’s decisions are corrupt or dishonest. Our citizens respect and obey even very unpopular decisions because they believe in the integrity of the judicial process and the honesty of our Justices.

Fifth, temperament. An open mind and respectful temperament and collegiality are vital to the Supreme Court. And the Justices before whom I have appeared uniformly listened to and probed, often intensely, the arguments presented to them. But however strongly they have disagreed in a particular case, they have remained respectful, warm, and gracious to their colleagues and to the advocates who appeared before them.

I have known Judge Kavanaugh for two decades. I know from personal observations and experience that he possesses and has consistently exemplified the qualities that I have described. He received an outstanding education in one of the Nation’s finest law schools, clerked for extraordinary jurists, including the Justice he is being nominated to replace, taught constitutional law at Harvard Law School, served in the executive branch and in private practice, and for 12 years at the highest level of the Federal appellate judiciary. He is thoughtful, gracious, open-minded, respected by his peers, and widely praised by the lawyers who appear before him.

Our system contemplates that Justices will be appointed by Presidents of either party. As lawyers who appear before the Court and as Americans who must live with the Court’s decisions, we cannot expect that our cases will be decided by jurists who always agree with our positions.

But we can aspire to a judiciary that will be prepared, perceptive, competent, open-minded, honest, and respectful. That is the jurist that is Brett Kavanaugh. He is the kind of person and judge that we expect and deserve on the Supreme Court. I hope you will confirm his appointment to this Court.

[The prepared statement of Mr. Olson appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Olson.
Now, Ms. Baker.

**STATEMENT OF ALICIA WILSON BAKER,
INDIANAPOLIS, INDIANA**

Ms. BAKER. Good morning, Mr. Chairman and Members of the Committee.

My name is Alicia Wilson Baker. I am a pro-life Christian and ordained minister from Indiana. I am someone who was denied the birth control I needed because of my insurance company’s religious beliefs, and I am honored to be here today, truly honored to speak on behalf of everyday women.

If Judge Kavanaugh is confirmed to the Supreme Court, I fear that many woman, especially those who can least afford it, will not get access to affordable birth control because of their employer’s religious beliefs. Birth control allows women and people to control

their lives, and without it, women's health and their futures are at risk.

I would like to tell you about my background. I grew up in a devout Christian family in California. My parents were leaders in our church congregation. My childhood is filled with happy memories of attending church, learning how to put faith into action through mission trips and serving our community.

I decided to go to seminary and become an ordained minister so that I can serve others. I currently work at a local neighborhood center in urban Indianapolis, where I collaborate with local agencies and neighbors to improve the quality of life in our neighborhood.

In 2015, I met and fell in love with my best friend, Josh, who is here with me today. Like me, Josh is also a Christian who believes that faith a verb. It is about how we live our lives. And like me, Josh had decided to wait until marriage to have sex.

Once we got engaged, we knew we would not be ready to have children right away. So we started researching birth control options. Josh and I were on a tight budget as we struggled to pay off our students loans and save for a home. We were relieved that the Affordable Care Act requires health plans to cover birth control at no additional cost to us.

On my doctor's advice, I decided to get an IUD, but what I got was a nightmare and a \$1,200 bill. It turned out my insurance company had a religious objection to covering my birth control. Nothing in our faith disapproves of birth control. We were making prudent and responsible decisions for our family, but our beliefs and our decisions were overridden by the religious beliefs of an insurance company.

In the days leading up to our wedding and for several months after, I was fighting with my insurance company, sending appeal after appeal. In the end, Josh and I scrounged together the money. But we had to use the money we had set aside to pay off our student loans and buy our first home together. I still feel a pit in my stomach when I remember the stress and anxiety that we went through just as we were starting our new life together.

But I know I am fortunate. I was ultimately able to pay that bill. But what happens to those who cannot pay for their birth control? What happens to those who face an impossible choice between getting the healthcare they need and putting food on the table or paying for childcare or staying in school?

If Judge Kavanaugh is confirmed to the Supreme Court, access to affordable birth control will be in jeopardy. Just 3 years ago, Judge Kavanaugh heard a case which was about something to what Josh and I had experienced. In that case, Judge Kavanaugh would have allowed employers and universities to use religion to deny birth control coverage to individuals.

If Judge Kavanaugh had his way, courts would give free rein to those who claim their religious beliefs override the law. As a Christian, I am against such broad interpretations of religious freedom. It is not right that employers may be allowed to use religion to avoid following the laws of the land.

I fear that some will use this reasoning not to protect religion, but as a way to discriminate. I shudder to imagine what this means for real people, for the communities I work with every day.

At this critical moment, when so much is on the line for women and their families, my faith guides me. Proverbs 31:8–9 says, “Speak out for those who cannot speak, for the rights of all the destitute. Speak out, judge righteously, defend the rights of the poor and needy.”

As a person of deep faith, I would never impose my religious beliefs on anyone, and no one else should either. My religious beliefs are separate from the law, and that is how it should be. But Judge Kavanaugh’s record shows he does not respect this critical separation.

This Committee and the Senate must weigh the harmful impact that Judge Kavanaugh would have on the health and well-being of so many people. I urge this Committee to block his nomination to the Supreme Court.

Thank you.

[The prepared statement of Ms. Baker appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Baker.

Now, Ms. Sinzduk.

STATEMENT OF COLLEEN E. ROH SINZDUK, FORMER HARVARD LAW SCHOOL STUDENT, AND SENIOR ASSOCIATE, HOGAN LOVELLS LLP, WASHINGTON, DC

Ms. SINZDUK. Mr. Chairman, Ranking Member Feinstein, and Members of the Committee, thank you for the opportunity to address the Committee about my former Harvard Law School professor, Judge Kavanaugh.

I took Judge Kavanaugh’s Separation of Powers class in the winter term of 2009. In the years since, he has served as a trusted mentor to me. My experience as Judge Kavanaugh’s student and mentee has led me to offer my firm support of his nomination to the Supreme Court of the United States.

In some ways, my support for Judge Kavanaugh is unsurprising. A recent New York Times article catalogued the exceptionally strong reviews that Judge Kavanaugh’s students have given to his teaching. Over the years, students’ anonymous feedback forms have consistently lauded the Judge as an outstanding professor, one who strives to present a balanced view of the material in class and who makes himself uniquely accessible to students outside of the classroom. I wholeheartedly agree with that praise.

Multiple articles have also detailed Judge Kavanaugh’s role as a mentor and sponsor for young lawyers, many of them females and minorities. You have heard about Judge Kavanaugh’s impressive record of hiring women and diverse law clerks, but Judge Kavanaugh’s efforts as a mentor are not limited to his clerks. He also works to maintain connections with countless law students and young lawyers across the country.

Judge Kavanaugh is an invaluable resource and advocate for those starting out in the profession and a champion of diversity in the legal world. Ever since I took his class, he has been a mentor

and a sponsor, offering friendly advice, helpful support, and a listening ear as I have navigated the stages of my legal career.

When I was considering applying for a Supreme Court clerkship, Judge Kavanaugh generously offered his advice and support, helping me to obtain a clerkship with Chief Justice Roberts. And when I went back to work after having my first child, a lunch with Judge Kavanaugh helped bolster my enthusiasm for my legal career.

In other ways, however, my support for Judge Kavanaugh may strike some as surprising. I am a registered Democrat, and from 2010 to 2011, I had the great honor of serving as a law clerk for then-Judge, now Chief Judge Merrick Garland on the D.C. Circuit. In that role, I experienced firsthand what a brilliant, fair, and kind jurist he is. I believe the judiciary, and the country as a whole, has suffered greatly from the failure to confirm Chief Judge Garland to the Supreme Court.

I nonetheless support Judge Kavanaugh's confirmation. In my view, preserving and protecting the integrity of the judiciary means supporting and confirming highly qualified judicial nominees, regardless of whether one agrees with the politics of the party that nominated them.

In my experience, Judge Kavanaugh has the traits that make him eminently qualified to serve as a Justice on the United States Supreme Court. His impressive intellect is obvious. But the Judge is also open-minded, he is principled, and he is evenhanded. I would like to speak a little more about each of those qualities.

First, in my interactions with Judge Kavanaugh, he has always demonstrated open-mindedness and intellectual integrity. When I think back on the Judge's Separation of Powers class, it is not his lectures I remember. It is his insightful questions and the classroom debates they sparked.

The course touched on some of the most important issues in our constitutional democracy, but rather than telling us what to think about them, the Judge asked questions that enabled us to develop our own views and share them with the class. More than that, he seemed genuinely interested in hearing our varying perspectives.

One of my favorite law school memories is engaging in a fierce debate with a Separation of Powers classmate over whether *INS v. Chadha* was correctly decided. Judge Kavanaugh seemed delighted to hear both sides, and he encouraged us to develop our conflicting views. With Judge Kavanaugh, I was confident that if I could make the right argument, he would accept my position.

My belief in Judge Kavanaugh's open-mindedness has deepened over the years through my one-on-one conversations with him. I often cannot resist sharing my views on separation of powers issues, and he is invariably an engaged listener and an insightful questioner, despite the fact that we come from different sides of the political aisle.

Second, in my experience, Judge Kavanaugh is highly principled. By that, I mean something very specific. He carefully delineates the difference between policy preferences and what the law demands.

In the Separation of Powers class, we often discussed current events and the way they implicated various constitutional concerns. Policy considerations inevitably came up, and we certainly dis-

cussed those, but the Judge would repeatedly remind us that those policy concerns are beside the point if the Constitution dictates a different outcome. More generally, the Judge taught us that the way to discern the legal principles that undergird our democratic system is to look to the text, history, and precedents regarding the Constitution, not our policy preferences.

Third, Judge Kavanaugh is evenhanded and treats people fairly and with respect. In class, he gave the same consideration to the views of all students. I consistently felt he was judging our answers based on our ability to reason clearly and support our points, not based on any political or ideological standard.

Judge Kavanaugh's evenhandedness goes beyond respect for varying ideologies. In my experience, he treats everyone equitably regardless of their gender, race, or background. One would think, or at least hope that, in 2018, that should not be remarkable. But as a woman, I know that explicit and implicit bias continue to plague the legal profession, just as they plague the rest of society.

Far too often in my career, I have felt that I was being treated as a female lawyer, rather than just as a lawyer. But with Judge Kavanaugh, I have never felt that way. In my interactions with him, I know that I am being judged on the merits of what I say, nothing less and nothing more.

I believe that a person with such sterling credentials and experience as a judge who so clearly values integrity, principle, and fairness is eminently qualified to serve on the Supreme Court. I, therefore, enthusiastically support Judge Kavanaugh's nomination.

Thank you for your time.

[The prepared statement of Ms. Sinzdak appears as a submission for the record.]

Chairman GRASSLEY. Thank you very much.
Now, Professor Murray.

STATEMENT OF MELISSA MURRAY, PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW, NEW YORK, NEW YORK

Professor MURRAY. Chairman Grassley, Ranking Member Feinstein, thank you so much for the opportunity to appear at these hearings on the confirmation of Judge Brett Kavanaugh to the United States Supreme Court.

My name is Melissa Murray, and I am a professor of law at New York University School of Law, where I teach constitutional law, family law, and reproductive rights and justice, and serve as a faculty co-director of the Birnbaum Women's Leadership Network.

Prior to my appointment at New York University, I was the Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley, where I taught for 12 years, served as faculty director of the Berkeley Center on Reproductive Rights and Justice, and served as interim dean of the law school. Like Judge Kavanaugh, I, too, am a graduate of Yale Law School.

Over the course of these hearings, much has been made of Judge Kavanaugh's warmth and kindness toward his clerks and those in his community. These accounts resonate with me, as Judge Kavanaugh and I have traveled in similar professional circles over the years. In fact, I, too, have had lunch with him, and I can attest to his friendliness and charming demeanor.

But this nomination is not about whom I would befriend or with whom I would have lunch. It is not about how Brett Kavanaugh treats a handful of women from elite institutions. It is about real people on the ground, people like the women to my right and the people they represent who will not have lunch with Judge Kavanaugh, who will not meet with Judge Kavanaugh, but who will nonetheless depend on Judge Kavanaugh to protect their constitutional rights to make decisions about their lives.

As you have heard from women like Alicia Baker and Liz Weintraub, confirming Judge Kavanaugh to the Supreme Court would threaten people's ability to make fundamental personal decisions, including deciding whether to have an abortion.

Reproductive rights are under serious threat in this country. What we have seen over the last two decades is a concerted strategy that would dismantle *Roe v. Wade* piecemeal, not in one fell swoop, but rather through a death by 1,000 cuts. This nomination is the culmination of that decades-long effort to destroy *Roe v. Wade* incrementally without necessarily formally overruling it.

The Supreme Court stands as a bulwark against this assault on reproductive freedom. Just 2 years ago in *Whole Woman's Health v. Hellerstedt*, Justice Kennedy joined a majority to reaffirm the undue burden standard first articulated in *Planned Parenthood v. Casey*, thereby reaffirming the Court's commitment to protecting reproductive rights.

But Judge Kavanaugh's nomination to replace Justice Kennedy imperils the Court's ability to continue to hold the line on reproductive freedom. In *Garza v. Hargan*, the only abortion case to come before him, Judge Kavanaugh voted to block a young immigrant woman from receiving abortion care and insisted that she remain pregnant against her wishes weeks after she had made her decision and after she had completed all of the State-imposed requirements.

Although he claimed to follow Supreme Court precedent in *Garza*, Judge Kavanaugh's opinion evinced a crabbed and skeptical view of these precedents, a view that is completely out of the step with the high court's own view of those cases.

Despite his claims during these confirmation hearings that he was respecting Supreme Court precedent on minors and abortion, in fact his dissent shows the opposite. He ignored the Supreme Court's holding in 1979's *Bellotti v. Baird* that allows minors to complete a confidential judicial bypass in lieu of parental or guardian consent.

Jane Doe had already met the Texas requirement of a judicial bypass by the time her case before Judge Kavanaugh. So further delay to seek a sponsor was wholly unwarranted.

Further, Judge Kavanaugh did not explain how the Government's flat prohibition wholly preventing Jane Doe from accessing abortion failed to constitute an undue burden under *Casey* or a previability ban under *Roe*. Nor did he weigh the potential harms to Jane Doe stemming from a further delay against the purported benefits of that delay, as is required by *Whole Woman's Health*.

Judge Kavanaugh's record in *Garza* suggests that rather than respecting precedent, he will undermine or ignore it. And in so doing, he will provide the necessary fifth vote that would utterly eviscerate the right to abortion.

During these hearings, when asked by you, Senator Feinstein, whether he agreed with the statement that a woman's right to control her reproductive life impacts her ability to participate equally in the economic and social life of the Nation, Judge Kavanaugh's reply was not, "I agree." Instead, he said, "I understand the importance of the precedent set forth in *Roe v. Wade*."

We have seen this before. In 2005, then-Judge Roberts came before this Committee and stated that *Roe* is the settled law of the land during his own confirmation process. Despite this earnest declaration, as a Justice, he voted to uphold a statutory scheme that would have shuttered 75 percent of the clinics in Texas.

If this is what it looks like to respect precedent and treat *Roe* as settled law, then these are empty promises. Since 2011, politicians have passed over 400 new laws in 33 States across the Nation that shame, pressure, and punish women who decide to have an abortion. Some of these laws would ban abortion as early as 6 weeks, before a woman may even know that she is pregnant. Others would require doctors to convey a falsehood to patients, telling them that abortion leads to breast cancer.

The point of these restrictions is to make it difficult, costly, and in some cases impossible for women to obtain an abortion. And as such, these restrictions impede women's ability to participate equally in the social and economic life of the Nation. And these restrictions are especially detrimental to young women, women struggling to make ends meet, women of color, immigrant women, rural women, and women who have already had children.

In practice, these restrictions mean that *Roe* is merely a hollow promise and not a reality for many women. To be clear, *Roe v. Wade* is not a decision invented by activist judges. It is part of a century's worth of jurisprudence that protects an entire constellation of rights, rights relating to family, marriage, parenthood, contraception, and personal autonomy in intimate life.

A vote against *Roe*, whether to overrule as a formal matter or gut it through incremental cuts, puts all of those rights in jeopardy. And make no mistake about it, a vote for Judge Kavanaugh is a vote against *Roe*.

Thank you for having me.

[The prepared statement of Professor Murray appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor Murray.

Now, Professor Amar.

STATEMENT OF AKHIL REED AMAR, STERLING PROFESSOR OF LAW AND POLITICAL SCIENCE, YALE LAW SCHOOL, NEW HAVEN, CONNECTICUT

Professor AMAR. Thank you, Chairman Grassley, Ranking Member Feinstein, distinguished Senators.

My name is Akhil Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I specialize in constitutional law. I have previously testified before this Committee on seven occasions, and it is always a solemn responsibility to appear here.

Here are my top ten points.

Point 1. Brett Kavanaugh is the best candidate on the horizon.

The Supreme Court's biggest job is to interpret and apply the Constitution. Kavanaugh has studied the Constitution with more care, consistency, range, scholarliness, and thoughtfulness than any other sitting Republican Federal judge under age 60.

He is the best choice from the long list of 25 potential nominees publicly circulated by President Trump. I say this as a constitutional scholar who voted for Hillary Clinton and strongly supported every Supreme Court nomination by Democratic Presidents in my adult lifetime.

Point 2. Originalism is wise and nonpartisan.

Studying the Constitution requires diligence and intelligence, especially for those, like Kavanaugh, who are "originalists," paying special heed to what the Constitution's words originally meant when adopted. I, too, am an originalist. In prioritizing the Constitution's text, history, and structure to discern its principles and distill its wisdom, we originalists are following in the footsteps of George Washington, Alexander Hamilton, James Madison, John Marshall, Joseph Story, and Abraham Lincoln, among others.

Originalism is neither partisan nor outlandish. The most important originalist of the last century was a towering liberal Democratic Senator-turned-Justice, Hugo Black, the driving intellectual force of the Warren Court, who insisted on taking seriously the Constitution's words and spirit guaranteeing free speech, racial equality, religious equality, the right to vote, the right to counsel, and much more.

Among today's scholars, the originalist cited most often by the Supreme Court is also a self-described liberal and a registered Democrat, yours truly. The best originalists heed not just the Founders' vision, but also the vision underlying its amendments, especially the transformative reconstruction amendments and women's suffrage amendment.

I believe that Justice Kavanaugh will be in this tradition. On various vital issues—voting rights, governmental immunities, congressional power to enforce the reconstruction amendments—Justice Kavanaugh's constitutional views may well be better for liberals than were Justice Kennedy's.

Point 3. Kavanaugh's writings reflect proper respect for tradition and precedent.

Originalists start with the Constitution's text and structure, but almost always need to consult other constitutional sources, such as tradition and precedent. Harmonizing these different constitutional sources requires great legal acumen. Kavanaugh's record shows that he is adept at harmonization.

Point 4. Kavanaugh's views on Executive power have strong constitutional foundations.

Many of Kavanaugh's views about the executive branch are quite standard. On several other executive branch topics, Kavanaugh's views are not yet conventional wisdom but are nevertheless sound and, indeed, align well with the testimony I offered this Committee in 1998 and 2017.

Point 5. The best basis for assessing would-be Justice Kavanaugh is the track record of Judge Kavanaugh.

The judicial track record is more proximate and relevant than Kavanaugh's pre-judicial life.

Point 6. Kavanaugh would work well with his new colleagues.

I predict that Kavanaugh, a studious and open-minded conservative who likes listening to and engaging with moderates and liberals, will be a pro-intellectual and anti-polarizing force on the Court.

Point 7. Judicial nominees should not make substantive promises about how they would rule on specific legal issues, nor should they make recusal promises that closely approximate substantive promises.

Point 8. Senators may properly oppose a judicial nominee simply because they disagree with a nominee's general constitutional philosophy or likely constitutional votes on the bench.

Point 9. The current Senate confirmation process is badly flawed and should be changed for future vacancies.

Point 10. Back to Point 1. Responsible naysayers must become yeasayers of a sort. They must specifically name better nominees realistically on the horizon. If not Brett, who?

Distinguished Republicans, Kavanaugh is your team's brightest judicial star. Rejoice.

Distinguished Democrats, do not be mad. Be smart. Be careful what you wish for. Our party controls neither the White House nor the Senate. If you torpedo Kavanaugh, you will likely end up with someone worse, someone less brilliant, less constitutionally knowledgeable, less studious, less open-minded, less good for America.

Thank you.

[The prepared statement of Professor Amar appears as a submission for the record.]

Chairman GRASSLEY. Thank you all very much.

Before I ask my questions and take 5 minutes to do that, Senator Tillis is going to Chair this Committee after I get done asking questions for this panel, I should say. I will be back, but because I will be gone when you separate, I want to thank all of you for your participation in this process.

And then I think after this panel, it is scheduled that we would have a lunch break.

I am going to start with Mr. McCloud because it seems to me you clerked for different people of different views on interpreting the law and the Constitution—Judge Sotomayor, I believe, and then also Judge Kavanaugh. So I will let you define yourself what the most important characteristics of a Supreme Court Justice is and if you see Judge Kavanaugh meeting these.

Mr. McCLOUD. Well, I think the most important characteristics are, first of all, intelligence and faithfulness to the law. I think Judge Kavanaugh, as his reputation shows from his years on the D.C. Circuit, has those characteristics in spades.

I think something that is maybe underappreciated in terms of the work the Supreme Court does is, how closely the Justices work together, and I share Professor Amar's view that Judge Kavanaugh would work well as a colleague on the Supreme Court. He has talked during these hearings about the idea of a Team of Nine, working together with his colleagues on the Court, to achieve a goal of justice and interpreting the law fairly, and I think that he would live that model if he were appointed to the Supreme Court.

Chairman GRASSLEY. Yes, thank you.

I am going to ask Ms. Garry this, but it is based upon a very strong point that Professor Murray made that we hear a lot about what Professor—or I mean Kavanaugh has done for people that have worked close with him. She fears that he may not take the average American's point of view into mind in his work as a judge.

So what would you want the average American to know about Judge Kavanaugh as a person and how he might see their problems, not the people he has associated with all of his life?

Push the button, will you?

Ms. GARRY. In my experience, Judge Kavanaugh listens and hears everyone he speaks with. I do think he considers people from a variety of backgrounds. I do not think he has lived only in one sphere. I think he has exposed himself to a wide range of people, and I think that he would listen empathetically and hear their voices.

Chairman GRASSLEY. And probably a point he has made and how he serves at—for low-income people at congregate meal programs as an example would be one way I would see from what he has said.

Ted Olson, you are famous in the legal community in this town and around the country as well. So you ought to interact with a lot of people that, in turn, have interacted with Judge Kavanaugh. What do other members of the legal profession say about the experiences that they have had with Judge Kavanaugh?

Mr. OLSON. Thank you, Mr. Chairman. That is a very good question.

The fact is that throughout his legal career, I have heard nothing but the highest praise for Judge Kavanaugh as a human being, as a lawyer, and as a judge. As far as I can tell and as far as I have heard, he is uniformly respected by his peers on the D.C. Circuit with whom he has worked in many cases for 12 years or more, including also the most recent appointees to the Court.

Every lawyer that I have spoken to who has appeared before Judge Kavanaugh has respected the experience and has related to me the fact that he has listened, he pays attention. It is impossible to tell exactly how he is going to decide until you read the decisions that he makes.

So, in summary, the answer to your question is I do not know of a lawyer or a judge who is more uniformly respected in terms of his personality, his character, his integrity, his fairness, and his competence.

Chairman GRASSLEY. Ms. Sinzdek, you obviously remember him as a good teacher. What are those qualities, if you can transfer them to being a good judge and eventually a Supreme Court Justice, what would you say about what you learned of him in class versus his being a judge?

Ms. SINZDAK. I think the qualities are directly transferrable. I think he was a great professor because he not only listened and engaged more than he talked, but he knew how to get people explaining their arguments in the best possible way.

And I think that as a judge, too, he needs to listen to everyone before him. He needs to be able to engage with different viewpoints. And then also he needs to be able to treat those viewpoints equally.

And in our class, I think that he was open-minded and wanted to listen to all, to people of all ideologies equally, wanted to hear the different sides of a discussion. And similarly, I think that as a Justice, he will listen to both sides of an argument. He will consider those.

And then, third, he knows what is important in the law. He was not just a teacher. He was a law professor. And what he told us was that what matters in the law is what the law says, not what your policy preferences dictate. And I think that in many ways, that is the most important quality for a Justice, and I think that he exhibited that.

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Thank you very much.

I want to just pick up on the last sentence that you said. The issue of qualities really should not matter. It should be the fairness, the likeability, the qualifications only. And that might be fine if some of the critical things that many of us—and I am going to speak for myself as a woman who has been a mayor. I represent 41 million people.

And Ms. Baker, America is like you out there today in the young woman. I see it over and over and over again.

And Ms. Weintraub, I am so proud of you. Stand tall. Be strong. You are quite wonderful to be here today.

Professor Murray, I think you were very cogent. I thank you for your remarks. I have never, in all my years here, been with a panel the majority of whom are women, and each one of you brought a different point of view, and it is very, very welcome.

For me, Ms. Garza, I wanted to ask you a couple of questions, if I could, because the Jane Doe case is really a problem for me because what it showed was, there were so many things in her treatment I did not like. The way she was treated by the Office of Refugee Resettlement. She was subjected to unnecessary sonograms, you know, forced to go to a crisis center, subjected to harassment, as I understand it, had been physically abused by her parents, and went to a Texas Judge and received an order of approval.

I do not have that order of approval. What did that order of approval say?

Ms. GARZA. Well, in Texas, you have to get a judicial bypass to bypass the consent from your parents and to consent to your own abortion care. And that order is typically based on a best interest assessment, whether or not it is in Jane's best interest to go ahead and proceed with making that decision on her own or whether or not she is sufficiently mature enough.

So in this case, she was—it was in her best interest to go ahead and proceed with that. A Texas Court decided that, and that is how the case moved forward.

Senator FEINSTEIN. Now the panel that the nominee in question was on, were questions asked? Were you there?

Ms. GARZA. No—no, I was—

Senator FEINSTEIN. It was in appellate court. I understand that.

Ms. GARZA. No, I was not there. However, I did listen to it. The question was not in—the order was not in question. A Texas court made that decision. Jane went through every single hoop she needed to go through in Texas, including complying with the Texas law

of the 2 days, and she was just being blocked. She was not being allowed to be—to go to her medical appointment, and she was not allowed to be released to her ad litem, to myself as her guardian ad litem or her attorney ad litem, that were appointed by State courts.

Senator FEINSTEIN. And why was that?

Ms. GARZA. Just to obstruct her ability to enact her decision. It was a policy enacted under ORR, and they directed the facility not to allow her to be released.

Senator FEINSTEIN. So, Professor Murray, I think the arguments have been made here, and my great query is, women have never historically been treated equal, and finally, you know, we got the vote. It began to change. We were able to go to higher education. The United States began to accept women, and now the world seems to be changing in favor of women.

What I am most worried about this is, that *Roe* goes down, and for what this meant in my generations, which were the 1950s and 1960s, when the death toll was estimated to be between 200,000 and 1.2 million of women that went to illegal abortionists and died. I do not want to see us go back to that day. And so that is inherent in this vote.

Weapons in this country are inherent in this vote, and if you look at where America is going, also the quality of the individual who is going to sit in that deciding seat I think overwhelms most else. Your analysis, and you spoke very cogently, how would you analyze this judge affecting those issues?

Professor MURRAY. Thank you, Senator.

It is clear to me reading Judge Kavanaugh's opinions on these reproductive rights cases, that he says he is following Supreme Court precedent, but that is not the case. In the *Garza* case, which is the only abortion case to come before him, Judge Kavanaugh said he was following the Federal precedent. Yet he did not even engage the question in *Whole Woman's Health v. Hellerstedt*, which would have required him to weigh the benefits of a delay against the burdens it would have imposed against Jane Doe.

That is required by the Supreme Court under its most recent decision in *Whole Woman's Health v. Hellerstedt*. He did not engage that at all.

In requiring that Jane Doe take an additional 11 days for the Government to seek a sponsor, his decision defied *Bellotti v. Baird*, a 1979 case where the Supreme Court held that a State cannot require a minor to obtain parental consent or even to notify a parent unless it provides an alternative judicial bypass option for determining whether an abortion is in the best interest of that minor.

And as Ms. Garza has said, Jane Doe went through that State-required procedure to have a judicial bypass. She obtained that bypass. A Texas State judge determined that an abortion was in her best interest. The Government then still prevented her from obtaining the abortion care she needed, and Judge Kavanaugh's decision, which would have required the Government to continue looking unsuccessfully for a sponsor for an additional 11 days, would have further delayed her care, making it almost 6 weeks from the time she decided to have an abortion until when she could actually receive it.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Senator TILLIS [presiding]. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman.

Thank you to each of the witnesses who are here.

Professor Amar, let us start with you. You are widely acknowledged to be one of the most respected constitutional law professors in the country. In your opinion, is Judge Kavanaugh qualified to serve as a Supreme Court Justice?

Professor AMAR. Unquestionably.

Senator CRUZ. How would you compare his level of qualifications to other Supreme Court nominees, without specifically disparaging any other nominee?

Professor AMAR. I have great respect for all the Justices, but I would actually say, without naming names, that, you know, I might rank him—I might predict that end of—well, were he to be confirmed by this body, at the end of his service, he would rank well above the average. In the—I would say in the top tier of modern Justices, and the modern Justices are quite impressive.

Senator CRUZ. Ms. Sinzdek, you were a student of Judge Kavanaugh's?

Ms. SINZDAK. That is correct.

Senator CRUZ. What was he like as a professor?

Ms. SINZDAK. Well, again, he was open-minded, principled. He was very fair. I mean, he was also a really nice guy. I take the point of my colleagues that likeability is not necessarily a criteria. So I did not gear my comments in that direction, but he was wonderfully warm. He took students out to dinner and was very friendly.

Senator CRUZ. So am I right that you were part of the legal team that brought a challenge to President Trump's so-called travel ban? Is that right?

Ms. SINZDAK. That is correct.

Senator CRUZ. And in your experience at Harvard with Judge Kavanaugh as a professor, you found him fair, open-minded, willing to listen to views from multiple perspectives?

Ms. SINZDAK. I did. I like to hope that I used a lot of the things I learned in Judge Kavanaugh's class to bring that challenge against what I still consider an unconstitutional order.

Senator CRUZ. Mr. Olson, you served with Judge Kavanaugh in the George W. Bush administration. You were Solicitor General while he was in the White House. What was your experience in terms of any professional interactions you had with him at that time?

Mr. OLSON. We did not have a great deal of professional interactions because his position in the White House did not directly relate to what the Solicitor General was doing. We worked often with the Counsel to the President, the White House Counsel. But from time to time, there were opportunities to see the kind of input that he was providing to the people in the White House, the senior officials in the White House, including the President.

He was scrupulous, far as I could tell, scrupulously balanced in making sure that the President and other senior officials in the Department were receiving even-handed presentations. So that he

would assure that if one side was being advanced to the President, that the other side was also being demonstrated.

His thoughtfulness impressed, I think, everyone around him that was dealing with him, both from the standpoint of the White House and the Justice Department.

Senator CRUZ. Now you have argued in courts of appeals all over the country. Have you had the opportunity to present oral argument before Judge Kavanaugh in the D.C. Circuit?

Mr. OLSON. I have. I have presented argument in one of the cases involving separation of powers, the constitutionality of the Consumer Finance Protection Board, and the court heard that case en banc in the D.C. Circuit. All of the judges were engaged in that case. It was the kind of case that the D.C. Circuit is very good at because it involves separation of powers and involves the structure of government.

All of the judges on that case were engaged. The argument must have gone on for a couple of hours. Judge Kavanaugh was as engaged, if not more so than the other judges. He—at the end of the day, he did not agree completely with the arguments that we were making, but he wrote a very thoughtful, reasoned concurring dissenting opinion with respect to the constitutionality of the Consumer Finance Protection Board.

He very carefully parsed what the Supreme Court had said in the *Free Enterprise Fund* case and came to a conclusion that was, I thought, very persuasive, although I did not completely agree with it. Very persuasive and reasonable.

Senator CRUZ. But let me thank each of the witnesses for being here on this panel, and I want to echo what Senator Feinstein said in particular, Ms. Weintraub. Thank you for your powerful and inspirational testimony. Thank you for being here and being part of this panel.

Ms. WEINTRAUB. Thank you.

Senator TILLIS. Senator Klobuchar.

Senator KLOBUCHAR. Thank you.

Congressman Richmond, thank you so much for being here and for your leadership.

I asked some questions yesterday of the Judge about voting rights, and I referenced data from the Brennan Center for Justice showing that 23 States, as you know, have now have more restrictive voting laws than they did in 2010. Can you elaborate on the consequences of *Shelby County*?

And as you know, yesterday Judge Kavanaugh noted that Section 2 of the law remains in effect, and is, in your view, Section 2 sufficient to protect voting rights?

Representative RICHMOND. Thank you for the question.

Section 2 is absolutely not sufficient. And for States like the State I come from and some of the other Southern States that were Section 5 States which had to preclear their actions that affect voting rights, they were not chosen by random, they were chosen because of their past history of affirmatively trying to disenfranchise minority voters.

And so, because of *Shelby*, you do not have that anymore, and you saw the race to the legislature. As soon as *Shelby* was decided,

where the courts held, that the disenfranchisement and the discrimination basically was done with laser-like precision.

Senator KLOBUCHAR. Word from the circuit court.

Representative RICHMOND. Yes. So you see the voter ID laws. You just saw in Georgia where they—there was an attempt to close polling locations right before a gubernatorial race with the opportunity to elect the first African-American Governor in this country. So it is a big concern for us.

Senator KLOBUCHAR. Right. And gerrymandering, as you know, this past term in *Abbott v. Perez*, 5-to-4, Supreme Court upheld a number of Texas electoral maps that the dissent said burdens the rights of minority voters. Again, 5-to-4 decision.

Based on Judge Kavanaugh's record, his testimony before the Committee, what do you think the future holds there when it comes to gerrymandering with him on the Court?

Representative RICHMOND. We are very concerned. And if you look at the effect that it has in terms of representation, especially for minorities, and I am not just saying that. What is important is the ability to elect a minority candidate of your choice. In many instances, minorities choose to elect non-minorities like Steve Cohen who represents Memphis, Tennessee, and does an amazing job.

But the ability to elect a minority is important. And so if the Court shifts toward—makes a drastic shift in terms of gerrymandering, then we face the ability of rolling back the clock in terms of African-American and minority representation in this country.

Senator KLOBUCHAR. Thank you very much.

Ms. Baker, thank you so much. I do not think we focused enough on that case, and you really brought it to light here. Can you tell us quickly why it is important that women are able to access affordable contraception, as well as the impact that you think Judge Kavanaugh's confirmation could have on the laws in this area?

Ms. BAKER. Absolutely. For me, as a Christian, I definitely believe that—well, one of my favorite Bible verses is John 10:10, in which Jesus says, "I have come that you might have life and have it to the fullest." And I definitely believe that birth control helps us to live our best lives as women. It helps us to go after, you know, education or our careers, helps us to better plan our families and when we are ready to have children. And so—if and when.

And so I really think that is critical to helping empower women and continue the advance forward for women in society.

Senator KLOBUCHAR. Thank you very much.

And I think the idea here is that you were someone that is pro-life. Is that correct?

Ms. BAKER. That is correct.

Senator KLOBUCHAR. And you are someone that just simply wanted to be able to afford contraception after you got married. Is that right?

Ms. BAKER. That is correct. Yes.

Senator KLOBUCHAR. And so the Affordable Care Act, there you were hoping to use those provisions and to be able to—there is other things in there that is helpful as well, not getting kicked off of insurance because of pre-existing conditions, an issue that came up here a number of times in our questions and concerns.

But one of them was that you were hopeful about getting contraception that you could afford, is that right, when you got married?

Ms. BAKER. That is correct. Yes.

Senator KLOBUCHAR. And so then what happened here is you go and you get an IUD, and then you find out that the employer is somehow able to exercise their religious rights. Could you explain that just a little more for people?

Ms. BAKER. Yes, absolutely. So I had even gone and done my due diligence and checked with my personal insurance company about the benefits and everything and made sure that it was all clear, not just my knowledge of the ACA, and it said it would be covered. And so when I went to get my IUD, they give a pregnancy test as well, you know, it is being used as contraception.

And so I went and got it put in, and then a few weeks later, we got the EOB for \$1,200. And that was about a month before our wedding and—

Senator KLOBUCHAR. Right.

Ms. BAKER. As you can imagine, the stress that already comes with planning a wedding and then putting that on top of it. We are trying to start our new life together, and so it was just a very difficult thing.

Senator KLOBUCHAR. Thank you.

And Professor Amar, I would ask you questions, but I am out of time. And also, you would have to recuse yourself since you are my daughter's college adviser.

[Laughter.]

Senator KLOBUCHAR. But I would like to note that your comments about the Judge having standard conventional opinions, maybe we can talk about it after, but it just is not my opinion based on looking at his rulings on net neutrality, or some of the things he has said about *Chevron*, or what he said about the Consumer Financial Protection Bureau. And so I am looking forward to debating that with you at a break.

Thank you.

Senator TILLIS. Senator Kennedy.

Senator KENNEDY. Thank you, Mr. Chairman.

I would like to thank all of you for coming today. I know a lot of work went into your statements. I find this kind of testimony very helpful.

Number two, I want to especially thank my colleague Congressman Richmond. I have known him a long time. Before he became a distinguished Congressman, he was a distinguished member of the Louisiana House of Representatives, and he is a smart guy and a fine American. And a good guy, too.

Number three, Ms. Baker, you are a Methodist?

Ms. BAKER. Free Methodist, that is correct.

Senator KENNEDY. Right. I am a Methodist, too. When Becky and I got married, I was raised in the Presbyterian Church. My parents founded two Presbyterian churches. So I was a Presbyterian, and my wife, Becky, was a Methodist. So we compromised, and I became a Methodist.

[Laughter.]

Senator KENNEDY. Ms. "Sinzdak," did I say that right?

Ms. SINZDAK. "Sinzdak."

Senator KENNEDY. Ms. Sinzduk, I appreciated your testimony, too, as I did the testimony of all of you, and I apologize again for hitting you in the head when I was going down to shake Congressman Richmond's hand.

Ms. SINZDUK. That is okay. No harm.

Senator KENNEDY. Mr. McCloud, what year did you clerk for Judge Kavanaugh?

Mr. MCCLOUD. I clerked for him from 2013 to 2014.

Senator KENNEDY. Okay. And then you went on to clerk for the Supreme Court after that?

Mr. MCCLOUD. I did, Senator. For Justice Sotomayor.

Senator KENNEDY. Okay. And now you are with Williams & Connolly?

Mr. MCCLOUD. Yes, Senator.

Senator KENNEDY. You are an associate there?

Mr. MCCLOUD. Yes, Senator.

Senator KENNEDY. Have a lot of free time, do you?

Mr. MCCLOUD. Not much, Senator.

Senator KENNEDY. I agree with my colleague Senator Feinstein that our world is getting better for women. I am biased, of course, but I think our world is getting better for many Americans. I am proud of that.

In the last 20 months, the U.S. Congress and President Trump have cut taxes, increased wages, helped create 4 million jobs, delivered 4.1 percent growth in our domestic product, deregulated the economy, improved healthcare, I believe, for our veterans, strengthened our military, stood up to China and Iran and North Korea and Russia. And last, but not least, we have confirmed some, I think, very accomplished men and women to join the Federal judiciary, including, but not limited to, one Supreme Court Justice and I think soon to be a second Supreme Court Justice.

And I am proud of that record, and I thank you all again for sharing your thoughts with us today.

Senator TILLIS. Senator Whitehouse.

Senator WHITEHOUSE. Thanks very much.

Professor Amar, you mentioned recusal. So, let me follow up with you a little bit on the recusal question.

When you have a judicial nominee whose name has been put forward by the subject of an ongoing criminal investigation and by someone who has been named in open court as directing other criminal activity, in the event that those criminal investigations should ultimately come before the Court and the nominee of that subject and that named co-conspirator is then on the Court, it is fair to say, is it not, that the question of recusal is a very live and legitimate issue?

Professor AMAR. Senator, it is. And I think back to the *Nixon* tapes case where one Justice who had been appointed by Richard Nixon and who had worked in the Justice Department, and Watergate involved questions about the head of the Justice Department, John Mitchell, one Justice, then-Justice Rehnquist did recuse himself from the *Nixon* tapes case, and three did not.

My thought is that that has to be decided when the case arises, and there should never be a promise of any sort to any nominator or to this body in the confirmation process about how you will vote

or even how you will recuse. You decide that when the case comes before you. And Rehnquist decided one way, and three other Justices appointed by President Nixon decided it the other way.

Senator WHITEHOUSE. Now since that episode, there has—the *Nixon* episode, there has been some case law at the Supreme Court developed in the area of judicial recusal, has there not?

Professor AMAR. There has. One thinks, for example, of Justice Scalia's decision not to recuse himself in a case involving then-Vice President Cheney in his official capacity.

Senator WHITEHOUSE. I mean actually legal precedent, as opposed to behavioral precedent at the Court. And I am specifically referring to the *Caperton* decision.

Professor AMAR. Oh, sure. Sure.

Senator WHITEHOUSE. What is your summary of the *Caperton* decision?

Professor AMAR. Thank you, Senator.

So one important thing to understand about that case, which arose out of West Virginia, is it involved a State judiciary, a State-elected judiciary, and one problem with State-elected judiciaries—I know a lot of States have them, I am not a fan of them, nor is Justice O'Connor, retired Justice O'Connor, who has actually made a crusade of this issue—is, you have to raise money to run, and then you do not have life tenure, and you have to raise money to run again.

And that makes it very different, it seems to me, than a Federal judge. One of the great glories of the Federal system is once you are confirmed to the Supreme Court, it is a life tenured position, and you should not make any promises getting it. But even if you did, they are not really, as a practical matter, easily enforceable because you never have to run again.

So I see that case as quite distinguishable in important ways. It also involved a financial—

Senator WHITEHOUSE. Although look at the standard. What is the standard that the Court used to apply to the judge in question to determine that he was constitutionally required to recuse himself? Was it not that the funder, by virtue of the amount of funding that he put into the race, had a significant and disproportionate influence on that judge occupying that seat?

Professor AMAR. That was part of the standard, if memory serves. It is an opinion of Justice Kennedy, for whom Brett Kavanaugh clerked. And there were about 40 different factors, actually, that in the dissent by Chief Justice Roberts were sort of identified as possible limiting considerations in that case.

But you are absolutely right, Senator—

Senator WHITEHOUSE. The standard was significant and disproportionate influence in putting the judge into that seat. Correct?

Professor AMAR. It did involve a huge financial contribution by a private person—

Senator WHITEHOUSE. Correct.

Professor AMAR. In a case that was already pending when—when the person was running for the State Supreme Court, a pending case.

Senator WHITEHOUSE. Correct.

Professor AMAR. A huge financial contribution by a private individual.

Senator WHITEHOUSE. And in this case, you have a pending criminal investigation, and you have somebody who has done a good deal more than put \$3 million toward getting that judge in the seat. He has actually 100 percent put that judge in the seat. Do you not see that there is any potential relevance between the *Caperton* decision and the decision that Judge Kavanaugh would face, if confirmed?

Professor AMAR. May I answer? Thank you, Mr. Chair.

So it is not 100 percent. That is what this body actually is about. Presidents do not put people on the Supreme Court. And if you have any concern whatsoever that any promise of any sort was made to the President or anyone in the White House about this litigation, I would say you should vote no because promises are improper.

There is another relevant precedent on judicial recusal, and to repeat, when that case comes before the Supreme Court, were Justice Kavanaugh to be on it, he is going to have to make that decision, as is everyone else. I just do not want him to promise anything, one way or another as part of the process of becoming Justice Kavanaugh.

That I start Con Law every year teaching *Marbury v. Madison*, which, as you know, actually has a really interesting recusal question, arguably, in it, because John Adams, at the very end of his administration, is putting his Secretary of State, John Marshall, on the Court. And then the case comes before the now-Chief Justice John Marshall, and there is a real question whether he should have recused himself.

I believe he should have, but that is because he had firsthand knowledge of adjudicative facts of the case, but not merely because he happened to have been picked by one President. Because all Justices are picked by one President or another one and confirmed by a Senate.

So it is actually the first question we do, in *Marbury v. Madison*, is the judicial ethics recusal question, and I do not think it is a sufficient basis for recusal just that you happen to have been nominated by a President who happens to be implicated in a litigation. That might not be enough.

Senator TILLIS. Senator Feinstein will be recognized for a correction of the record.

Senator FEINSTEIN. Thank you. I appreciate this, Mr. Chairman, because I apparently misspoke.

It is the estimates of the number of illegal abortions in the 1950s and 1960s that range from 200,000 to 1.2 million per year. I said deaths. That is not correct.

Senator TILLIS. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Mr. Olson, you have been at the center of the DC legal community for decades. What is Judge Kavanaugh's reputation among the lawyers you know? How is he—how is he thought of and regarded?

Mr. OLSON. I do not know of anyone in the judiciary or in the legal profession in Washington, DC, or anywhere around that who is respected more than Judge Kavanaugh. Now there are other

judges, of course, who have a reputation which is very, very high. The D.C. Circuit on which Judge Kavanaugh sits is populated by very, very talented, very fair judges, many of whom could be perfectly well qualified to be on the Supreme Court.

But my experience with respect to Judge Kavanaugh, it would be hard to describe someone with a greater reputation.

Senator HATCH. Well, thank you. You have appeared before Judge Kavanaugh in court many times. What kind of a judge is he? What type of a judge is he during oral argument?

Mr. OLSON. He is very attentive, like other colleagues on that court. As I said, this is a very, very fine court. But my experience has been that he has not only read the briefs, but he understands the history that brings the case to the court.

He is very, very thoughtful. He asks very hard questions of the litigants, no matter which side you are on, very perceptive. The sort of thing that you experience in the United States Supreme Court, where the Justices are probing the strengths and weaknesses of your case and an advocate has to be ready to answer those hard questions.

Judge Kavanaugh asks those hard questions, and you cannot tell from his questions where he is going to come out in a case. He is looking for information and analysis and input from the advocate. That is what a good advocate hopes for in a good judge.

Senator HATCH. Well, thank you.

Professor Amar, what are the most important qualities you think Senators should look for in a potential Supreme Court Justice, and why should people from both sides of the political aisle, Republicans and Democrats, support Judge Kavanaugh's nomination?

Professor AMAR. Senator, I did—I do believe that the most important job of the Supreme Court is constitutional interpretation and implementation. It does other things, but that is the most important. And Constitution does not define itself. It requires a lot of careful study, and I just thought that Judge Kavanaugh, more than any other sitting Federal judge, Republican Federal judge under age 60, has studied it with more care and scholarliness and consistency and range.

He is read very widely. I refer you to the very interesting exchanges he had with Senator Lee, for example, about the Federalist Papers. How many people would know Federalist 37 and 39? Maybe 10, maybe 78.

So, but in answer to—Senator Cruz asked me a question, and I should have said one other thing. It is not just that I think he will be good on his own on the Court. It is that I think he will actually help bring out the best in others. I think it is a small group, and when I think about the one-on-one interactions and the collegial interactions, I see him as exceptional.

And the final thing that I really do want my fellow liberals and Democrats to hear is I believe he actually is likely to be better than many are saying, even on this panel, on things like voting rights, on congressional power to implement the reconstruction amendments. Many originalists do not pay enough attention to the amendments, to the women's suffrage amendment, to the reconstruction amendments.

And when I read what Judge Kavanaugh has written, both on the bench, including a voting rights case that I actually think was an impressive opinion, and I contrast that to *Shelby County*, for example, which I think was the worst decision of the last 20 years, in fact, 15 years, I actually am optimistic about Judge Kavanaugh as someone who will very seriously take the vision of the reconstruction generation and the women's suffrage generation alongside the founding generation.

Senator HATCH. Well, I want to compliment this whole panel. It has been an excellent panel. You folks are really helping us here on the Committee with your testimony from every one of you on the panel. So I am proud of you, appreciate you, and it is one reason why this system does work better.

Thanks, Mr. Chairman.

Senator TILLIS. Senator Coons.

Senator COONS. Thank you, Chairman Tillis.

Congressman Richmond, welcome. I just wanted to follow up on the line of conversation with Professor Amar. Do you think Judge Kavanaugh is the right nominee to replace Justice Kennedy, particularly given Kennedy's critical voice and vote in *Fisher v. University of Texas*, where the Supreme Court upheld UT's race conscious admission policies and given Judge Kavanaugh's decisional record?

Representative RICHMOND. No, and that is a very real concern. Look, the question has been asked now very consistently about affirmative action, whether it is in the *Bakke* case or other cases about whether it is still necessary, and I will just say this. And we will take it out of legalese for a minute and just take it to plain, old physics.

If a ball is rolling down the hill, the only way to stop it is to apply equal and opposite force. And the ball of racism and discrimination in this country rolled down hills for centuries, and the only way to stop it is an opposite, but equal force. And that is what affirmative action and that is what those cases mean.

And if you look at some of the decisions and if you look at Scalia's comments in the last case, he actually questioned the intellect of African Americans and their ability to succeed at a prestigious university. So, when you couple the other Justices and their opinions with Kavanaugh's record, that is what leads to the real concern about where we are going to go with affirmative action, race-based factors in admissions, and others.

Senator COONS. Thank you, Congressman.

Ms. Baker, thank you for both your testimony and your witness today. And thank you for bringing forward what is a challenging and very personal fact pattern.

I just want to make sure I heard right. In some ways, I think for you the most shocking thing and the most upsetting thing was a decision that chooses the religious liberty interest of your employer, a company really—nonprofit, but a company—their views on what contraception you should be able to access versus your views about what you ought to be able to do in preparing for marriage and preparing for parenthood.

Is that what sort of stuck most? As I understood your testimony today, that really in particular struck you as just baffling, that the religious liberty interest of a company ended up trumping yours?

Ms. BAKER. Yes, absolutely. That is something that has stuck with me throughout the whole process.

Senator COONS. Thank you.

Professor Murray, I thought you did a particularly powerful job of explicating the range of ways in which Judge Kavanaugh's writing and opinions caused some hesitation or concern. It is in *Priests for Life*, in his dissent, that he was particularly clear about his view that the complicity of a corporation in being forced to check a box should outweigh the liberty interest of a real, live, breathing person.

Can you just comment on why that tension might strike you as novel or why, given *Hobby Lobby*, you might see this as a very difficult, long-term trend line in this Court, should Judge Kavanaugh be confirmed?

Professor MURRAY. Thank you, Senator.

There are a number of troubling messages that Judge Kavanaugh evinces in that dissent in *Priests for Life*. The first that strikes me is exactly the concern that Ms. Baker related. The Supreme Court has said in *Eisenstadt v. Baird*, decided in 1972, the year before *Roe v. Wade*, that the right of privacy, if it means anything, it is the right of the individual, whether married or unmarried, to make a decision so fundamentally affecting the person as whether to bear or beget a child. The decision about what kind of contraception a person uses is certainly wrapped up in that, and the Supreme Court has acknowledged it.

In the *Hobby Lobby* case, five Justices of the Court said that ensuring access to contraception was a compelling governmental interest. What we saw in *Priests for Life* is that Judge Kavanaugh would defer substantially to the wishes of an employer to—based on the employer's religious beliefs and the employer's faulty understanding of the accommodations process, to deny an individual like Ms. Baker, who has made a reasonable contemplative choice about what is best for her and her family, and instead defer to the wishes of the employer. And that is deeply concerning.

Senator COONS. Chairman, one last question, if I might?

Professor, just to continue, I do not know if you got to see my line of questioning of Judge Kavanaugh I think fairly late last night about the *Glucksberg* test. He said all roads lead through *Glucksberg*, and I went through a line of examination with him about whether or not if that test, deeply rooted in this Nation's legal history and tradition, if that had been applied, whether the outcome would have been the same in a whole range of cases relating to marriage, to intimacy, to access to contraception.

And as Justice Kennedy wrote, I think importantly, in *Obergefell*, if rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. Are you concerned that Judge Kavanaugh might depart from Justice Kennedy's vital jurisprudence in substantive due process and that that might have a real impact on how justice is dispensed in these areas going forward?

Professor MURRAY. I think it is clear from Judge Kavanaugh's judicial record, Senators, that he is not a jurist in the mold of Justice Kennedy, who frequently upheld these precedents like *Whole Woman's Health*, like *Planned Parenthood v. Casey*, in his writings. Judge Kavanaugh, in these decisions, has evinced a crabbed and narrow understanding of the right to liberty.

The right to liberty that is enumerated in the Constitution is not fossilized in amber. It has changed over time to admit individuals who would not have been contemplated within the body of the people at the time of the founding or even just as the reconstruction amendments were being ratified.

So decisions like the right to marry have evolved. We did not have a situation where individuals who wished to marry a person of the same sex could do so until just 2015. These decisions are all imperiled by a Justice who would follow history and tradition unfailingly toward his outcome.

Senator COONS. Thank you. I have many more questions, but I am out of time.

Thank you, Mr. Chairman.

Senator TILLIS. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Thanks to all of you for being with us today.

Mr. Olson, I would like to start with you. Your name has been used a lot this week in our proceedings, not necessarily with your whole name, but your last name has made many appearances with a lot of references to *Morrison v. Olson*. I was wondering if you could just tell us briefly a little bit about your experience with that case?

Mr. OLSON. Well, the *Morrison v. Olson* case, as everybody on this Committee knows, involved the constitutionality of the independent counsel statute under a statute that required the appointment of an independent counsel by members of the judiciary, prevented the removal of the independent counsel except under very narrow circumstances.

The constitutionality was challenged in the United States Supreme Court in a case that I think of as the *Morrison* case, but other people refer to as *Morrison v. Olson*. And the Supreme Court upheld the constitutionality of that case on a 7-to-1 vote, with, in my judgment, a very, very persuasive dissenting opinion by Justice Scalia.

Over time, I have heard from a number of people in the academic world, the legal academic world, that Justice Scalia's opinion dissenting in that case, which was—he has described as—he did describe as one of his most important contributions to jurisprudence, has received much more favorable attention over the years.

The importance of it is separation of powers and the extent to which power vested by Article II of the Constitution in the President shall be reserved to execution by the President or whether it shall be taken from the President and given to other individuals who are not accountable to the electorate through the electoral process. And, of course, I could go on and on, but I do not think you want me to do that. It is an important case, and it may be revisited someday.

Senator LEE. And you raise a great point. In that respect, judicial independence, somebody's willingness to stand out, stand alone, at times dissenting or perhaps concurring in the absence of additional support, can end up having a big influence, as Justice Scalia's dissent in *Morrison v. Olson* made clear. Or in the case of, for example, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*. Over time, they acquired more meaning.

Ms. Sinzduk, I wanted to talk to you a little about your class with Judge Kavanaugh. What was that like, and I noticed that you mentioned *INS v. Chadha* as something that he got you excited about. How did he get the class excited about *Chadha*?

Ms. SINZDAK. Well, I think it is naturally an exciting case.

Senator LEE. I tend to agree, but I have met exactly five people on planet Earth who agree with me there.

Ms. SINZDAK. Well, I mean, I think part of it was that he would, as I mentioned briefly in my remarks, open class talking about current events. So he was very much about contextualizing separation of powers issues as they were affecting the real world, which kind of took what is a lengthy, but scintillating opinion and kind of put it in—so it was about putting it in a practical context of thinking about the legislative versus the Executive power.

Senator LEE. Great. Thank you.

Professor Amar, I cannot resist the opportunity to talk to you about Hugo Black. You mentioned Hugo Black as someone you admire, someone you would look to. And yet he is someone who has offered a number of opinions I assume you would disagree with, author of *Korematsu*, for example.

Tell me about your affinity for Justice Black.

Professor AMAR. Justice Black always carried a copy of the Constitution around with him, and I was charmed when Brett Kavanaugh pulled his out, and it looked pretty well worn to me as if he had maybe looked at it a time or two. Justice Black reminds us that you do not have to have gone to a fancy law school to be one of the greats. I know it has been a concern for some.

They think, oh, it is just Professor Amar just likes the fellow because it is an Ivy League club or something. You come to my office and you see in my office Abe Lincoln, two pictures of Abe Lincoln, and he is a guy who had less than a year's formal education in his whole life. And Hugo Black did not go to a fancy law school. He came from the South land. He was actually underestimated, I think, in part because of that.

There is a very interesting piece about country lawyering in The New York Times by just an op-ed yesterday about how folks who sometimes come from the South, and/or speak a slightly different way, are underestimated by fancy-pants, Yankee Ivy League types.

So, Hugo Black actually—and he is a Southerner who really—a Southern White person who really understood the reconstruction amendments. He was there in *Brown v. Board of Education*, and the people from his hometown did not like what he did in *Brown v. Board of Education*. He championed incorporation of the Bill of Rights against the States. He championed the right of even indigents in *Gideon v. Wainwright*.

But long before that, in a case called *Johnson v. Zerbst*, indigents to have counsel, he was the driving intellectual force of the Warren Court, saying all sorts of things before Warren and Brennan got on the Court. And this body might be interested just from the fact that he was a former Senator turned Justice, and we do not have so many of those right now, but maybe in the future we will. And it is a reminder that you do want all sorts of diversity on your Court. And it really is an issue maybe if they are all coming as Federal court of appeals judges from a few schools. That is a genuine concern to think about.

Senator LEE. Thank you very much, Professor.

Thank you, Mr. Chairman.

Senator TILLIS. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

Thank you all for being here. This panel really is extraordinary, some really powerful advocates.

Thank you, Congressman Richmond, for your standing so strong in a dark and dangerous time for our democracy. When the history of this era is written, my view is that the heroes will be our independent judiciary and our free press, and I would like to ask you, Mr. Olson—by the way, in the interest of full disclosure, you and I argued before the Supreme Court together. You may not remember it because it was 1 of 63 for you, but it was 1 of 4 for me.

Mr. OLSON. I remember it very well, Senator.

Senator BLUMENTHAL. Thank you. And we won 9–to–0 in upholding the sex offender registry case.

Mr. OLSON. Correct.

Senator BLUMENTHAL. I am deeply troubled by the attacks on our judiciary and most especially from the President of the United States. You are absolutely right when you say, and I am quoting you, “Our courts are the envy of the world. They depend on the faith and confidence of the public.” Courts do not command armies or police forces, and the President’s attacks on the courts undermine that credibility.

And so I asked yesterday, Judge Kavanaugh, about some of those attacks, and I was disappointed in his responses. He would not even go as far as Neil Gorsuch did, now Justice Gorsuch, in saying that attacks on the judiciary are disheartening and demoralizing. I also cited to him some remarks made by President Trump about Justice Ginsburg, saying “Her mind is shot, resign. We are all embarrassed by her.”

Do you not think that Judge Kavanaugh and members of our judiciary and all of us have an obligation to stand strong against these kinds of attacks?

Mr. OLSON. I can only speak for myself. I have the greatest respect for our judiciary in this country. I meant what I said. It is the envy of the world.

It is the envy of the world in part because very, very fine people are put on our courts, and our judges and Justices exercise independence from the appointing authority and from everything in their backgrounds. They make independent decisions based upon individual cases. I deplore statements criticizing the integrity or intelligence of members of our judiciary across the board.

As far as Justice Ginsburg is concerned, I have to say that she is someone that I have the hugest respect for. She is a hero in this country, a warrior. She has stood for many, many great things. She argued cases in the Supreme Court that broke ground on behalf of women and on behalf of all of us, and I respect her.

I have argued before her. I lost a very significant case involving the Virginia Military Institute, which she decided. I was representing the State, the Commonwealth of Virginia. She is an extraordinarily talented, able person. She remains so to this day.

Senator BLUMENTHAL. Thank you.

Ms. Garza, when Judge Kavanaugh came before our Committee and I asked him about the real world consequences of the delay, he characterized it as simply a delay in your client being able to terminate her pregnancy. I wonder if you could describe for us what the consequences were and whether those consequences were apparent in the record so that they would have been known to a member of the Court.

And I want to thank you, by the way, for the great work that you are doing in Brownsville. I visited Brownsville. I know what you are doing to try to prevent separation of children from families and passports being taken away from American citizens and some of the other cruel and inhumane practices going on there.

But if you could talk to us about some of those consequences, I would appreciate it.

Ms. GARZA. Thank you for your question.

Well, I had to see Jane go through all of it. Delaying her further, she had already been delayed at that point for many weeks. You know, the coercion tactics, the pressure, and she never once wavered, never once. And this could have affected her. She could have been forced to have a child against her will. So that was—

Senator BLUMENTHAL. She had to have a surgical procedure, did she not, instead of having other options?

Ms. GARZA. The medical abortion. Yes. She had the option to do a medical abortion early on, but because she was delayed and constantly week after week, she had to have a surgical abortion.

Senator BLUMENTHAL. And were health risks—

Ms. GARZA. And the health—yes, and the health risks increased as she was being pushed further into her pregnancy.

Senator BLUMENTHAL. My time is expired. Thank you.

I have a lot more questions. This is a great panel, and I want to thank all of you for being here today.

Thank you.

Senator TILLIS. Senator Booker.

Senator BOOKER. Thank you very much.

So, first, I just want to ask a couple things because I was confused by some of the very—I guess very pointed language. So, Professor Murray, I would like to start with you, if I can?

You were mentioning the standards that were not applied in the *Garza* case. And I pulled the two cases you mentioned, *Bellotti*, which discusses striking down a parental consent statute as unconstitutionally burdensome. So why would not a judge that sticks to precedent stick to this case? I do not understand that.

Professor MURRAY. It is also something I do not understand, Senator. The *Bellotti* case is directly on point with the facts of the

Garza case. Jane Doe had completed the required judicial bypass, which under *Bellotti* is an alternative to securing parental consent. And yet, despite her having done that, Judge Kavanaugh, in his decision before the three-judge panel and again in his dissent, reiterated the need for a sponsor, right, someone, a support network to aid her in making this decision, adding additional delay, something—

Senator BOOKER. But I heard—can you try to put yourself in the shoes of the Judge? What excuse could he possibly have? There is a lot of bragging going on here that when it came to abortion cases or anything, that he would follow precedent. I just—I really sincerely do not understand how this was the binding precedent of the Court about undue burden. The story we heard was gut-wrenching about what this individual had to go through, gut-wrenching.

And there was a clear burden, right? The more you waited, the more of a burden was being put on this person. I just—can you really help me understand this?

Professor MURRAY. Well, during his testimony before this body, Judge Kavanaugh said that his insistence on Jane Doe having a sponsor was because she was a minor. She was alone in this country, and he viewed it as sort of a proxy for parental consent.

But again, I go back to the precedent. The Supreme Court—

Senator BOOKER. Well, a proxy for parental consent. But again, I heard in the testimony from Ms. Garza here that she was—is it true that you were the appointed guardian?

Ms. GARZA. Yes, I was her guardian ad litem.

Senator BOOKER. Right. And so that, to me, just does not hold water.

Professor MURRAY. In addition to precedent upon precedent, there were guardians upon guardians. She had a guardian ad litem. She had gone through the judicial bypass process. A judge in Texas had made the determination that an abortion was in her best interest, that she wanted the procedure. And nonetheless, ORR refused to let her leave Federal custody.

And then Judge Kavanaugh compounded that injury by refusing to allow her to have the abortion, instead insisting that she have a sponsor, adding an additional 11 days to the delay.

Senator BOOKER. And so just real quick, the other case you mentioned, this *Whole Woman's Health* case, is again about weighing certain standards. Correct?

Professor MURRAY. It is about weighing burdens and benefits, and again, Judge Kavanaugh made no mention of that. He made no mention of the burdens of an additional delay. And Ms. Garza has spoken movingly about the difference between seeking a medication abortion versus a surgical abortion, which admits additional risk to the woman.

Senator BOOKER. Right. So this fiction that somehow—and what did you think of it when he used—and maybe, Ms. Garza, I can ask you, what did you think of it when he used this language like “abortion on demand.” All the things, Ms. Garza, that you just outlined to us does not sound like abortion on demand. It sounds like you are signaling something to a whole bunch of folks so you can get yourself on a list so that you can be considered for the Supreme Court. Would you agree with that?

Ms. GARZA. Yes. Simply yes.

Senator BOOKER. Why use that term? Why use that term?

Ms. GARZA. I do not understand what “abortion on demand” means because that was not the situation for Jane. I mean, she was one of the most vulnerable people in our community, one of the most vulnerable human beings. She was an immigrant. She did not speak English. She was in detention, and she was being put under extreme pressure.

And I felt it was unfortunate that Judge Kavanaugh did not take that into consideration.

Senator BOOKER. So I just want to say this is like a fiction that is being presented to us, that somehow there was not an agenda here by this judge to try out for the Supreme Court to a President that promised his supporters I am going to put somebody on there that is going to overturn *Roe*.

Cedric, real quick, you said that equal and opposite force rolling down when it comes to racism, you were not saying that we should have racism against another group or bigotry toward other people. You are talking about equal and opposite force, a positive force for justice, force of life, right?

Representative RICHMOND. Yes, exactly. And it was mentioned today all of the economic improvements in the last 2 years. But what we have not talked about is the increased intolerance, racial intolerance over the last couple of years.

When we grew up, Senator Booker, it was well known about racial profiling and driving while Black and that you could be stopped. But it has gone to another level now. Now it is just living while Black. So whether you are studying at Yale, whether you are sitting in Starbucks, whether you are leaving an Airbnb that you purchased, all of a sudden, just being African-American makes you a criminal suspect. And that has happened since this President was sworn into office. So—

Senator BOOKER. And I just want to get you on the record because we are going to use your words. But you believe you deal with that issue by pursuing justice, not by pushing anybody down.

Representative RICHMOND. No.

Senator BOOKER. It is just by trying to elevate folks up as a matter of justice.

Representative RICHMOND. Yes.

Senator BOOKER. I just want to say to the Chair, I have one more question. It is going to be mean. It is going to be a mean question. So please do not interrupt me, though. Let me get it out. And say “potato, potato” to you, but this is going to be mean. Let me get it out.

Akhil Amar, sir, Mr. Professor, I have one question for you. My final question: In your Con Law class, do you regret passing me? [Laughter.]

Professor AMAR. You have a right to remain silent.

Senator BOOKER. You are under oath.

Professor AMAR. I think the only thing that I ever did to my Wikipedia page was add your name as one of my former notable students because I am so proud to be associated with you, even if we disagree on this issue, as we may very well.

Senator BOOKER. Thank you, sir. Thank you very much.

Senator TILLIS. Senator Harris.

Senator HARRIS. Thank you.

A conversation has come up—Congressman Richmond, I want to ask you a question. But a conversation has come up during this process that leads me to believe that there have been certain dog whistles that have been offered by this nominee, especially in recent years. “Abortion on demand” being one of them.

Another being a term that he used, Congressman Richmond, in a Wall Street Journal op-ed that I asked him about, and the term is “racial spoils system.” And he referred to a racial spoils system, it was in reference to a Hawaiian case and the Office of Hawaiian Affairs. But I asked him about the meaning of that term and what did he mean when he used that term twice.

And he told me, “I am not sure what I was referring to, to be entirely frank,” when I asked him what did he mean by using that term. And I explained to him that it is a loaded term, and I would like for you to share with the Committee what you understand that term to mean and how it has been used, based on your experience.

Representative RICHMOND. Well, I will tell you that it is a very common dog whistle, especially in the South, where you are pitting—and I will just be as frank as I can.

Senator HARRIS. Please do.

Representative RICHMOND. You are pitting poor White people against poor Black people, and your justification to poor White people is that the reason why you are poor is because minorities are scooping up all of the benefits that should be going to you.

And this country is better than that. First of all, it is not true. But second, those programs and those things that I think that he refers to are righting that very wrong history in this country. But just the use of the term is what we see far too often today, which is the dog whistle. It is not even a dog whistle anymore, it is just blatant pandering to a base of people. And I believe that it is a lot more significant than even you would address.

But think of that in the case of race-based factors in admissions, which will come back before the Court because this Justice Department is investigating Harvard right now. So what does that mean for minorities that are applying to prestigious universities or universities all around the country? And that is why it is such a concern.

Senator HARRIS. And to emphasize your point, Congressman, and I actually mentioned this earlier in this process, the Judge has been lauded for the amount of thought that he puts into his writings and the words that he speaks. And the fact that he would use such a loaded term and said he did not understand what it meant was troubling to me as well.

Professor Murray, even if a Justice Kavanaugh does not vote outright to overrule *Roe*, how else could he undermine a woman’s right to make decisions about her healthcare? What other types of scenarios might come before the Court short of overruling *Roe* that could impede a woman’s access to reproductive healthcare or to an abortion?

Professor MURRAY. As I said in my opening statement, it is not just the threat of overruling *Roe*, but incrementally gutting its protections through a death by 1,000 cuts. And there are at least over

10 cases currently pending at the lower Federal courts that all concern restrictions on the methods of abortion that may be used.

Senator HARRIS. So if you will, can you break down for the American public that is watching this hearing so that you can speak to those people who are watching the hearing about the things that they are familiar with that could be impacted short of a Justice Kavanaugh overruling *Roe*.

Professor MURRAY. Certainly. The restrictions that are pending throughout the States, and as I said, there have been over 400 laws passed since 2011. These laws would increase wait times to obtain reproductive care like an abortion. They would eliminate certain methods of abortion, like the dilation and evacuation procedure, which is the safest procedure according to doctors for safely evacuating a fetus from the womb.

They would also do things like require doctors to tell their patients falsehoods about the abortion procedure, that it leads to suicidal ideation or that it leads to breast cancer. These have all been disproven by science. A number of these laws have been passed. Many of these laws have been challenged and those cases are pending, and certainly, there will be a case that may percolate and make its way to the Supreme Court. And if Justice Kavanaugh is on the Bench, he will be in a position to decide.

Senator HARRIS. And to emphasize your point, all of these things could happen short of him overruling *Roe* if he were the deciding Justice on that case?

Professor MURRAY. Again, we can make the protections of *Roe* utterly meaningless for millions of ordinary women in America by simply making this procedure inaccessible, by putting it out of reach, by making it impossible, by making women drive hundreds of miles to obtain abortion care, by making them wait hours, making them leave their jobs, leave their families in order to access care that is their constitutional right.

Senator HARRIS. Thank you.

Mr. Chairman, I have a document that I would ask be added to the record and ask for consent for that. It is from Dēmos regarding this nomination. Dēmos is a public policy organization working for both political and economic equality for all Americans. And the report is in opposition to Judge Kavanaugh's confirmation based on concerns that his confirmation would threaten equal justice for people of color and the future of racial equity.

Senator TILLIS. Without objection.

[The information appears as a submission for the record.]

Senator HARRIS. Thank you.

Senator TILLIS. Senator Coons.

Senator BOOKER. Mr. Chairman, I am sorry. I just—I forgot to put into—or I ask unanimous consent that a letter from the National Latina Institute for Reproductive Health in opposition to Judge Kavanaugh's nomination also be entered into the record.

Senator TILLIS. Without objection.

[The information appears as a submission for the record.]

Senator TILLIS. Senator Coons.

Senator COONS. Thank you, Chairman Tillis.

I, too, would like—would ask unanimous consent that a letter be entered into the record from the Leadership Conference on Civil

and Human Rights. This letter expresses strong opposition to Judge Kavanaugh's nomination on behalf of 180 different organizations involved in civil rights and human rights.

Senator TILLIS. Without objection.

[The information appears as a submission for the record.]

Senator TILLIS. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman.

Ms. Weintraub, can you talk about the dangers you see for Americans with disabilities and their civil rights if Judge Kavanaugh is confirmed to the Supreme Court?

Ms. WEINTRAUB. Yes, thank you, Senator.

Senator HIRONO. Hirono.

Ms. WEINTRAUB. Yes.

Senator HIRONO. Even the Chairman has problems pronouncing my name.

[Laughter.]

Ms. WEINTRAUB. Well, anyway, I see as the issue about the *Doe* case, these are three women with intellectual disability, first in regard to myself and my friends, and we—they were not asked what they wanted to do nor personal decisions around their body, and we all deserve the right to make decisions.

And yes, these women, they may not understand about these issues, but that is why we bring our friends. I would never go into a doctor's office myself. I would take my husband. I would take my supporters. I can tell you that, and it was in my written testimony.

I just was diagnosed with diabetes, and I brought in my husband. And we did not understand. As I told you, my husband also has a disability, and both of us did not understand. So we asked my sister to help us to understand these issues.

So what I am saying is that, "Nothing about us without us." We need to be told. We need to be involved in these decisions. And Judge Kavanaugh took that away from us.

Thank you.

Senator HIRONO. Thank you.

There have been a lot of questions raised about *Garza*, and Judge Kavanaugh testified that—this is for Professor Murray and Ms. Garza. He testified that he viewed *Garza* as a parental consent case, but that was not a parental consent case. Would you agree, both of you?

Professor MURRAY. It was not a parental consent case. The judicial bypass procedure had been followed and was in lieu of parental consent.

Senator HIRONO. So why would—I would characterize that as a very obvious misstatement of the question before the court. And when you get the issue wrong, you are likely to come up with the wrong answer. So I think it was so fundamental that he mischaracterized or misstated the issue. Would you agree with that, both of you, Professor Murray and Ms. Garza?

Ms. GARZA. I would agree with that for sure.

Senator HIRONO. So we could sit here—would you agree with that?

Professor MURRAY. Yes, I agree.

Senator HIRONO. So we could sit here and talk about whether there should have been time for the sponsor to be found and all of that, but that only—that is totally irrelevant—

Professor MURRAY. That is correct. It is irrelevant.

Senator HIRONO [continuing]. To what should have been the real issue in this case, whether or not she should have the right to abortion. So I think that is very troubling when somebody who is about to be seated on the Supreme Court mischaracterizes the question before the court.

Now I did want to ask you, Professor Murray, if you can talk about the contradiction in Judge Kavanaugh's dissents in *Garza* and *Priests for Life* because I believe that he really wanted to reach a result in each case. They are different cases, but nonetheless, though, they both have to do with a woman's reproductive rights. And in the end, he denied the women involved their reproductive rights, and I believe he misapplied the facts to the law to get there.

So can you talk a bit about the contradiction in the outcomes, the dissents in *Garza* and *Priests for Life*?

Professor MURRAY. Sure. I have spoken at length about *Garza* and the way in which Judge Kavanaugh ignored existing precedent, such as *Bellotti v. Baird*, such as *Casey* and its undue burden standard, and *Whole Woman's Health v. Hellerstedt*, which requires judges to weigh both the burdens and benefits of a particular restriction.

In *Priests for Life*—again, I have also spoken about that case—what we saw is such incredible deference to the employer and the employer's religious beliefs and the employer's view that doing something as simple as filling out a form to notify the Government of its objections to providing the necessary contraception is an impermissible burden on religious exercise. That is just a broad deference that would be meaningful, as Ms. Baker had testified, to many women.

Senator HIRONO. So you found undue burden in the *Garza* case and—

Professor MURRAY. Substantial—

Senator HIRONO. So very—but what do you see is the common—

Professor MURRAY. The common, the common element in all of that is there is no burden that is too great for the woman. There is a burden in *Garza* on Jane Doe, and in finding a substantial burden on the religious exercise of the employers, there is a burden in the absence of contraceptive coverage to women like Ms. Baker.

Senator HIRONO. I think that is why there are so many people who are very concerned about Judge Kavanaugh being on the Court because, as you said, there are hundreds and hundreds of cases that States have passed that limit the woman's right to choose. So for him to say that *Roe v. Wade*, even were he to say that *Roe v. Wade* is settled law is of little comfort to those of us who support women's reproductive choice.

Thank you.

Senator TILLIS. Professor Amar—

[Disturbance in the hearing room.]

Senator TILLIS. Professor Amar, welcome back to the Committee. My colleague here, Senator Coons, and I were talking about how

much we enjoy your insights in spite of the fact that you hate our Special Counsel bill, and we also agreed that we are not going to allow you to talk about it because we would have to extend the hearing for 2 hours, mainly because of Senator Coons' commentary.

I wanted to ask you a question about Judge Kavanaugh and his body of work, some 307 opinions. And could you—if you have studied them, and I assume you have, can you give me any insights into ones that you think best reflect his thought process in arriving at an opinion?

Professor AMAR. In the appendix to my testimony, I offer a snippet from The Washington Post that I wrote about the *PHH* case. I think it is the same one that Ted Olson discussed involving the Consumer Financial Protection Bureau and its structure. And what—Senator Klobuchar, I think, passingly mentioned it also before she—in her remarks.

And what is impressive particularly about that case, it is the only case by a court of appeals that I actually assigned my students last year. I usually just give them Supreme Court cases. And what is so impressive about—and this is long before the nomination, of course—is it is trying to take seriously the founding and founding principles and the role of the President and the bureaucracy. The First Congress agreed that Presidents could fire Cabinet officers at will. It is called the Decision of 1789. It was very basic.

The Supreme Court has unanimously reaffirmed that. The Supreme Court agreed with that in a very famous case called *Myers* that was written by—beginning of the 20th century by former President, Chief Justice Taft, and today's Supreme Court takes it very seriously. And so, Judge Kavanaugh was confronted with the Decision of 1789 that says Cabinet officers are basically fireable at will, and yet we have all these independent agencies—the Securities and Exchange Commission, the Federal Communications Commission—whose members are not removable at will, but only for good cause.

And I note you are saying, ooh, this is perilously close to—but I am not going to talk about it, and I will not talk about it. But, so, how are we going to take seriously the founding, but also take seriously the 20th century with the rise of independent agencies that have been affirmed again and again and again by the Supreme Court? And I thought Judge Kavanaugh came up with a beautiful synthesis of founding first principles and respect for modern understandings and institutions.

And I do predict that the Supreme Court, when the case finally goes up, will perhaps embrace something very similar to that approach, and he will fit in very well with John Roberts on one side, maybe Elena Kagan will be part of that. She understands Executive power also, with someone like Clarence Thomas or—and some of the others on the other side.

So I think he will work for a Team of Nine, but he will respect the founding a lot, but he also takes seriously modern precedents and modern realities.

Senator TILLIS. Thank you very much.

And thank you, everybody on the Committee.

Mr. Olson, the only comment I will make. Senator Blumenthal, talking about 9–to–0 decision, I am not a Supreme Court expert, but that is a pretty definitive opinion. Is that right?

Mr. OLSON. Absolutely.

Senator TILLIS. I want to thank all those on the panel—

Senator COONS. I take—I take complete credit for it.

[Laughter.]

Senator TILLIS. I want to thank you all on the panel. I thought your opening testimony was outstanding, and with panels this size, it is very difficult to direct questions to everyone, but we do appreciate you all being here.

Congressman, thank you for your time and for your attention throughout the entire hearing.

We are going to take a 30-minute recess for lunch. That will give us time to transition to the next panel. So we will return at 1:03 p.m.

We are in recess.

[Whereupon, at 12:32 p.m., the Committee was recessed.]

[Whereupon, at 1:06 p.m., the Committee reconvened.]

Chairman GRASSLEY. Before I introduce the panel, if nobody told you, that you push the red button before you speak. Otherwise, we will not be able to hear you. So, the next panel is followed by eight witnesses. Four are for the Majority and four are selected by the Minority. We have a Mr. Kramer, Ms. Eastmond, Ms. Taibleson, Mr. Corbin, Mr. Lachance, Ms. Mahoney, Ms. Smith, and Mr. Christmas.

I would ask you at this point if you would stand, and I would like to have you take an oath.

[Witnesses are sworn in.]

Chairman GRASSLEY. Thank you all very much for responding.

Now I would like to say a little bit about each of you so the public watching on television or anybody in the audience knows. Aalayah Eastmond is a—let us see—I am going—yes, okay, is a student. Oh, you know why I am—I should be starting with Mr. Kramer.

A.J. Kramer is Federal Public Defender for the District of Columbia, very important position. He has held the position since the creation of the Office of Federal Public Defender for the District of Columbia in 1991. Now, I do not know, but I would bet you would be one of the longest-serving people in that position any place in the country.

We have Aalayah Eastmond, a student from Parkland, Florida and survivor of the very bad school shooting at Marjory Stoneman Douglas High School. Quite a tragedy you went through, and we will hear about it, I am sure.

Rebecca Taibleson served as law clerk for Judge Kavanaugh from 2010 to 2011. Later clerked for Justice Scalia on the Supreme Court and was an associate at Kirkland & Ellis. She currently serves as Federal prosecutor in Iowa's neighboring State of Wisconsin.

Jackson Corbin is a student from Hanover, Pennsylvania, and that is all the information I have about you, but if you want to tell us any more about you, we will not take it off of your time that you have to speak to us.

Then we have Hunter Lachance, a student from Kennebunkport, Maine.

And then we have Maureen Mahoney serving as Deputy Solicitor General of the United States from 1991 to 1993. She is a retired partner of Latham & Watkins.

Melissa Smith is a teacher at U.S. Grant High School, Oklahoma City, Oklahoma.

Kenneth Christmas is executive vice president for business and legal affairs, Marvista Entertainment. He is a 1991 graduate of Yale Law School, and you were a classmate of Judge Kavanaugh.

So, I welcome all of you, and I think we will proceed with Mr. Kramer, and then we will have our questioning.

**STATEMENT OF A.J. KRAMER, FEDERAL PUBLIC DEFENDER,
OFFICE OF THE FEDERAL PUBLIC DEFENDER FOR THE
DISTRICT OF COLUMBIA, WASHINGTON, DC**

Mr. KRAMER. Thank you, Mr. Chairman, and Ranking Senator Whitehouse. Thank you for the opportunity to speak today on behalf of Judge Brett Kavanaugh's nomination to be a Justice of the Supreme Court. I have been, as Chairman Grassley said, the Federal Public Defender in Washington, DC, since 1990. Prior to that, and I think all you meant was that I am old when you said I am one of the longest. And there, I have worked in the Federal Public Defender's Offices in Sacramento and San Francisco before I came to Washington, DC, so I have spent my entire legal career as a Federal Public Defender.

I do want to echo two things that were said by the prior panel that I, too, was dismayed that Chief Judge Garland was not confirmed for the Supreme Court because I think he would have been a great Supreme Court Justice, and also Congressman Richmond's remarks about race in the criminal justice system, which I think still pervades the criminal justice. And I—so I suppose you ask what I am doing here speaking on behalf of Judge Kavanaugh, and I will tell you why.

I have two disclaimers I have to make. I speak only on my behalf, not on behalf of our office here in Washington, DC, or any other Federal Public Defender Office or the Federal Public Defender system. And also, I have read essentially none of Judge Kavanaugh's civil opinions, but I have read almost all of his criminal opinions, and I have argued in front of him numerous times, probably more than 20 times, in criminal cases. And that is what I am here to talk about, his decisions in criminal cases. And I have to just say that he is extremely well prepared in oral argument. He asks the pertinent questions. He asks them in an extremely nice manner. Not all judges are like that, but he asks the most important questions and zeroes in on the most important issues in the case.

I think I was asked to talk about a couple of cases that I argued. One of them was a woman who was convicted of extortion, testified extensively at her trial about how she had been severely beaten by her boyfriend and forced into committing the offense. And I took over the case after the trial proceedings and argued that her lawyer had been ineffective for failing to present expert testimony on battered women's syndrome. It went up and down to the court of

appeals and back, and Judge Kavanaugh wrote the opinion for the court of appeals saying that her lawyer had been ineffective for failing to retain an expert on battered women's syndrome. And he wrote a primer essentially on the defense of battered women's syndrome for lawyers, and over a dissent of one of his colleagues.

In another case that I argued and tried, actually, it was a terrible tragedy of a person in the military who had died after a hazing incident involving a gang, and there were major issues about jury instructions in closing argument. And the case was reversed again in a 2-to-1 panel opinion, and Judge Kavanaugh wrote a concurring opinion in that case talking about how important it was that the jury be properly instructed on the mens rea for the crime, and that while—while my client had committed some heinous acts, he deserved to have a fair trial, and the trial in this case had not been fair, and he wrote a concurring opinion to emphasize that.

I should add that there are a number of other cases I have argued and our office has argued where Judge Kavanaugh has been protective of making sure that mens rea has been proved in various cases, including a case called *Burwell*, where I was appointed amicus by the court of appeals for an en banc argument. Judge Kavanaugh was one of three judges that dissented from the en banc that adopted the views that I put forward.

He has also been a major advocate on the court of appeals of writing about the bizarre situation where defendants who go to trial and are acquitted of a number of counts in a case, including a case where everybody was acquitted of all but one count, but then they are sentenced for the conduct of which they were acquitted. The Judge takes that all into account and gives them a heavier sentence, which I should add that Congress could end very quickly in a bill with a couple of sentences telling judges they should not take account of acquitted conduct. He has been a very—he has been very critical of that.

I should also add that I have served on two committees with him, so I think the bottom line is, he has been extremely fair in criminal cases where it might be assumed that he would just reflexively affirm criminal cases. He has been extremely fair and thoughtful in my experience. And I have also served on a committee—two committees with him, one of whom provides for CJA lawyers, Criminal Justice Act lawyers. His concern has always been to provide the most effective lawyers for defendants and the highest quality.

And I just want to end with one thing. He sends me emails occasionally talking about how he likes the good job that our office does in defending criminal defendants and our clients. And he sent me an email totally unsolicited, quoting the Chief Justice's dissent in a forfeiture case, and he said, "Federal prosecutors when they rise in court represent the people of the United States, but so do defense lawyers one at a time." And Judge Kavanaugh sent that to me, that quote, and said, "That is a nice line that summarizes what you and your office do so well."

So, all of that is why I am here to support the nomination of Judge Kavanaugh for the Supreme Court.

[The prepared statement of Mr. Kramer appears as a submission for the record.]

Chairman GRASSLEY. Thank you.

STATEMENT OF AALAYAH EASTMOND, PARKLAND, FLORIDA

Ms. EASTMOND. Chairman Grassley, Ranking Member Feinstein, and other Members of the Committee, thank you for the opportunity to be here today to share my experience and perspectives on gun violence in America. It needs to be a critical part of your consideration for any judge, particularly for the highest court in the land. My view is significantly impacted by my experience as a survivor of gun violence at Marjory Stoneman Douglas High School in Parkland, Florida just 6 months ago, and also losing my uncle, Patrick Edwards, 15 years ago in Brooklyn, New York.

My name is Aalayah Eastmond, a senior at Marjory Stoneman Douglas High School in Parkland, Florida. I work across the country to help amplify the voices of young people, and particularly young people in communities of color whose day-to-day experience with gun violence is always ignored, mischaracterized, marginalized, and minimized by the press, the public, and the corporate gun lobby.

1:02: February 14th, fourth period, Holocaust history. My last period of the day. The classroom door was locked today because of the new procedures. In the beginning of the period, we began presenting our hate group projects that we have been working on. Nicholas Dworet was in my group. Little did I know, 79 minutes from then he would be saving my life.

2:21: We heard a round of extremely loud pops. We had no idea what it was or where it was coming from. The class was in complete silence, and we all stared at each other in immediate fear. Within seconds we heard it again. We all immediately ran. The class split in half. Half of my class ran to the safe spot, which was out of view from the window that was in the classroom door. The other half was diagonally across from the window in complete view. I was not in the safe spot. As I sat down, I remember telling myself if I were to get shot anywhere, I wouldn't make it. I needed to get behind something. The only thing in front of me was Nicholas Dworet. Helena Ramsay began passing books down so we can shield ourselves from the bullets, but yet everyone thought it was a drill.

2:22: I clenched the book from Helena and then looked down at my phone to call my mother. As I raised my finger to hit the green call button, the loud pops were now in my class. I thought to myself, what kind of senior prank is this? As I began to see red on the floor, I assumed it was a paintball gun. I looked up and saw Helena Ramsay slumped over with her back against the wall. I began smelling and inhaling the smoke and gun powder. Then Nicholas Dworet rapidly fell over in front of me. I followed every movement of his body. When he fell over, I fell over with him. I then placed myself underneath his lifeless body, placing his arm across my body and my head underneath his back.

Bullets continued flying. I kept my eyes on the ground so I knew when to hold my breath and close my eyes when the shooter got near. I began talking to God. I told God that I knew I was going to die. I asked Him please make it fast. I did not want to feel anything. I asked for the bullet to go through my head so I would not endure any pain. I laid there for about 30 seconds still protected

by his lifeless body, waiting for the shooter to move onto the next class.

After the shooting stopped in my class, his body began to be very heavy. I couldn't breathe anymore. I rolled him off of me and placed his head on his arm so he would not be touching the cold ground. I sat up and looked over. Helena was still in the same exact position I last saw her. I froze, still in absolute view of the window—of the window the shooter shot into. Two of my classmates then pulled me behind a filing cabinet. We were all crammed, some on the phone with 9-1-1, some on the phone with their parents.

I immediately called my mom. I told her my last goodbyes. I told her how much I loved her. I apologized for all the things I might have done in my lifetime to upset her, and then the phone hung up. I then called my father, I told him how much I loved him. I told him to tell my brothers I love them, and I said my last goodbyes. I could not hear anything they were saying to me, but I made sure they could hear me. Not knowing whether it was one shooter or multiple, and not knowing whether they were coming back or not was an unimaginable amount of fear, sitting behind the filing cabinet waiting to die. I began hyperventilating. My classmates began breathing with me and trying to keep me calm and quiet. It did not work. They then covered my face. I felt like I was suffocating but it was to keep me quiet.

2:30: Broward County Police Department was heard from outside the shattered glass. I thought it was the shooter playing a trick. Then a SWAT team member came to check the pulse of Helena and Nicholas. He then looked at me with compassion and said, "I know." We all ran out passing bodies in the hallway on the way out. When I got outside, I was completely disoriented. The police then said, "He is still on the loose guys, we need you to work with us." I was petrified.

4:00: I finally found my friend and her mother. They noticed the unimaginable. They called the police over, and they began picking body matter from my hair. I completely broke down. The police took me back on campus to gather photos of me and collect my bloodied dress. They placed me in a chemical suit meant for chemical and biological exposure, then recorded my statement.

9:30: At the Marriott Hotel, I was finally allowed to physically touch my mother. It was absolutely horrific, surreal, and mind-numbing. I will never forget what I saw, what I did, and what I experienced that day. I will never forget Nicholas Dworet who, even in death, helped protect and save my life. Days later we received news that my mother would be having a miscarriage because of what the shock of the shooting did to her body. The shooting did not only impact me on February 14th, it impacts me every day of my life.

I have also lost a family member to gun violence. I lost my uncle, Patrick Edwards, in the streets of Brooklyn New York. He was shot in the back. The bullet then pierced his heart. He was only 18 with his whole life ahead of him, and unfortunately that is the same story of thousands of Black and Brown families across the country. Gun violence disproportionately impacts Black and Brown youth,

whether that being police brutality, homicides, or domestic violence.

As for people of color, law enforcement is the shooter in some cases, history of bias, brutality and racism in so many communities. Like many of brothers and sisters of color, I am not comforted by deputies with handguns, let alone assault rifles. I am very concerned since learning Brett Kavanaugh's views on guns and how he would strike down any assault weapons ban. Too many dangerous and prohibited people continue to be able to readily access and use dangerous weapons to terrorize Americans at home, work, church, school, concerts, and on our streets, and anywhere we go on our day to day life.

As you consider what to do and who to appoint to make us safer from gun violence, remember my story. Remember my classmates who died. Remember the victims of colors who—that face mass shootings every day. Remember all victims of gun violence from Parkland, Brooklyn, Miami, Milwaukee, Oakland, and all over America. As you make your final decision, think about it as if you had to justify and defend your choice to those who we lost to gun violence. If Kavanaugh does not even have the decency to shake hands with a father of a victim, he definitely will not have the decency to make life-changing decisions that affect real people.

The youth is urging our society to recognize the depth and seriousness of the gun violence epidemic in America. We are all here with an urgent message for you: if the youth across the country can fight to eradicate gun violence, why cannot judges, lawmakers, and Donald Trump understand that young people are dying from this senseless gun violence?

Thank you.

[The prepared statement of Ms. Eastmond appears as a submission for the record.]

[Disturbance in the hearing room.]

Chairman GRASSLEY. Ms. Taibleson.

**STATEMENT OF REBECCA TAIBLESON, FORMER LAW CLERK,
EASTERN DISTRICT OF WISCONSIN, FOXPOINT, WISCONSIN**

Ms. TAIBLESON. Thank you. Mr. Chairman, Ranking Senator Whitehouse, and Members of the Committee. I am honored to be testifying before you today. My name is Rebecca Taibleson. I am here today from Milwaukee, Wisconsin. I clerked for Brett Kavanaugh in 2010 and 2011, and I enthusiastically support his nomination to be an Associate Justice of the United States Supreme Court. I would like to talk about two things today: first, what Brett Kavanaugh is like as a judge, and second, what Brett Kavanaugh is like as a person.

At work in his chambers, Judge Kavanaugh has a motto of sorts. It is, "process protects us." I will admit, it is not very catchy, but it is true to the Judge and to his core judicial philosophy. What it means is that Judge Kavanaugh goes through an intense, step-by-step process in order to decide each and every case. That process starts with an open mind and a foundational commitment to the belief that either side might be right. Judge Kavanaugh then reads and analyzes every brief and re-reads every relevant precedent in the case, and he insists that his clerks find the very best version

of every argument in the case, even when the lawyers themselves have not.

In addition to the parties' arguments, Judge Kavanaugh also takes very seriously the views of his colleagues, the other judges on the case, especially when they differ from his own. I can remember all——

[Disturbance in the hearing room.]

[Audio malfunction in the hearing room.]

Chairman GRASSLEY. There is something wrong with the system. Okay.

Ms. TAIBLESON. Is this okay? Okay.

Chairman GRASSLEY. Yes. Start over again, Rebecca.

Ms. TAIBLESON. Yes, sir. Mr. Chairman, Ranking Senator Whitehouse, and Members of the Committee. I am honored to be testifying before you today. My name is Rebecca Taibleson. I am here today from Milwaukee, Wisconsin. I clerked for Brett Kavanaugh in 2010 and 2011, and I enthusiastically support his nomination to be an Associate Justice of the United States Supreme Court. I would like to talk about two things today: first, what Brett Kavanaugh is like as a judge, and second, what Brett Kavanaugh is like as a person.

At work in his chambers, Judge Kavanaugh has a motto of sorts, "process protects us." I will admit it is not very catchy, but it is true to the Judge and to his core judicial philosophy. What it means is that Judge Kavanaugh goes through an intense, step-by-step process in order to decide each and every case. That process starts with an open mind and a foundational commitment to the belief that either side might be right. Judge Kavanaugh then reads and analyzes every brief and re-reads every relevant precedent, and he insists that his clerks find the very best version of every argument in the case, even when the lawyers themselves have not.

In addition to the parties' arguments, Judge Kavanaugh also takes very seriously the views of his colleagues, the other judges, especially when they differ from his own. I can remember all too clearly, being corrected by Judge Kavanaugh once when I, fresh out of law school, spoke too dismissively about a different judge's opinion on a case. I learned from that. Understanding Judge Kavanaugh's humility and respect for his colleagues is essential to understanding his identity as a judge.

Judge Kavanaugh completes his entire process from scratch for every issue in every case. It is no coincidence he is often the last person at work in the courthouse each night, but it is worth it. This process, as he says, protects us. It protects against snap decisions, shortcuts, and pre-judgments. By never skipping a step, never giving short shrift to an argument or ignoring a precedent, Judge Kavanaugh ensures that his decisions are based on the law and the facts of each case and only those things. That process also protects us, American citizens, from having unelected judges ruling based on their own predispositions or preferences.

Only after completing that process does the Judge decide once and for all what he thinks, and once he is decided, he is difficult to budge. He is independent and stubbornly so. He cannot be pressured by his law clerks or his colleagues, and he cannot be intimi-

dated by other actors in Government. It is simply not part of his process.

Politics also have no place in Judge Kavanaugh's process. Having known the Judge for almost 10 years, and having worked with him very closely, I myself do not know what his views are on the political issues of the day. And as a law clerk, it would have been unthinkable to even mention the political implications of a case. In fact, had we known in advance how to decide a case based on the parties, or the amici, or some policy goal, we might have skipped a few steps in the process and gone home a bit earlier at night, but he never did, and so we never did. For those reasons, if you want to know what Judge Kavanaugh is like as a person, his cases are not the best place to look because he keeps his preferences out of them. His process reflects his fairness, work ethic, and judicial temperament, but the outcomes are based on the law, not his personal views.

But I can tell you that as a person, Brett Kavanaugh stands out. He has testified extensively this week, so I do not need to tell you how smart, thoughtful, and unflappable he is. When his guard is down, when he is not before this Committee or on television, he is the same way. But in my view, those are not his most remarkable qualities. Instead, it is his everyday, universal, disarming kindness. I sometimes find myself saying that Judge Kavanaugh is normal or approachable, but those cliches are not quite right. Instead, those are compliments designed for Federal judges, who no one expects to be normal or approachable. In truth, Judge Kavanaugh is far, far nicer than is normal, and far more approachable than almost anyone you will ever approach. He has an easy laugh and a great sense of humor. I myself am rarely funny, as Senator Booker has pointed out, but he laughs at all of my jokes, including, especially the jokes at his expense. Although his credentials are elite, you would never know it to talk to him. The Judge is a regular at his neighborhood bar, for example, where he is partial to a Budweiser and a hamburger, and where the long-time bartender did not even know Brett Kavanaugh was a lawyer until he saw his nomination to the United States Supreme Court. If he is confirmed, Judge Kavanaugh's humility, collegiality, and kindness will stand out on the Supreme Court.

Judge Kavanaugh is going to stand out on the Supreme Court for another reason as well, which is his support for women in the legal profession. Elite legal circles are predominantly male. The year I clerked on the Supreme Court, for example, 26 of the 39 law clerks were men, and that is typical. Just this morning, The New York Times ran an article about the barriers faced by women and people of color throughout the legal profession. According to that article, an ABA report found that in 2016—2016—only 35 percent of active American lawyers are women. Judge Kavanaugh, by contrast, has hired more women than men as law clerks. One year, all four of his clerks were women, which was a first for the D.C. Circuit Court of Appeals. That is something no Supreme Court Justice has ever done.

After hiring us, Judge Kavanaugh goes to bat for us. As the Members of this Committee know, hard work and smarts are not always enough to reach the top of your profession. Instead, it takes

guidance from people who have been there and advocates willing to fight for you. Studies have shown that women often are at a disadvantage on those fronts, but Judge Kavanaugh is a force of nature. Thanks to his sponsorship, about 85 percent of Judge Kavanaugh's female clerks have gone on to clerk on the Supreme Court. We have clerked for Justices across the Court, including Justices Kagan, Breyer, and Sotomayor. We have served in all three branches of State and Federal governments. We are professors, prosecutors, and nonprofit attorneys. One of us is now even a judge herself. I know of no Federal judge who has more effectively supported women in this profession than Brett Kavanaugh.

Ten years after I first met Judge Kavanaugh, I am now figuring out how to be lawyer and a mom to three children aged 3 and under. In fact, if you heard a baby crying outside this chamber earlier this morning, that is my fault. She is 3 months old, and she absolutely insisted on coming. I know firsthand how important it is to have an advocate like Brett Kavanaugh, and I attribute my still-vibrant legal career in large part to him.

I am only one of many. A significant number of Judge Kavanaugh's former clerks have been here for these hearings, and we have uniformly recommended him for his character, his work ethic, and his kindness. The United States and the American people would be well served with Judge Kavanaugh on the Supreme Court.

Thank you.

[The prepared statement of Ms. Taibleson appears as a submission for the record.]

Chairman GRASSLEY. Mr. Corbin.

STATEMENT OF JACKSON CORBIN, HANOVER, PENNSYLVANIA

Mr. CORBIN. Chairman Grassley, Ranking Member Feinstein, and distinguished Members of the Senate Judiciary Committee, I am privileged to represent 130 million people with pre-existing conditions today, and I am grateful for the invitation to testify before you. My name is Jackson Corbin, and I am 13 years old. I am a lot like other teenagers. I love comic books, Marvel movies, and I love to play Minecraft and Fortnite with my friends.

Ten years ago, my brother, mother, and I were all diagnosed with Noonan Syndrome, a genetic condition that affects various systems of the body. As a result of my Noonan Syndrome, I have a lot of pre-existing conditions. Noonan Syndrome affects my growth, so I will never be as tall or as strong as other people my age. I have stomach issues, reflux, and I get really bad headaches. My most severe condition is my Von Willebrand Disease, a form of hemophilia. This means that I cannot play contact sports or do things like roughhouse, roller skate, or jump on trampolines. I take medication to control my reflux and to clot my blood if I get hurt. Having my clotting medicine at home means that I do not have to go to the emergency room every time I lose a tooth or get a bad bruise or a cut.

My brother, Henry, is my best friend. He is 10-and-a-half years old, and he has Noonan Syndrome, too. We do everything together, including going to our specialist visits. My mom always says the greatest thing she ever did was to give the two of us to each other.

Noonan Syndrome affects everyone differently, so in addition to having all the same conditions as me, including Von Willebrand Disease, Henry has even more special healthcare needs than I do. When Henry was a baby, he had to have lifesaving stomach surgery and a blood transfusion. Now he has what is called gastroparesis, which means he vomits almost every day, sometimes even in his sleep. The medicine he takes helps, but not all the time. We share a room, and at first it was scary to see him vomit in his sleep, but now I am used to it. When I hear him gagging, I roll him over so he does not choke and run to get my parents. Henry also has heart problems and asthma. I worry about Henry, a lot.

I have heard my mom and dad say that they are grateful for our insurance because the cost of our care is more than my family makes in a year. That means if the Affordable Care Act is repealed and Henry and I lose our insurance, my parents will not be able to afford to pay for our care.

I have been fighting for healthcare for nearly 2 years. Last year, in the first speech I ever gave on the lawn of the Capitol, I compared myself to Dr. Seuss' "The Lorax." The Lorax says, "I am the Lorax and I speak for the trees," and so I said, "I am Jackson, and I speak for the children." I said that because I have met so many children with special healthcare needs who are unable to speak for themselves. I wanted to be their voice. But as my journey continued and I met even more children and adults who have pre-existing conditions, and who, like me and Henry, are scared for their future, I realized that I don't only speak for the children anymore. Today, especially, I speak for everyone.

I speak for myself, Henry, and all the other children across the country with special healthcare needs. I speak for the parents who struggle with their own health issues while caring—while caring for their children, including my own mom, who has Noonan Syndrome, too. I speak for every person with a disability who high fives me in the Senate hallways as they fight for our care. I speak for every person with a disability who will never be able to live independently. I even speak for the man who has Lupus who altered the suit that I am wearing today. Most importantly, I speak for every American whose life could change tomorrow with a new diagnosis.

My Noonan Syndrome is a part of who I am. It has been a part of me since the day I was born, and will be a part of me for the rest of my life. If you destroy protections for pre-existing conditions, you will leave me and all the kids and adults like me without care or without the ability to afford our care, all because of who we are. We deserve better than that.

I might be a kid, but I am still an American. The decisions you are making today will affect my generation's ability to have access to affordable healthcare. We must have Justices on the Supreme Court who will save the Affordable Care Act—save the Affordable Care Act, safeguard pre-existing conditions, and protect our care. Please give us the chance to be healthy, to grow up, and to lead this country one day. I know I want that chance.

Thank you.

[The prepared statement of Mr. Corbin appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Jackson.

[Applause.]

[Disturbance in the hearing room.]

Chairman GRASSLEY. Mr. Lachance, go ahead.

**STATEMENT OF HUNTER LACHANCE,
KENNEBUNKPORT, MAINE**

Mr. LACHANCE. Senator Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee, my name is Hunter Lachance. I live in Kennebunkport, Maine, and I am a sophomore at Kennebunk High School. I am 15 years old, and I suffer from asthma.

I live in a State that has some of the highest rates of asthma in the country. According to the Maine Center for Disease Control, nearly 12 percent of the adults in our State have asthma compared with 9 percent nationally. Maine children also suffer from a higher rate of asthma than the national average. I am one of those statistics. Despite Maine's many beauties, it has worse air quality than most people realize. Because Maine sits at the end of America's tailpipe, air pollution from upwind States is carried into Maine by prevailing winds.

Air pollution makes life extremely difficult for those of us with asthma, and it makes it harder for me to breathe. For me to live a healthy life, air pollution needs to decrease, not increase. I am concerned that the Supreme Court could make major decisions in the next few years that will cause air pollution in Maine to increase if Brett Kavanaugh is confirmed.

Many people in this room may have asthma, or know someone who does, so what I am about to describe may be familiar. Here is a coffee stirrer. If you have one, I encourage you to put it to your mouth and try breathing through it. Now, imagine only being able to breathe through this sized-hole this size for an hour, or a day, or even a week. That is what it has been like during an asthmatic attack. Unfortunately, I am not alone in having asthma impact my life. Asthma affects nearly 25 million Americans, including over 6 million children. Two million people go to an emergency room each year because of asthma. I am here today because my future, and my health, may depend on it.

I am just your everyday kid from Maine. I play sports, like to swim, and love playing in the snow. But my active life changed when I was diagnosed with asthma at the age of 10. Suddenly, everything became more difficult. I was sidelined from sports, began missing school, and my parents constantly worried about my health. The year after I was diagnosed, I missed close to a quarter of the school year. I can vividly remember times when my asthma attacks were so strong and scary that I was removed from class by my teachers and sent to the nurse's office. Most of the time, the nurse sent me home or asked my parents to get medical attention. I remember one really bad attack when I was home sick for 3 straight weeks. Asthma is a leading reason why kids miss school, and it has directly impacted my ability to learn from my teachers and spend time with my friends.

Although air pollution does not cause asthma, it triggers attacks. On ozone alert days, people across the country have trouble breath-

ing, and this should worry everyone. It worries me. In Maine, we need strong Federal regulations on air pollution because pollution does not stop at State borders. If States upwind from Maine are allowed to pollute more because Federal regulations are weakened, then that is bad for me, it is bad for Mainers, and it is bad for anyone in America with a respiratory disease or asthma.

That is why I am here. I am deeply concerned that if Judge Kavanaugh is on the Supreme Court, he would vote to weaken laws that protect my health because he already has. In a 2012 ruling, he rejected the Cross-State Air Pollution Rule based on the Clean Air Act's Good Neighbor provision, which regulates air that crosses State lines. According to the EPA, this rule reduces sulfur dioxide and nitrogen oxide pollutants and will prevent 34,000 premature deaths. During his time on the D.C. Circuit Court of Appeals, Mr. Kavanaugh has repeatedly struck down other Clean Air Act protections. This worries me a lot because clean air is a life or death issue for so many people like me.

We need a Supreme Court that will protect clean air because lives depend on it. We also need a Supreme Court that will uphold protections to address climate change because my generation's future depends on it. For me, climate change means that life will be even more difficult with more ozone alert days, more dust and soot in the air from forest fires, and more mold due to extreme weather and flooding.

Here is my coffee stirrer again. Next time you have the chance, pick one up and try breathing through it and see how long you can last. This is what it is like to suffer through asthma—through asthma. If the Supreme Court fails to protect clean air, then it is failing to protect me and millions of other Americans. Please do not confirm someone for the Supreme Court with a record like Judge Kavanaugh's, a record that could mean more air pollution, more asthma attacks, and more premature deaths for the millions of Americans unfortunate enough to be afflicted with asthma like me.

Thank you for letting me testify today.

[The prepared statement of Mr. Lachance appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Lachance.

Now, Ms. Mahoney.

STATEMENT OF MAUREEN E. MAHONEY, FORMER DEPUTY SOLICITOR GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Ms. MAHONEY. Thank you, Mr. Chairman, Senator Whitehouse, and Members of the Committee. I am honored to add my voice in support of Judge Kavanaugh today. I worked with him at the Solicitor General's Office, and I appeared before him on the D.C. Circuit, and it is hard for me to think of anyone who is more qualified.

I would like to make two points: First, I want to share my view that Judge Kavanaugh has much in common with my former colleague, Chief Justice Roberts, whom the Senate voted to confirm by a wide margin. Second, I want to explain why Judge Kavanaugh's extraordinary record of mentoring female lawyers is so important to my profession.

In 2005, I testified before this Committee in support of Chief Justice Roberts' confirmation, and I am struck by the many similarities between him and Judge Kavanaugh. Some are obvious. Both are extraordinary lawyers, both worked in the White House Counsel's Office and the Solicitor General's Office, and both served as judges on the D.C. Circuit. But they also share a civility and evenhandedness on the bench that reflects their genuine effort to consider all sides of an argument thoroughly before reaching any conclusions.

I have had the pleasure of arguing before both men. Like the Chief Justice, Judge Kavanaugh asks difficult and incisive questions of both parties, but he is polite, and he conveys his thoughts with an open mind. As the ABA confirmed this morning, my view is widely shared by the Bar. Don Verrilli, Solicitor General during the Obama administration, has called Judge Kavanaugh a "brilliant jurist who is a gracious person, both on the bench and off." And a bipartisan group of appellate practitioners praise his unfailing courtesy to counsel and to the other judges and his colleagues. In an era when some appellate judges have behaved like brusque advocates for one side during oral argument, Judge Kavanaugh has been a model of the proper judicial disposition.

The Chief Justice and Judge Kavanaugh also understand the proper role of a Federal judge: to be an independent, neutral arbiter. During his confirmation hearing, the Chief Justice famously described judges as umpires who apply the rules without fear or favor. I think it is fair to say that the Chief Justice has done so. At various times, both sides of the aisle have denounced his rulings just like the same thing that happens to umpires. And Judge Kavanaugh has similarly demonstrated impartiality and fairness in his 12 years on the D.C. Circuit. He repeatedly ruled against the Bush administration, where he worked prior to becoming a judge, in his first 3 years on the bench. He has ruled in favor of an al-Qaeda terrorist, in favor of a pro-choice Democratic interest group, and against the Republican Party. And to the surprise of some, even the ACLU has recognized that Judge Kavanaugh has been "sympathetic" to Title VII claims. As Judge Kavanaugh has explained in multiple speeches over the years, a judge must check any prior political allegiances at the door, and I am confident he will stay true to that ideal.

Second, Judge Kavanaugh also stands out as a mentor to women lawyers. I know you have heard the statistics a lot, but they are worth repeating. Over half of Judge Kavanaugh's law clerks have been women. Twenty-one of those 25 have been hired to clerk on the Supreme Court, and this is simply astounding. These women have gone on to serve in all three branches of Government, in the White House in the Solicitor General's Office, four Federal prosecutors. One is a Deputy Solicitor General of the District of Columbia. Another, as you just heard, serves as a judge on the Eleventh Circuit.

It is difficult to overstate how important opportunities like these can be for a lawyer's career, especially in appellate practice. Credentials like a Supreme Court clerkship or a job at the Solicitor General's Office are keys that unlock doors at the highest levels of the legal profession. Very few women have historically held these

elite positions. When I clerked for Chief Justice Rehnquist in 1979, almost 80 percent of the law clerks at the Court were male, and a large gender imbalance endures today. Almost twice as many men as women have been hired as Supreme Court clerks since 2005.

In the most recent Supreme Court term, women delivered just 12 percent of the oral arguments, and women make up only 19 percent of law firm equity partners. I was one of the lucky few. I argued 21 cases before the Supreme Court, and this never would have happened without the mentorship of a Federal judge, just like Judge Kavanaugh does for his clerks. Chief Justice Rehnquist helped launch my appellate career by hiring me as his clerk, and in 1988 he then arranged for me to argue my first Supreme Court case. I was the first woman to receive the honor of being appointed by the Supreme Court to argue a case by invitation. With that argument under my belt, Chief Justice Roberts recruited me in 1991 to join him in the Solicitor General's Office as one of four deputies, a position that has rarely been held by women.

These were the opportunities that made it possible for me to compete with the men who dominate the Supreme Court Bar. For more than a decade, Judge Kavanaugh has been instrumental in opening these doors for a new generation of women lawyers. He has been a teacher, adviser, and advocate for women in ways that unquestionably demonstrate his commitment to equality, and that will ultimately reduce persistent gender disparities in the legal profession. In short, Judge Kavanaugh's independence, his civility and open-mindedness, and his generous mentorship are just a few of the many characteristics that make him superbly qualified to serve on the Supreme Court.

Thank you.

[The prepared statement of Ms. Mahoney appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Mahoney.

Now, Ms. Smith.

**STATEMENT OF MELISSA SMITH, SOCIAL STUDIES TEACHER,
U.S. GRANT PUBLIC HIGH SCHOOL, OKLAHOMA CITY,
OKLAHOMA**

Ms. SMITH. Good afternoon, Mr. Chairman and Members of the Judiciary Committee. Thank you for this opportunity. My name is Melissa Smith, and I am a union member and public school teacher at U.S. Grant High School on the southwest side of Oklahoma City. I am also the very proud daughter of a police officer, who served his community 41 years, and who taught me how to use my voice. He made sure that I not only knew my rights, but that I knew how to exercise them.

Because of my father, I went into juvenile justice where I quickly realized that most teenagers have no idea that they have rights. So, I became a high school social studies teacher where I can open my students' eyes to the concepts of equality, justice, and fairness. I teach them that under the U.S. Constitution, they do have rights. I teach them the impact of the law and their roles and responsibilities within the Government so that they can be engaged and active in our democracy. Today, I am honored to be able to show my stu-

dents exactly what it means to use your voice and participate in our Government at the highest level. As you consider your vote to confirm Judge Kavanaugh to a lifetime appointment, please consider our experiences.

Oklahoma City Public Schools is the State's largest district where almost 90 percent of our families are considered to be economically disadvantaged. I am a proud General at U.S. Grant High School General. We have the most dedicated teachers and incredible students. Our district has had to cut almost \$40 million from its budget in the last 2 years. Our fine arts budget was slashed by 50 percent, and our library media budget was completely eliminated. Our school building was built for 1,200 people just 11 years ago, yet we currently have 2,200 staff members and students.

Classrooms that have almost 40 students rarely have enough desks for all of them. It is often first come, first served to those classrooms. Some teachers do not even have classrooms at all. They have all of their belongings, textbooks, and supplies on carts, and they push them from classroom to classroom, hour to hour. I am telling you about our funding crisis in Oklahoma for two reasons: first, because Judge Kavanaugh's stated position on private school vouchers would exacerbate the situation in Oklahoma City. Vouchers do nothing to help student achievement, but do everything to undermine the public schools that 90 percent of children in this Nation attend. Siphoning more funding away from public education will destroy public schools.

The second reason I am telling you about our funding crisis is that I have seen firsthand how the collective power of unions allows individuals to band together to bargain for resources for students and teachers. Judge Kavanaugh has a strong history of siding with big business over the needs, rights, and safety of individual employees. His record shows that he sides with employers who do not adhere to their collective bargaining agreement, and he does not see the need for union representation in employee meetings. I can tell you that through my union, I have learned the power of collective voice. I can advocate for my own working conditions, which are the same learning conditions for my students. Unions give voice and agency to people who cannot find it otherwise. They make it possible for us to accomplish together what we could not do on our own.

Five months ago, Oklahoma City Public Schools teachers walked out of our classrooms. Our legislature passed a \$6,000 pay raise in an attempt to stop that walkout, but we were fighting for more than just a pay raise. We were fighting for our students and their needs that often go well beyond what you would expect a teacher to have to take care of. I have physically picked up a teenager off the floor and carried her to the counselor's office. She was sobbing saying that she did not want to live anymore. Thank goodness our counselor was able to be at school that day. I have seen the terror on a transgender student's face when he shared that he identifies as male, and then that terror turn to joy when I, as a trusted adult, accepted him for who he is. Just last week a fellow teacher wrote a reference letter for a student and his family for their hearing to determine whether or not they can remain in this country. She stressed about it for days because she needed it to be perfect.

Her student has never known anything but his life in Oklahoma, and he is terrified of being sent to a place that is not his home.

The morning after the 2016 Presidential election was a tough one at U.S. Grant. Many of our students are undocumented or have undocumented family members. The U.S. Grant family rallied around all of our students more than usual on that day. We do not ask if they or their parents are undocumented. That is not our purpose. And so far, the U.S. Supreme Court agrees.

Now why am I sharing these experiences with you? Because I worry about my students and who will look out for them. I worry that our Government is too far removed from the people it serves, and that the consequences of that gap are far more dangerous than we realize. If confirmed, Judge Kavanaugh's decisions will impact not just teachers and students in schools now, but the futures of my students and for generations to come. The experiences of my students and fellow staff members show that there is a real impact of Judge Kavanaugh's jurisprudence on America's future.

Thank you for allowing me to be here today. I would like to end my statement the same way I end every single Friday in class with my students: "Be the example, have a good weekend, and please make good choices."

[Applause.]

[Disturbance in the hearing room.]

[The prepared statement of Ms. Smith appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Ms. Smith.

Now, Mr. Christmas.

STATEMENT OF KENNETH C. CHRISTMAS, JR., EXECUTIVE VICE PRESIDENT, BUSINESS AND LEGAL AFFAIRS, MARVISTA ENTERTAINMENT, LOS ANGELES, CALIFORNIA

Mr. CHRISTMAS. Chairman Grassley, Ranking Member Feinstein, and other distinguished Members of this Committee, I am honored, grateful, and humbled to appear before you endorse—to endorse the nomination of Judge Brett Kavanaugh to sit as an Associate Justice of the United States Supreme Court. I have known this nominee for 3 decades. He is a close personal friend. I hope my testimony today will illuminate a side of Judge Kavanaugh that is not often seen in media accounts.

I met Judge Kavanaugh in 1988 during my first year at Yale Law School when he was a second-year law student. In addition to both of us pursuing our love of the law, we watched SportsCenter, played pick-up basketball, and loved going to Yale football games. We became fast friends. The following year, we roomed together with six other law school students in a house behind the Yale gym.

I have always admired Judge Kavanaugh's ability to create deep relationships with people from all walks of life, conservative, liberal, athlete, academic, male, female, White, Black. I think the one reason for this is he never assumes he is the smartest person in the room. Judge Kavanaugh deeply believes he can learn something from everyone. A wonderful confidant, Judge Kavanaugh has always made me feel comfortable speaking to him about basically anything because he genuinely cares how others feel and authentically tries to understand how they think.

During law school, I often sought out Judge Kavanaugh's advice. He would implore me to first understand the issues from the points of view. Put yourself in their shoes, I recall him advising me. How would that make you feel? Then, he would challenge me to demand of myself that which you ask from others. Should he be fortunate enough to be confirmed, I believe Judge Kavanaugh will bring that same humility and compassion to the Supreme Court. It is who Judge Kavanaugh is.

Since graduation, the same eight law school roommates have spent a long weekend together every year with an astonishingly minimal absentee rate, and Judge Kavanaugh has been no exception. These 26 reunions have kept all of us close, even as our families and careers demanded more time from each of us. I will never forget a long drive I took to Bucks County, Pennsylvania for one of our early annual reunions. Judge Kavanaugh listened and asked questions for the whole ride as I explained my bewilderment over those who deny the continuing effects of slavery and Jim Crow laws. While I was raised in California, I have deep family roots in Mississippi. I believed then, as I do now, that the laws of our country must remain responsive to historical prejudice, discrimination, oppression and mistreatment of African Americans. There was no doubt left in my mind following that ride that Judge Kavanaugh deeply cared, and still cares, about truly understanding my Black experience and point of view.

Over the years, Judge Kavanaugh and I have traveled together many times in and outside the country. I drove with Judge Kavanaugh to Boston to watch him run his first Boston Marathon. Judge Kavanaugh made the trip to California for my wedding, and I flew back to DC for his. While our age is no longer conducive to pick-up basketball games, we have been able to commiserate over coaching our children and learning that the first rule of being a good youth basketball coach is understanding you are no longer a player. Our support for one another has been a steady and reliable force as we move through life's ups and downs.

Earlier this year, Judge Kavanaugh and I, along with our other law school roommates and friends, gathered over a weekend for the funeral of the son of another roommate. I witnessed Judge Kavanaugh's love, care, and support of our friend during the most difficult of times. He attended dinners, participated in fellowship well into the night, and spent the day at the funeral service in support of the family. In a time of personal crisis, I will not need to look far for my friend because Judge Kavanaugh will already be there.

So, you may ask what does coaching basketball, showing up at each other's wedding, listening to my experiences as a Black man living in America, or attending a funeral have to do with determining whether Judge Kavanaugh should become a Supreme Court Justice? The answer is it speaks directly to his humanity. Judge Kavanaugh cares. He is far from being an ideologue. He does naturally what a good judge should do, seek to understand before offering an opinion. Judge Kavanaugh is a tremendous son, friend, husband, and father. He is honest, empathetic and intellectually curious. That is the person I know.

Over the course of my life, I have found that a true test of a friendship is when support for a friend is inconvenient. For me, from the perspective of a lifelong Democrat, it is inconvenient to support Judge Kavanaugh, especially during this time of an unprecedented partisan divide and polarization among Americans, but I know it is the right thing to do. As an American, I am quite concerned about the attacks on our esteemed institutions, like the judiciary. My expectation of any judicial nominee I support, especially when it is for the Supreme Court, is that he or she possess a powerful sense of fairness and impartiality. As an African American, I expect a nominee I support to have a deep sense of obligation to protect the interests of those disempowered, particularly those whose voices are too often drowned out of our political discourse and cannot be heard. Again, all this requires a judge who is compassionate, humble, and principled. Judge Kavanaugh is such a nominee.

Everyone here today is well aware of Judge Kavanaugh's extraordinary qualifications, both educationally and professionally. However, it is Judge Kavanaugh's humanity that compelled me to come here today to testify on his behalf. For this reason, without equivocation or reservation, I respectfully urge this Committee and the Senate to confirm Judge Brett Kavanaugh as an Associate Justice of the United States Supreme Court.

Thank you.

[The prepared statement of Mr. Christmas appears as a submission for the record.]

Chairman GRASSLEY. Thank you. As Chairman of the Committee, I should thank all of you for your testimony. I know you have to work hard to do it. Some of you have traveled a long way, so just generally thank you. And then I am going to ask my questions, and then I will call on Senator Whitehouse, and I would ask for maybe 10 or 15 minutes if one of my Republican colleagues would moderate while I step out, and I will be close by.

Senator HATCH. I would be happy to.

Chairman GRASSLEY. Okay. I am going to start with you, Mr. Christmas, and I am going to—I am going to say that for 4 days now we have had a lot of people exercise their public constitutional rights to speak, as you have heard it this day, afraid of Judge Kavanaugh being a Justice on the Supreme Court. We have three or four panel people right here that you have heard their own testimony. And so, there is this fear that he does not—might not take into consideration the needs of people less fortunate than he is with various problems that we have heard expressed here. So, I think you probably spoke a little bit to this in your testimony, but emphasize for us—speak not to me, but to the people that have these concerns.

Mr. CHRISTMAS. Well, Senator, I understand those concerns. I do not share that fear. Brett is one of the most thoughtful, empathetic people I know. I have spent much time with him talking about issues that are very dear to me. He has been generous with his insight. He cares, and I think that empathy that he naturally exhibits will serve him well, and I would encourage people to understand this man is thoughtful, is humble, and thinks to understand before he makes himself understood.

Chairman GRASSLEY. From your point—I will follow up. From your point as a lawyer and as—you expect a judge to look at the facts of the case and the—what the law is, and leave their own personal views out of it. So, can you explain, to the people that have these concerns about him, those things that have to be taken into consideration that maybe do not deal exactly with a person that has special medical problems like you have heard here today?

Mr. CHRISTMAS. Yes, and I recall Brett, when he came to my wedding—I should say, Judge Kavanaugh—and he spent time with my family. I recall him speaking at length with members of my family who had no real knowledge of what it is like to be a judge and be involved in DC and the way that Judge Kavanaugh is. And I was just struck by how easily and comfortably he was able to speak to everybody who he had just met during that wedding. There was a period where my niece graduated from Howard University and I had mentioned to Judge Kavanaugh that I may come out, and he arranged for 20 of the members of my family to tour the West Wing, and he showed up on a Saturday with a couple of his aides. That is the sort of the person he is.

So, I understand the concerns, but the man I know is generous with his time and thought, and I love the discussion about process. He seeks to not be influenced by people outside, and he is one of the most prepared, thoughtful people I know.

Chairman GRASSLEY. I will end with Mr. Kramer. Not being a lawyer, but I can assume what public defenders do, you are dealing mostly, defending people that do not have resources of their own, and, in fact, that may be a hundred percent of your clientele. You have heard, several days, that my colleague from New Jersey has expressed concern about people that cannot defend themselves in court, the jury system not working the way it traditionally works, and mandatory minimums, all that.

Can you give people of low-income that you represent, maybe other problems, that—the assurance that they are going to get their concerns addressed the way they ought to be through somebody that is on the Supreme Court?

Mr. KRAMER. Thank you, Chairman Grassley. Yes, absolutely, and I tried to get that out. The fact—the reason that I am here is because of the fairness that Judge Kavanaugh has shown. Our clients are without resources, and tend not to be a very popular group. And Judge Kavanaugh has shown through my experience, my numerous arguments in front of him, and the opinions he has written a belief in the fundamental—and I completely share Senator Booker's views on the criminal justice system. But Judge Kavanaugh has shown through his opinions in the criminal cases that I have argued as well as his service on the CJ committee that I have been involved with a concern for the fundamental fairness of the system and a—that people should be—even though they are without resources and represented by a public defender, that they should have the best representation possible. And that is why I wholeheartedly support his nomination.

And I note one more thing that is, in a sense, to me remarkable. Usually a judge who wants to be confirmed for a position or another court would never have a public defender in the hearings talking in support of them. And I think that, again, shows Judge

Kavanaugh's concern for the fundamental fairness of the system, and that is why I support him.

Chairman GRASSLEY. Okay.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Aalayah, may I use your first name? I could call you "Ms. Eastmond," if you wanted.

Ms. EASTMOND. No, it is fine.

Senator WHITEHOUSE. Aalayah, I just wanted to tell you that you have had to live through an experience that no child should have to live through, and what you have brought into this hearing room from that experience has been stunning.

Ms. EASTMOND. Thank you.

Senator WHITEHOUSE. Your testimony was incredibly well delivered—

Ms. EASTMOND. Thank you.

Senator WHITEHOUSE [continuing]. And incredibly well prepared, and I hope that not only you, but your friends and family who are with here today are very, very proud of what you have been able to draw out of that horrible experience you went through.

Ms. EASTMOND. Thank you.

Senator WHITEHOUSE. Take care of yourself because these things do not go away.

Ms. EASTMOND. Yes.

Senator WHITEHOUSE. But keep doing what you are doing—

Ms. EASTMOND. Thank you.

Senator WHITEHOUSE [continuing]. And do it with pride and confidence because you really shone today.

Ms. EASTMOND. Thank you.

Senator WHITEHOUSE. And, Jackson, may I use your first name as well? I just want to thank you, as well. It may seem a little weird coming from an old guy across the podium, but when I was 13 I was about your size, and I know what it is like to be the small kid. And I just want you to know that when you spoke today, you were the biggest person in this room.

Mr. CORBIN. Thank you.

Senator WHITEHOUSE. And you did a wonderful, wonderful job, and you brought a really important message to us. So, to you and to your family and friends who are here, congratulations. Well done. Please be proud and keep your voice.

Mr. CORBIN. Thank you.

Senator WHITEHOUSE. Hunter, you and I have a—may I use your first name also? At some point, you know, you can say, "no, I would prefer you call me 'Mr. Lachance.'"

Mr. LACHANCE. No, "Hunter" is fine.

Senator WHITEHOUSE. Okay, "Hunter" is fine. You and I share a similar predicament. We are the inhabitants of downwind States. Rhode Island, like Maine, is a tailpipe State, and if it were not for the EPA, there is nothing that our State environmental officials could do to protect us from out-of-State pollution, very often from coal-burning plants and so forth. And we have the same situation you do. We have a lot of kids, and when the air gets bad, you often see them in the emergency room. You have situations in Rhode Island where we are—you know, you are driving into work in the

morning and it is a beautiful day, the sun is shining. You should be out playing. You know these days. But on the radio you hear today is a bad air day, and we want little kids, we want old people, and we want people with breathing difficulties to stay inside on what would otherwise be a great day for you to be out swimming and playing sports and doing all those things. So, the voice that you brought here was very, very important.

To each of you I would say, part of the problem that I have in this whole nominations process is, that you are up against enormously powerful forces on the other side. The National Rifle Association essentially has dominion over Congress with respect to everything that has to do with guns and the ammunition that tore through your friends. The—I do not know what you would call it, a “mania,” a “fetish,” an “ideological crusade”—against providing your family with reliable healthcare simply makes no sense to me, and yet it is enormously powerful. And we came very, very close to a vote here where it would have been taken away from you.

And so, and, of course, the polluters have almost as much dominion around here in Congress as the NRA does. They bring in phony scientists who quarrel with the real science because they are paid to quarrel even if their science is not real. And they do economic studies that only show the harm to the polluting companies and totally omit what it is like to be you on a day that you cannot breathe except, like, through that little coffee straw.

So, this is a one-sided place, and the forces that have the most money and that make the most money are able to use it here in ways that keep very, very unbalanced. And my concern is that the current Republican Majority on the Supreme Court and the decisions of Judge Kavanaugh reflect a desire to enhance that power to defer decisions that the Court could make into this very unbalanced forum, to diminish the regulatory agencies where there is the actual expertise to understand and say how chlorophora carbons work, or what a loose guy filing should look like for a new stock offering, or complicated things like that.

And so, that is my biggest concern, and I am not going to take any more time because I have burned it all already. But I really, really was so impressed with each of the three of you, and I just wanted to say thank you. Well done. Do not ever give up. Those other forces may be big, but this is still our country.

Thank you.

Senator HATCH [presiding]. Mr. Kramer, as a public defender, you have spent your career representing defendants who do not have the money for a fancy law firm—

Mr. KRAMER. Yes.

Senator HATCH [continuing]. Or any kind of a law firm, who may have been accused of some very serious misconduct. Now, when appearing before Judge Kavanaugh, have you ever felt that your client’s economic status or situation or charged conducted affected the Judge’s treatment of your client?

Mr. KRAMER. No, I would say just the opposite, that they have always been treated without regard to any of those factors.

Senator HATCH. How have you ever had a case where you felt your client’s economic situation or charged conducted affect Judge Kavanaugh’s decision in the case?

Mr. KRAMER. I do not think it has ever affected his decision in a case. He examines the facts and the law and decides based on that without regard to those circumstances.

Senator HATCH. Well, he is a judge who is most well known for his jurisprudence on broad structural issues, like the separation of statutory interpretation or the—well, sometimes his jurisprudence on individual rights gets less attention. For example, his discussions of the importance of mens rea requirements, which I am very concerned about, and the problems, among many things, and the problems inherent in sentencing based on acquitted conduct. How has the—how has Judge Kavanaugh contributed to criminal law and the rights of defendants?

Mr. KRAMER. Well, in the acquitted conduct, he is bound by Supreme Court precedent, but he has encouraged judges as a matter of discretion, which they have to not use acquitted conduct for sentence. He has in a number of cases, some of which I have argued, on mens rea, he has reversed convictions or noted in concurrences that—or dissents that he believes that people should not be convicted of certain crimes without the proper mens rea. And he has written a number of those cases. So, I think in both of those areas, those are important individual rights for my clients.

Senator HATCH. Well, thank you.

Ms. Mahoney, you have known Judge Kavanaugh for over 2 decades since both of you were in the Solicitor General's Office together at the Justice Department. You have also appeared before him in Court. Now, what kind of a jurist is he on the bench?

Ms. MAHONEY. Phenomenal. I—

Senator HATCH. Do you have an advantage because you had served with him before?

Ms. MAHONEY. No, no, I am sure it was not an advantage.

Senator HATCH. What is the matter of him?

Ms. MAHONEY. Yes, right, I am sure it was not an advantage. He is extremely careful about his work, and one of the harder—hardest-working judges out there, and that is the way he was in the Solicitor General's Office, too. He is kind of renowned for his work ethic, for trying to find an answer in the case. And I think he believes that if you look long enough and hard enough, in most cases the answer is going to come, and it is just a product of doing the work.

Senator HATCH. Well, that is great. How many other lawyers have worked with Judge Kavanaugh or argued cases before him? You know many of them—

Ms. MAHONEY. I do not—I know most of the Appellate Bar in Washington, DC. Many of them have argued before him. Many of them know him from working with him either in the White House—

Senator HATCH. What are their opinions?

Ms. MAHONEY. I do not know anyone who does not put Judge Kavanaugh in just the highest category they can come up with. He is—he is remarkable, and people really adore him. I will tell you that, you know, around Washington, at least in my world, when people who were debating who would be appointed to the Supreme Court when Justice Kennedy retired, the answer from almost everybody that I talked to was, well, it ought to be Brett Kavanaugh.

So, I mean, this was—you know, this is the Supreme Court Bar and the Appellate Bar in the Washington, DC, area, but there is just really deep uniform respect for him as a jurist and as a man.

Senator HATCH. Everybody I know who knows him speaks very glowingly of him—

Ms. MAHONEY. Glowingly.

Senator HATCH [continuing]. Just like you.

Ms. MAHONEY. Uniformly glowingly.

Senator HATCH. Well, it seems to me he is precisely the type of person we want on the Bench.

Ms. MAHONEY. It would be a travesty if he does not get a hundred votes.

[Laughter.]

Senator HATCH. Well, you have put a lot of pressure—

Ms. MAHONEY. There you go. Just do that.

[Laughter.]

Senator HATCH. Keep it up. I appreciate that.

Ms. MAHONEY. Right.

Senator HATCH. We are happy to have all of you here. This is very important, and your testimonies all will be paid—given serious attention. Let us—who is next on this—

Senator WHITEHOUSE. Senator Blumenthal.

Senator HATCH. Senator Blumenthal, you are next.

Senator BLUMENTHAL. Thank you, Senator Hatch. I want to join in thanking all of you for being here. This is another great panel. I want to join my colleague, Senator Whitehouse, who very eloquently and powerfully thanked Aalayah Eastmond, and Jackson Corbin, and Hunter Lachance. You have really shown us how an individual voice can make such a difference. But I also want to thank Melissa Smith for your comments on how a collective voice can be impactful, and a lot of young people would not have their individual voices but for your service as a teacher.

I have always thought that being a teacher, along with being police, firefighter, emergency responders, you are the unsung heroes, our public service employees. I want to thank you for your personal testimony about the importance of the issues that matter in real lives to real people and have real impact.

Ms. SMITH. Thank you.

Senator BLUMENTHAL. And I want to ask Aalayah Eastmond, since we are talking about real people and real lives, you know, in Connecticut we had—we had a tragedy similar to the one you experienced. And I lived through an afternoon and then a week similar to what you did in Parkland, not the same firsthand experience that you did, but I saw the impact on loved ones, and children, and parents, and teachers as you did. And I saw the impact on moms and dads like Fred Guttenberg, who was here earlier in the week, as you know, and you commented in your testimony about him.

If I were Judge Kavanaugh, who, as you know, said that assault weapons should not be banned, cannot be banned, under the Second Amendment of the Constitution, what would you say to him?

Ms. EASTMOND. That my life, along with all the other youth, is more important than that gun.

Senator BLUMENTHAL. And if he said to you, you know, there is this legal principle that says unless it was a ban or one analogous

to it at the time of our Constitution or traditionally in our law, what would you say about the real impact of that kind of assault weapon on your life?

Ms. EASTMOND. Yes, it is unimaginable. The shooter at my school shot 34 kids in under 6 minutes, and that gun ended 17 lives on February 14th. That gun ended lives at Sandy Hook. That gun ended lives all over the country, and there are mass shootings that happen almost every month. And I believe that that gun needs to be banned, any assault rifle, and he needs to listen to us because our lives are just as important as any American's freedom to own a gun.

Senator BLUMENTHAL. Well, I hope that Judge Kavanaugh is listening to you. Thank you very much.

Thank you, Mr. Chairman.

Senator HATCH. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Thanks so much to all of you for being here. My friend and colleague, Senator Kennedy from Louisiana, had to step out for a few minutes and was not sure whether he will back in time, but he asked me to convey to you his gratitude to each of you for your testimony and your willingness to provide insights.

Ms. Mahoney, I would like to start with you. I heard mention a minute ago speculation about unfair advantage in court. And, Senator Hatch, I can tell you, she always has an unfair advantage in court because she is so good. You have always been one of my favorite litigators to watch argue cases in the Supreme Court. It is an odd little hobby of mine watching Supreme Court litigants, and I always enjoyed you arguing.

One of the things I have appreciated about your arguments is that you focus on the law. You focus on what—why your client's case is right, and you focus—you seem to have an approach that echoes something that you said a minute ago, which is that if you are willing to go to the hard work of finding the right answer in a case, you can find the right answer. The law will normally supply a correct answer, and you seem to believe that Judge Kavanaugh shares this view.

Tell me how that can instill a sense of civility among members of the Bar and among jurists, the belief that there is a right answer in the law.

Ms. MAHONEY. I think—I think there is a right answer in the law. I think he believes that, and it—and it should instill a sense of confidence in the Judiciary because there is sort of this pervasive view that the Justices are—or it is becoming more pervasive that the Justices are just partisans, you know, deciding for their team. And I certainly do not believe that is the case. I do not think that is what is going on. There are different ideologies, but I do not think it is partisanship. And I think that Justice—Judge Kavanaugh—Justice Kavanaugh hopefully—will perform will his role in a way that people will understand that he is just working to get the answer, the way he asks questions, the way he probes evenly, the way he shows respect for everyone, and the way he explains his decisions, and the way he surprises people sometimes with the way that he rules.

You will not be happy—Republicans will not be happy every time. Democrats will not be happy every time. But it will be a product of his reasoning and his effort and his work in the case. And I think Americans should be grateful for that kind of judicial approach, whether they are Republicans or Democrats, and I would hope that we could get beyond some of this polarization.

Senator LEE. As someone who has devoted her career to arguing in front of the Supreme Court, you can confirm that there is no aisle, there is no political aisle in the Supreme Court.

Ms. MAHONEY. There is no political aisle. No, there is not.

Senator LEE. And, in fact, 5-to-4 decisions are very rare.

Ms. MAHONEY. They are very rare, yes, they are.

Senator LEE. Ms. Taibleson, I appreciated your comments. Having served as a law clerk myself, I know that there is a special bond and relationship that develops between a law clerk and the judge or Justice for whom the law clerk is working. One of the reasons for that is, you are able to interact with the jurist on a day-to-day basis, not only in seeing, in your case, how Judge Kavanaugh interacted with his law clerks, but also how he interacted with his colleagues. What can you tell us about what you saw and what—how that would portend for how he would interact with colleagues regardless of their backgrounds and regardless of what some people might identify as their political ideologies?

Ms. TAIBLESON. Certainly, Senator. The D.C. Circuit Court of Appeals is composed of many judges who have diverse views on the law and on judicial philosophy, more generally. But at least when I was there, their views of Judge Kavanaugh are not diverse. Instead, they uniformly respect him. They appreciate his collegiality, his ability, his hard work, and ultimately the fact that he is a straight shooter. There are certainly always going to be disagreements, but those are disagreements that he has in good faith. There is no hidden agenda, nothing like that. He says what he means, and he means what he says.

I think on the Supreme Court, he is going to bring those same characteristics, and I think he is going to be sort of a uniter for that reason. I think he is going to bring out the best in his fellow Justices should he be fortunate enough to be confirmed, and is going to have great relationships with Justices across the ideological spectrum.

Senator LEE. Thank you.

Ms. Smith, I have great respect for teachers. Both my parents worked as educators in different capacities at different points in their careers, and they always taught me to have great respect for my teachers, especially social studies teachers because of the importance of the subject matter you teach. Can you help me understand, I understand that resources are scarce and resources—more resources often need to be devoted to public education to make sure that you as a teacher and your colleagues, those with whom you work, have the capacity to do your job, to educate people. Help me understand the connection between your concern for those resources and the jurisprudential philosophy of this Federal judge.

Ms. SMITH. One of my biggest concerns is his positions on public school vouchers. Taking money from public education to give a few

select people some choice takes money from us to fund someone else's education. We will be left in my district with the majority of our—of our same students with less funding than we have now, so—

Senator LEE. Well, when you say “his position,” you do not mean his policy position because he is acting not as a policymaker, but as a jurist deciding on whether or not something is lawful, deciding whether or not the policymakers are empowered to make that decision.

Ms. SMITH. Right, I understand—

Senator LEE. Is there not a difference between those two things?

Ms. SMITH. Yes and no. We often believe that our—whether they be elected officials or judges are not supposed to bring their personal views into it and only base decisions on the laws, but it does not always seem like that is the case. Maybe not with Judge Kavanaugh, but there is always a concern that personal views will influence judgment. That is a concern that teachers have, that students have. And when he has publicly spoken in support of public school vouchers, that is a concern that we have.

Senator LEE. I see my time has expired.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Thank you.

Senator Booker.

Senator BOOKER. I did not mind if he kept going. I did not want—I know I am the last person, I think, sir.

Chairman GRASSLEY. Well, we have got another panel waiting.

Senator BOOKER. Oh, you do have another panel. I apologize.

Chairman GRASSLEY. Yes.

Senator BOOKER. Okay. First of all, I just want to thank all the panelists for coming. I really do appreciate you participating in this process, and it is extraordinarily helpful.

Aalayah, your testimony was really heartbreaking and painful to listen, but the poise with which you spoke of something that I know is horrific and unimaginable was extraordinary.

Ms. EASTMOND. Thank you.

Senator BOOKER. Extraordinary.

Ms. EASTMOND. Thank you.

Senator BOOKER. And there are specific policy things that you all are advocating for. I know—I have met with lots of the students from Parkland, and I am just wondering if you—just give you another opportunity, not just because I also think you are extraordinarily eloquent speaker.

Ms. EASTMOND. Thanks.

Senator BOOKER. But are there any particular policy issues that you all are advocating for, that you can maybe speak to in a little more detail about what you would like to see and how that relates to a Supreme Court Justice?

Ms. EASTMOND. Yes. Right now we are focusing on an assault weapons ban because they are just unnecessary. Next year I will be 18, and I could get an assault rifle. Like, why I would need that? And also, high-capacity magazines, we want those gone, too. And also, my focus, I really want people from the Congress to focus on the youth from Black and Brown communities because that is often the elephant in the room that nobody wants to talk about,

and their lives are being taken away every single day. So, I think focusing on the entire spectrum of gun violence and not only mass shooting, but the shootings that happen every day in urban communities, are just as important.

Senator BOOKER. And I guess that is what spoke to me a lot because I live in a community with a lot of—even though my incredible mayor has done a lot to lower the shootings in my city, we still have a lot of—I had one on my block just this year where someone was murdered with an assault weapon at the top of the hill where I live. And I appreciate your concerns about that, and your advocacy is extraordinary. And I think that for you and the other young people on this panel, you should know in many ways your voices can be more powerful than any adult. And I just really want to thank everybody, all three of you, for being there.

Ms. EASTMOND. Thank you.

Senator BOOKER. Mr. Kramer, you said that generally you agree with me on criminal justice issues?

Mr. KRAMER. Yes.

Senator BOOKER. That is all I wanted to hear.

[Laughter.]

Senator BOOKER. No, sir.

Mr. KRAMER. That is good enough for me.

Senator BOOKER. Good enough for me as well. No, sir, the—can you just give me—I tried to make a point yesterday about the balance of power shifting in American law. I mean, we seem to have a right to a jury, but that seems to me, and I am not saying you should agree with me on this. I just want to hear your real opinion on it. It is really shifting dramatically because in a plea bargain, which is not really a fair bargain, but now prosecutors have a lot more of a—of a threat of jeopardy to offer—to offer that makes often people take a plea bargain because they are too afraid of going to trial. When they do go to trial, the chances for success are pretty low, and I know that public defenders often will let people know what the reality is. Is that shift in our American criminal justice system happening?

Mr. KRAMER. Senator Booker, that is a great question, and absolutely. I think you know the statistics. Over 97 percent of the cases in Federal court pleaded guilty last year, and similar statistics in State court, and I would not call it a “plea bargain.” I would call it a “plea imposition.” The terms are given. You take it. And you are absolutely right about mandatory minimum sentences skewing the power in the system. It is all in the prosecutor’s hands.

I have been around for a long time and seen a huge power shift as a result of sentencing guidelines, mandatory minimums, and just draconian sentences, especially of people of color. It has affected disproportionately. And so, yes, you are absolutely right, there has been a huge shift.

Senator BOOKER. And that is the painful thing for me is, I see young kids getting caught up for drug crimes that kids in privileged communities. You know, I, too, went to Yale, I went to Stanford. Lots of drugs. Lots of drugs. I will not make any personal confessions right now, but lots of drugs.

[Laughter.]

Senator BOOKER. And so, here are kids getting charges for doing things that two of the last Presidents admitted to doing, and then they are presented with a plea. I have had young kids sit in my office and say, hey, look, I was terrified, facing 10 years, stacked mandatory minimums. This guy told me I can get out right now, and then I end up with a—then I end up with a criminal conviction, but they do not realize that is a lifetime sentence.

And so, I guess, just can you make this point for me, that this idea of a right to a jury trial, that is kind of being eroded in the United States of America. Would you agree with me?

Mr. KRAMER. I would call it a disappearing right, Senator Booker. And also, I think you are absolutely right, and since you did not make any confessions, I do not feel I have to make any either.

[Laughter.]

Senator BOOKER. You are good.

Mr. KRAMER. But you are right, there is—you are talking about the neighborhoods. There are tactics in various neighborhoods that if they were engaged in other neighborhoods in the cities or suburbs that would just be—they would not be tolerated by the population there, but because of a powerless population in the neighborhoods where it does occur. And so, you are right on both points about the tactics that occur in various neighborhoods, and you are absolutely right about the disappearance of the—of the jury trial.

Senator BOOKER. Okay, thank you. My time has expired. I just want to say something to Mr. Christmas because I have met—Mr. Christmas and I know—have previous—we have met each other before. And I just want to testify to your character because it is a tough—you said something—he said something that was really—I think really important about the partisanship and the tribalism often, and how friendships are tested, that you were speaking to what you know of him as a friend, not as a judge, but as a friend, and I want to appreciate that.

And I want to make an open offer for you because you stopped playing basketball because of your age. The Senate has a basketball game, and I promise you there are age-appropriate of us that can play, and you probably would be like Michael Jordan if you came and played amongst us.

[Laughter.]

Mr. CHRISTMAS. I will do my best.

Senator BOOKER. All right. Thank you, sir.

Chairman GRASSLEY. We have two things left for this panel. Senator Kennedy, you want some time. And then Senator—well, now, we are going to have Senator Hirono, too. Go ahead, Senator Kennedy.

Senator KENNEDY. I had to step out for a few minutes, but I heard your testimony, each of you, and I just want to thank you for it. And I know you each spent a lot of time putting the testimony together. This stuff does not just write itself. I was—mentioned to the earlier panel, I enjoy this immensely. I learn a lot from listening to your different perspectives, and I just want to thank you.

Chairman GRASSLEY. Senator Hirono does not want to be recognized.

Senator HIRONO. Mr. Chairman, I have questions for the next panel—

Chairman GRASSLEY. Yes.

Senator HIRONO [continuing]. But I certainly thank this panel for being here.

Chairman GRASSLEY. Yes. Yes. I am—for courtesy to the Ranking Member, he wants to speak for a minute to some people on the panel.

Senator WHITEHOUSE. Yes, thank you very much, Chairman. I just wanted to make one point because there is so much discussion about mens rea, and I just wanted to provide what I see as some context for this. I have read Judge Kavanaugh's decisions on mens rea, which have focused so far on individual defendants, and very often individual defendants who faced very significant terms of incarceration. And I see no objection whatsoever in any of the decisions that I have read of his.

I have also been at the center of the effort to try to negotiate a sentencing and reentry reform package, along with Senator Cornyn, Senator Grassley, and Senator Booker, and Senator Lee, and others. And as we did that, what began to pop up and what popped up through big industry-funded groups, was a late-arriving desire to reform mens rea. And the obvious motive for that is a group of offenses, a category of offenses, that are called "public welfare offenses."

And those are offenses in which we say, particularly about a dangerous instrumentality, like a pollutant, or benzi, or dynamite, or something like that, that at some point if you are a big corporation and something really goes wrong—you spill your 10,000th barrel—that is a crime, and we do not care what your mens rea, what your degree of intent is. Your job as a big corporation that pollutes or has dangerous things is, to make sure that does not happen. That is why we put that marker out there. And it is a very well-established type of criminal conduct, is it not, Mr. Kramer?

Mr. KRAMER. Yes, absolutely. Public regulatory offenses like that, they are—there are a number of them, right, that have no mens rea requirement.

Senator WHITEHOUSE. And my worry, and I will just put this out, there is a marker, and this will be telling if it happens, is, if this body of precedent that Judge Kavanaugh is building up with respect to individual defendants who face significant terms of incarceration all of a sudden has a very big morph and suddenly becomes the basis for an attack on these public welfare offenses. I have seen that maneuver begin to happen in Congress, and if it starts to happen in the courts, to me, at least, that would be another telling sign of the big influencers and interests that operate so much of what happens in our court systems coming in to seize a prize. And I hope that we do not go there.

Mr. KRAMER. Did you want me to respond? If you want me to respond briefly, I do not want to—

Senator WHITEHOUSE. Go ahead and respond briefly.

Mr. KRAMER. The only thing I can say, and I know exactly what you are talking about, is that, Judge Kavanaugh, the opinions he has written are in cases that have a mens rea requirement, knowing, willfully. And I have never seen him write that it should be

extended to public with—he is—in other words, he is going with the will of Congress and what Congress enacted. And I have never seen him take that step in an opinion—

Senator WHITEHOUSE. And I hope he never does.

Mr. KRAMER. Of a case—of a crime without a mens rea requirement.

Chairman GRASSLEY. Okay. Once again, even though I thanked you once, we know you go to a lot of work to do this for the people of this country and the Senate in the consideration of this nomination. Thank you very much, and you are dismissed.

Before I introduce the next panel and swear the next panel, I want to take the opportunity to give appreciation from the Chairman of the Committee for all the staff work that goes into this. And I have been fortunate as a Senator to have an outstanding staff over many years, and I hope they know how much I appreciate them, both Committee staff and Personal Office.

Before closing this hearing today, I would like to name staffers specifically assigned to work on this nomination hearing. Some are my permanent staff, led by Chief Counsel for Nominations Mike Davis, and including Lauren Mehler, Steve Kenney, Jessica Vu, and Katharine Willey.

And then others are here only temporarily because we get additional resources when we have a Supreme Court nominee, so I want to name them and say thank you for their extraordinary work and commitment to public service. The special counsels added specifically for this Supreme Court nomination were led by Andrew Ferguson and included Tyler Badgley, Lucas Croslow, Colleen Ernst, Megan McGlynn, and Collin White. The law clerks were Camille Peeples, Abby Hollenstein, Tim Rodriguez, Dario Camacho, Elizabeth Donald, Bob Minchin, Nathan Williams, Sam Adkisson, Nick Gallagher, Michael Talent, Asher Perez, Garrett Ventry, as did Jacob Ramer as an intern.

So I thank the legal team for their important part in the Senate's consideration of Judge Kavanaugh.

I think before I introduce you, I would ask that you stand so I can swear you, please.

[Witnesses are sworn in.]

Chairman GRASSLEY. Thank you all very much. I know a lot of you here, names I recognize, you are famous around town and famous in history, so I probably will not do justice to your introduction.

Monica Mastal is a real estate agent in Washington, DC. She has known Judge Kavanaugh for 25 years.

John Dean, who I have known not as a person but I have known since before I even got to Congress by his reputation, served as Richard Nixon's White House Counsel from 1970 to 1973.

And then, of course, famous lawyer Paul Clement is a partner of Kirkland & Ellis, served as Solicitor General of the United States 2005 to 2008 and has argued over 90 cases before the Supreme Court. Judge Kavanaugh and Mr. Clement clerked at the same time on the Supreme Court. Judge Kavanaugh clerked for Justice Kennedy—and the Justice's whose big shoes Judge Kavanaugh is nominated to fill—when Mr. Clement clerked for the late Justice Scalia.

Professor Rebecca Ingber—I hope that is right—is an assistant professor of law, Boston University School of Law.

Professor Adam White has had me on panels with an organization he is with, and he is also from Iowa, not right now from Iowa but was born in Dubuque, Iowa. By the way, I talked about you in my opening statement this morning. Professor Adam White is assistant professor at George Mason University Antonin Scalia Law School and is executive director of C. Boyden Gray Center for the Study of Administrative State. He is also a research fellow at the Hoover Institution and a member of the Administrative Conference of the United States. And I also had a chance to meet your parents about an hour ago, and they came out just especially for you.

Professor Lisa Heinzerling, is that right? Is a Justice William J. Brennan, Jr., Professor of Law at Georgetown University Law Center.

Professor Jennifer Mascott served as a law clerk for Judge Kavanaugh from 2006 to 2007 and went on to clerk for Justice Clarence Thomas, Supreme Court. She is an assistant professor of law at George Mason University Antonin Scalia Law School and is counsel to the law firm Consovoy McCarthy Park.

Professor Peter Shane is the Jacob E. Davis and Jacob E. Davis II Chair in Law at the Ohio State University Moritz College of Law.

So will you proceed, Ms. Mastal?

**STATEMENT OF MONICA MASTAL, REAL ESTATE AGENT,
WASHINGTON, DC**

Ms. MASTAL. Thank you, Mr. Chairman.

Mr. Chairman Grassley, Ranking Member Whitehouse, and Members of the Senate Judiciary Committee, I am honored to be here today to address you in support of my friend and my daughter's favorite coach, the Honorable Brett Kavanaugh. My testimony today will not be from a legal perspective but from a personal and parental perspective. Consider it more about the person than the nominee.

I have known Judge Kavanaugh for many years, but in recent years have seen him on a regular basis thanks to his position as the coach of the CYO girls fifth and sixth grade basketball team at Blessed Sacrament School. In our house, he is not known as Judge Kavanaugh but as Coach K. He was my daughter's coach for 2 years. Our first year, his daughter was in fourth grade and therefore ineligible for the team. He still coached. In my book, that alone qualifies him for sainthood.

As a high school and college player, Coach K had the job prerequisite of basketball knowledge. More importantly, however, he had the other necessary attributes of patience, fairness, and diplomacy, and he had them in spades. Fairness with young players and opposing teams, patience with boisterous parents, and diplomacy with referees who are on their fifth game of the day and making some questionable calls.

In the few hours a week of practices and games, Judge Kavanaugh teaches much more than the fundamentals of basketball. All of the other important concepts were there, too: teamwork,

hard work, commitment, setting and achieving goals, and striving to be your best. It is an enormous task to communicate all of that to young girls in so little time, but his calm demeanor got the message across. No yelling or gavel was necessary.

Of course, the Kavanaugh's contribution to our community extends beyond basketball. School auctions, food drives, and service projects are abundant at Blessed Sacrament, and Brett and Ashley are always there to participate.

This leads me to another personal perspective: Brett is relatable to everyday Americans. In the public eye, Supreme Court Justices are strictly cerebral, ethical, humble, and courageous. He is all of those things, but I am one of the everyday Americans who sees him getting his children to practice, managing four games a weekend, serving as a lector at church, running on the high school track, and socializing with friends.

As my final note today, I would like to read Coach Kavanaugh's "final note" to my daughter, from his end-of-the-season player evaluation. I share this with the utmost confidence that every player on the team received the same honest, appreciative, supportive, heartfelt, and confidence-building message. It stated: "Thanks, Mary Grace. You are an excellent athlete and were a great contributor to the team. We loved your spirit and attitude. We really enjoyed coaching you and wish you all the best. We look forward to having you on the team next year. Keep up your great spirit, attitude, and work ethic and you will be a big success in all you do." It kind of makes me want to go back to fifth-grade basketball.

Thank you for the opportunity to share this personal perspective. As the great UCLA basketball coach John Wooden said, "Young people need models, not critics." I think this final note says it all as to the model Coach Kavanaugh has been to our children. I know the parents of his players feel as fortunate as I do that our girls had such a wonderful mentor. Through basketball, he taught them the skills they will need not only for a season, but for a lifetime.

Thank you.

[The prepared statement of Ms. Mastal appears as a submission for the record.]

Chairman GRASSLEY. Mr. Dean.

STATEMENT OF JOHN W. DEAN, FORMER COUNSEL TO THE PRESIDENT, PRESIDENT RICHARD M. NIXON, BEVERLY HILLS, CALIFORNIA

Mr. DEAN. Mr. Chairman, Ranking Member, Members of the Committee, thank you for the invitation. In my allotted time, I would like to take a few points from the statement I have submitted for the record.

I have made two overriding points in that submitted statement. First, if Judge Kavanaugh joins the Court, it will be the most Presidential-power-friendly court in the modern era. Republicans and conservatives only a few years ago, I know well, fought the expansion of Presidential power and Executive powers. That is no longer true.

Judge Kavanaugh has a very broad view of Presidential powers. For example, he would have the Congress immunize sitting Presidents from both civil and criminal liability. Under Judge

Kavanaugh's recommendation, if a President shot somebody in cold blood on Fifth Avenue, that President could not be prosecuted while in office. Also, it is not clear to me listening to the testimony that he really believes *U.S. v. Nixon* was correctly decided.

A second general point from my submission, a very vital, I think, process point, Ranking Member Dianne Feinstein stated on the morning of September 4 just before the hearings opened that after participating in nine Supreme Court confirmations, it had never been so difficult to get access to background documents relating to a nominee as in the current proceedings. Unsuccessfully, the Minority sought to postpone these hearings until all the requested documents were provided. The Chair, however, declined to consider the motion that would make review possible.

This Committee is deeply involved in the final phase of vetting Supreme Court nominees. Based on personal experiences with the confirmation, for example, of William Rehnquist and studying the confirmation of Clarence Thomas, it is clear there was an across-the-board failure to fully vet the nominees, and it has haunted their careers on the Court, it has hurt the Court and the American people. Because of the withholding of documents, Judge Kavanaugh may be traveling the same path as Rehnquist and Thomas.

When writing a book that I did several years ago, "The Rehnquist Choice," I explained how Rehnquist was selected by Nixon as one of the two—for two openings that occurred in 1971. I also reported my sad discovery that Rehnquist had dissembled during his confirmation proceedings. He did, however, notwithstanding false statements, become an Associate Justice.

When Ronald Reagan nominated him to be Chief Justice in 1986, again, he was not vetted, and in those hearings he was confronted not only with his early false statements but new material that resulted in new false statements. All the Court historians that I have examined as well as Court scholars find clear and convincing evidence that Mr. Rehnquist lied in his two confirmation proceedings. This hurt him and it hurt the Court.

Because Justice Thomas was not fully vetted, his career on the Court has been under a cloud as well. Justice Thomas' truthfulness vis-a-vis Professor Anita Hill's claims of sexual harassment have never been fully resolved, nor has the controversy ever ended. A definitive study of this controversy was undertaken in 1994 by journalists Jane Mayer and Jill Abramson, "Strange Justice: The Selling of Clarence Thomas." They found a preponderance of evidence that supported Anita Hill's claims. This controversy has received renewed attention with the #MeToo movement, which is growing stronger and it is not going to disappear. In fact, Justice Thomas' truthfulness is an issue in this year's midterm elections. A Democratic candidate in Massachusetts has made impeachment of Thomas for his false claims during his confirmation one of the planks of her campaign.

In closing, Judge Kavanaugh's nomination has raised issues about the truthfulness of his confirmation to become a judge on the D.C. Circuit. His answers to this Committee have not resolved the issue. Frankly, I am surprised that Judge Kavanaugh is not demanding that every document that he has ever handled be re-

viewed by this Committee unless, of course, there is something to hide.

Thank you.

[The prepared statement of Mr. Dean appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Dean.

Now, Mr. Clement.

STATEMENT OF HON. PAUL D. CLEMENT, PARTNER, KIRKLAND & ELLIS LLP, AND FORMER SOLICITOR GENERAL OF THE UNITED STATES, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. CLEMENT. Thank you, Chairman Grassley, Senator Whitehouse, and Members of the Committee. It is a great pleasure and honor to return to the Senate Judiciary Committee where I served as a staffer some two decades ago. It is an even greater pleasure and honor to be here today to testify in support of the confirmation of Judge Kavanaugh's nomination to the Supreme Court of the United States.

Judge Kavanaugh and I first met some 25 years ago when we clerked at the Supreme Court together during the same term for different Justices. Although the law clerks were an impressive bunch, Brett immediately stood out. Unlike most of the rest of us whose legal experience consisted of a single appellate clerkship, Brett came to his Supreme Court clerkship with two clerkships under his belt already on the Ninth and Third Circuits, and he had also served as a Bristow Fellow in the Office of the Solicitor General, where he spent a year following the Court closely and working on briefs in opposition and other Supreme Court filings.

As a result, while the rest of us were feeling our way rather blindly through the process of preparing our first pool memos and sorting through our first sets of briefs, Brett was already fully versed in the Court's certiorari criteria, rules, and even stood ready to handicap the likely quality of upcoming oral arguments by members of the Supreme Court bar. Brett quickly came to be seen by his fellow law clerks as a resource on everything from the minutia of Supreme Court practice to matters of high constitutional doctrine.

But what really stood out about Brett was not just his knowledge of the Court and the law, but the undeniable fact that he was a well-rounded, likable, and unpretentious person. You expect a Supreme Court law clerk to have a first-rate legal mind. You do not necessarily expect a Supreme Court law clerk to have a sweet jump shot. I can tell you from firsthand experience that Brett had both. He was as comfortable talking about how to break a full-court press as he was discussing the *Rooker-Feldman* doctrine.

For all these reasons, Brett was admired by fellow clerks from all chambers and across ideological lines. None of us was the least surprised to see him become the first of our ranks to argue a Supreme Court case and the first to become a Federal appellate court judge, beating out Justice Gorsuch by a nose.

Judge Kavanaugh and I became friends during our clerkship year and have remained friends ever since. But I am not here today testifying out of friendship. Rather, I am testifying today be-

cause of what I have seen in observing Judge Kavanaugh in his over 12 years of service on the Federal appellate bench.

By happenstance, I was in the courtroom to witness one of Judge Kavanaugh's first oral arguments as an appellate judge. He was incredibly well-prepared. He demonstrated a mastery of the record and asked penetrating questions of both sides. He carefully listened to the arguing attorneys' answers, as well as the questions emanating from his more seasoned colleagues. None of this surprised me, but I was struck by the fact that he was expressing this mastery of the record and a profound interest in the legal arguments in the context of a petition for review from a decision of the Federal Energy Regulatory Commission, or "FERC."

Now, at least in my days as a law clerk on the D.C. Circuit, FERC cases were not among the most coveted by the law clerks or the judges. FERC cases were notoriously complex, with long administrative records filled with strange acronyms and doctrines unknown in other areas of the law. I feared for my friend Judge Kavanaugh that he would be saddled with the assignment of the FERC case while his more senior colleagues authored opinions in higher-profile cases addressing more readily accessible doctrines.

While my fears were realized, I am quite sure that Judge Kavanaugh did not mind. As I have seen in the ensuing 12 years, he approaches every case with the same thorough approach, regardless to the amount in controversy, the degree of notoriety, or the agency involved. He recognizes that each case is the most important case for the clients and lawyers involved and treats each case accordingly.

Let me close with just a few words about judicial temperament. The concept has been much discussed in the course of other judicial confirmation hearings, but the topic has received less attention in the course of these particular hearings because Judge Kavanaugh has so plainly demonstrated the requisite judicial temperament over his years on the D.C. Circuit.

That said, I believe it is a mistake to think of judicial temperament as if it is a binary characteristic, something a judicial candidate either has or lacks. Instead, there are degrees of judicial temperament. And I am here to tell you, based on my own experience arguing in front of Judge Kavanaugh that Judge Kavanaugh has judicial temperament in spades. He is respectful of counsel in both his demeanor and in his level of preparation and engagement.

Nothing is more discouraging to litigants or their clients than a cold or underprepared bench. There is no fear of that with Judge Kavanaugh. He understands that appellate cases are serious business for the parties involved and prepares accordingly. So I think based on my experience knowing him not just as a friend but also as a judicial officer, by any conventional measure, I believe he is enormously qualified to serve on the Nation's highest court. I am confident he will serve with distinction, and I urge you to vote for his confirmation.

[The prepared statement of Mr. Clement appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Mr. Clement.
Now, Professor Ingber.

**STATEMENT OF REBECCA INGBER, ASSOCIATE PROFESSOR
OF LAW, BOSTON UNIVERSITY SCHOOL OF LAW, BOSTON,
MASSACHUSETTS**

Professor INGBER. Thank you, Chairman Grassley, Ranking Member Whitehouse, and distinguished Committee Members. It is an honor to testify before you today.

My name is Rebecca Ingber. I am an associate professor at the Boston University School of Law, and previously, I served in the State Department Office of the Legal Advisor, where I worked with colleagues at the Departments of Justice and Defense, in the intelligence community, and at the White House on matters involving international law and war and Executive power, so my testimony today will focus on Judge Kavanaugh's jurisprudence in these areas.

Judge Kavanaugh has clearly had an exceptional career and has many obvious strengths, but I believe there are concerns his jurisprudence raises that should be addressed before final consideration of his nomination.

In particular, and as I explore in more detail in my written remarks, Judge Kavanaugh's opinions reveal that he is exceedingly reluctant to impose checks on the President's powers in the national security sphere.

Now, this is not an area where Judge Kavanaugh has merely followed precedent with his hands tied.

To take one prominent example, in a case involving the President's authority over detainees at Guantanamo Bay, Judge Kavanaugh wrote an 87-page separate opinion to argue that the Court should not look to international law to inform the President's war powers, a position that is contrary to over two centuries of settled precedent. In fact, all three branches of Government have long looked to international law to define war powers over the entire course of this Nation's history. When Congress authorizes the President to use all necessary and appropriate force, it does so against the backdrop of that history.

The Supreme Court has ratified this understanding repeatedly, including in opinions that look to international law both to read the President's powers expansively and to interpret the outer limits on those powers. They did just that in *Hamdi v. Rumsfeld*, which Justice Kennedy joined, which looked to international law to find that the 2001 statute authorizing the President to use military force also authorizes detention, as well as limits on that detention.

Perhaps because these rules have always guided our understanding, international law is one of the only tools the courts and the political branches have for interpreting war powers. Thus, it is often the only limiting principle for interpreting the outer bounds of the President's wartime authorities.

Now, I want to clarify a misconception about international law. These are not rules imposed on us by some outside source. The international laws of war, for example, are rules that we have affirmatively chosen to be bound by, specifically in wartime, and which the United States, including the U.S. military, has always played a principal role in shaping. These are rules that benefit our military, as well as all of us.

These rules are so built into the national ethos that we may forget they derive from international law. For example, we know that it is unlawful for the President to kill families of terrorism suspects. Why? Because the international laws of war prohibit the targeting of civilians. And we have always interpreted the President's authority to wage war in light of those rules.

If the Supreme Court were to adopt Judge Kavanaugh's position on this or other areas where he has invoked national security to dismiss the Court's role in checking the President, the result would be that the President could wield nearly unreviewable discretion when he invokes war or national security.

For my time in Government, I know there is a great deal of thoughtful decisionmaking and robust process that happens inside the national security apparatus, but I also saw firsthand the importance of the Court's role in checking Presidential power, even when the President invokes war or national security. Mistakes happen. Bad decisions may come about through incompetence, through insufficiency of facts, exigency, and even, yes, through the intentional abuse of power. Even a robust process can lead to Presidential overreach. After all, the premise of the separation of powers is that each branch will seek to enhance its own authority and the other branches, including the courts, are there to impose limits.

Moreover, while Judge Kavanaugh would have the courts defer broadly to the President in this area, the reality is that the executive branch looks to the courts to understand the parameters of its authority. When a judge defers broadly to the position that the Government takes in court, a position taken not under the best view of the law standard but rather that of a defensive litigant trying to win its case, the court's deference often has the result of a merits decision, and that becomes the law for the executive branch going forward. If the courts never—

[Disturbance in the hearing room.]

Professor INGBER. If the courts never push back on the Government's litigation positions, the result is a one-way ratchet of expanding Executive power.

And because so much of executive branch decisionmaking in this realm happens in secret, accountability through public scrutiny alone is often insufficient. Judicial review is at times the only means of holding the President accountable.

For these reasons, and those in my written testimony, I urge you to consider the dangers in a judicial approach that cedes to the President unreviewable discretion in this realm.

Thank you for inviting me to testify today. I would be pleased to answer any questions the Committee has.

[The prepared statement of Professor Ingber appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor.

Now, Professor White.

STATEMENT OF ADAM J. WHITE, PROFESSOR AND EXECUTIVE DIRECTOR, THE C. BOYDEN GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE, GEORGE MASON UNIVERSITY ANTONIN SCALIA LAW SCHOOL, ARLINGTON, VIRGINIA

Professor WHITE. Thank you. Chairman Grassley, Ranking Member Whitehouse, Members of the Committee, thank you for inviting me to testify in support of Judge Kavanaugh's nomination.

Chairman Grassley, as you very kindly mentioned, my first education in civics and history came from the teachers in Dubuque, Iowa, and the University of Iowa, so it is a real pleasure to be here today, a great honor to discuss Judge Kavanaugh's own deep appreciation for our Constitution and the rule of law, as exemplified by his 12 years of service on the D.C. Circuit, 300-plus judicial opinions, and a deep record of legal scholarship.

His record is particularly impressive on questions of administrative law; that is, the body of law that governs administrative agencies and defines the agencies' relationships with Congress, with the courts, with the President, and with the people. In my longer written testimony, I focus on four important aspects of Judge Kavanaugh's approach to administrative law. Today, I would like to highlight two issues in particular.

The first involves doctrines of judicial deference to administrative agencies' legal interpretations. Not long ago, skeptics of judicial deference were found primarily on the left. Now, increasingly, judicial deference also finds critics on the right. I would like to echo a lot of Professor Ingber's comments toward the end of her testimony on the inherent challenges and problems of excessive judicial deference to the executive branch, not just in matters of foreign policy and national security but also with respect to executive regulatory agencies.

Throughout his time on the D.C. Circuit, Judge Kavanaugh has faithfully applied the Supreme Court's increasingly complex approach to judicial deference, including *Chevron* deference, especially in recent cases involving agencies claiming immense new regulatory powers under the guise of decades-old statutes.

My second point today goes to the design of administrative agencies. From time to time, Congress has passed laws giving a certain degree of independence to the leadership of Federal regulatory commissions or to other officers by limiting the President's ability to fire those officers at will. Making officers independent from the President raises profound constitutional questions because, as Professor Amar explained this morning, the Constitution vests the President with Executive power. The Constitution obligates the President to take care that the laws are faithfully executed, and when you break that link of accountability between officers and the President, you undermine both of those constitutional commitments.

So on the limited occasions where the Supreme Court has affirmed statutes giving regulatory commissions or other officers a measure of independence, it has done so carefully and subject to crucial limits. Judge Kavanaugh has followed those judicial precedents very carefully in cases where Congress improperly attempted to vest even greater independence in newly created regulatory agencies beyond the limits previously allowed by the Supreme

Court. And this includes the *PHH* case, as Professor Amar noted this morning.

In applying those Supreme Court precedents, Judge Kavanaugh has attracted criticism from those who would like to see administrative agencies be made even less accountable to the courts, the President, and the Congress. Now, in an era when agencies are often eager to enact policies that Congress has not legislated, some of Judge Kavanaugh's critics favor those energetic agencies over Congress. And in a system where an elected President might disagree with the policy preferences of an administrative agency, some of Judge Kavanaugh's critics favor making the agencies independent from the President rather than accountable to the President. And in an era when administrative agencies have been increasingly eager to impose unprecedented and immense regulatory programs despite the lack of clear legislative authorization, some of Judge Kavanaugh's critics favor judges becoming more deferential to agencies, not less.

I think Judge Kavanaugh, in applying the Supreme Court's precedents under the Constitution, has the better of these arguments. His approach in my opinion is administrative law at its best, empowering agencies to administer the laws efficiently and effectively but always subject to the deeper fundamental commitments of our Constitution's structure and rights. For that reason, I hope that you will give your advice and consent to the appointment of Judge Kavanaugh to the Supreme Court.

Thank you for this opportunity to testify.

[The prepared statement of Professor White appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor White.

Now, Professor Heinzerling.

STATEMENT OF LISA HEINZERLING, JUSTICE WILLIAM J. BRENNAN, JR., PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Professor HEINZERLING. Thank you, Chairman Grassley.

Chairman GRASSLEY. Push the red button or whatever color the button is.

Professor HEINZERLING. Thank you, Chairman Grassley and Ranking Member Whitehouse, for inviting me to testify here today. My name is Lisa Heinzerling, and I am the Justice William J. Brennan, Jr., Professor of Law at Georgetown University. I will testify about Judge Kavanaugh's views on administrative law. They are somewhat different from the views we have just heard.

Administrative agencies are at the heart of administrative law. These agencies are the institutions you know by their initials: the EPA, the FDA, the FTC, the FCC, and so on. They are the institutions that do the day-to-day work of Government, staffed by experts, created and set in motion by Congress, and subject to requirements of public input and reason-giving.

Administrative agencies combine expertise, politics, and deliberation in a way other institutions do not. They are responsible for everything from addressing air pollution to enforcing rules against financial fraud. They are essential to the daily business of Government.

Judge Kavanaugh would limit the ability of Congress to structure and empower administrative agencies to do this important work. He would eliminate Congress' power to provide agencies with some measure of independence from the President by protecting their top officials from being fired for political reasons. He would also erase Congress' power to give agencies legal authority to deal with the most important problems we face unless Congress speaks with precise and crystalline clarity. His opinions stating these views read as if they are addressed to the administrative agencies themselves, but make no mistake, Judge Kavanaugh's sights are trained on Congress and its power to structure and empower administrative agencies.

Judge Kavanaugh believes that the basic problem with the structure of government today is that the President has too little power and that Congress has too much. Judge Kavanaugh believes that one of the constitutionally guaranteed powers of the President is the power to fire agency officials for any reason he deems sufficient, even where Congress has made a different choice. Yet longstanding Supreme Court precedent confirms Congress' constitutional power to create agencies that are relatively independent from the President. Judge Kavanaugh's approach to this precedent has been to treat it grudgingly and read it narrowly. Once on the Supreme Court, Judge Kavanaugh would be able to cast this precedent aside, and in doing so, restructure modern government.

The result would be a super-powerful President, a diminished Congress, and a corrosion of the checking and balancing that the Constitution contemplates. Under Judge Kavanaugh's constitutional theory, the President would be able to exercise undiluted control over all of the administrative agencies. Ironically, Judge Kavanaugh has thus taken an instrument that is aimed at checking concentrated power—that is, the separation of powers—and turned it into an instrument calibrated to increase the power of the already most powerful person in the Government.

Judge Kavanaugh also has a cramped view of Congress' power to delegate crucial jobs to administrative agencies. He has indicated that his preference would be to discard or drastically pare back longstanding precedent giving agencies deference when they interpret statutes that Congress has charged them with implementing. The result would be uncertainty and disruption as agencies, citizens, and courts adjusted to a wholly new approach to statutory interpretation.

Even more damaging, however, is Judge Kavanaugh's view that Congress may not empower an agency to issue a major rule—that is, a rule that has great political and economic significance—without giving the agency a precise and crystal-clear instruction to that effect. This interpretive approach would perversely disable agencies in the very circumstances in which we need them the most. It would skew statutory interpretation against agencies' power to undertake protective regulatory programs that run counter to Judge Kavanaugh's own political preferences. And it demands a legislative clarity that Judge Kavanaugh himself has said is difficult to achieve.

Worst of all, it is quite clear that Judge Kavanaugh would apply his strict new principle of interpretation only to affirmative regu-

latory initiatives and not to deregulation or failure to regulate. This is not a neutral principle.

Judge Kavanaugh often says that his motivating force is the protection of individual liberty, but the liberty Judge Kavanaugh embraces is badly skewed and terribly small. It is the liberty of powerful groups to do their business unhindered by Government rather than the liberty that comes from meaningful Government protections against harmful human behavior. In the name of liberty, Judge Kavanaugh has rejected rules addressing toxic air pollution, climate change, workplace safety, and financial fraud without acknowledging that in such cases liberty sits on both side of the legal question. There is on one side the liberty of regulated groups to go about their business unimpeded by Federal law. There is on the other the liberty of the rest of us to go about our lives at home, at work, at school, and in our communities with the reasonable assurance that the Government has our back in protecting us against coming to harm at other people's hands.

Thank you.

[The prepared statement of Professor Heinzerling appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Professor.

Now, Professor Mascott.

**STATEMENT OF JENNIFER MASCOTT, FORMER LAW CLERK,
AND ASSISTANT PROFESSOR OF LAW, GEORGE MASON
UNIVERSITY ANTONIN SCALIA LAW SCHOOL, ARLINGTON,
VIRGINIA**

Professor MASCOTT. Mr. Chairman, Ranking Member Whitehouse, and Members of the Committee, thank you for the opportunity to testify today. I am honored to speak in support of my mentor and former boss, Judge Kavanaugh, and to share with you why I believe he would be an outstanding Supreme Court Justice. So my testimony will highlight three aspects of Judge Kavanaugh's character and judicial service: first, his commitment to mentorship and consideration of diverse perspectives; next, his fair-minded and careful consideration of legal questions; and then finally, his commitment to following the law, independent of personal policy preferences. These are qualities that I have witnessed firsthand as Judge Kavanaugh's law clerk and then as a student of his opinions over the years.

I served as a law clerk to Judge Kavanaugh during his first year on the bench, and already at that time Judge Kavanaugh demonstrated a commitment to seeking out diverse perspectives. Our group of four clerks came from different parts of the country, had diverse racial backgrounds, grew up among distinct religious traditions, and graduated from ivy-league, as well as non-ivy-league law schools.

Judge Kavanaugh's decision to hire our group of clerks showed his value for perspectives of people from different walks of life, and the Judge values hard work, achievement, and determination, not any specific pedigree.

We routinely had lively discussions in the Judge's chambers as he prepared each month for oral arguments. The Judge encouraged us to ask tough questions of him as he prepared and to debate legal

issues with him and with each other. The Judge wanted to hear and consider all sides of an issue, apply the law fairly, and help train us to bring more rigor and precision to our legal analysis, skills that have stayed with me throughout my career so far. And now, as a law professor, I view it as part of my job to pass along those skills to another generation of students.

In addition to training us professionally, the Judge also mentored us on a more personal level. We had regular lunches with the Judge where we would discuss our families, our professional aspirations, sports. Judge and Mrs. Kavanaugh had us in their home for dinner during the holiday season, a tradition that continued for many years. And Judge Kavanaugh's devotion to training and mentoring female and male leaders in the legal professional does not conclude at the end of a clerkship in his chambers. He has remained a close mentor to me, providing advice at every major point in my career since the end of my clerkship more than 11 years ago.

And Judge Kavanaugh also branches out to assist young lawyers far beyond the four corners of his clerk community. He presides over student moot court proceedings. He speaks to students associations and regularly teaches courses to students in law school campuses.

Judge Kavanaugh's record of mentoring young lawyers and his practice of hiring law clerks with diverse life experiences demonstrate his commitment to giving back to the legal profession and show that he has an open mind. Judge Kavanaugh knows the impact that members of the judiciary can have on the legal profession, the state of the law, and individuals in the real world.

Judges take an oath to decide cases according to the law and the Constitution, but care for people and the legal system in its entirety can make a jurist a more careful, modest, and thoughtful judge.

Judge Kavanaugh's determination to consider all relevant issues and hear discussions from all sides also shows his humility and his commitment to equal justice under the law. During my clerkship, he approached each case with the same level of care, regardless of the identity of the litigants or the legal issues presented. He considered all relevant statutes, precedent, and history, and he was conscientious when writing his opinions. He would work through scores of drafts, wanting his opinions to be precise, clearly written, and accessible to litigants and the public.

In the years since clerking for the Judge, I have become a professor who teaches and writes in the areas of administrative law and the constitutional separation of powers, and serving as a clerk for Judge Kavanaugh prepared me to analyze issues rigorously, write carefully, consider all sides of an issue.

Judge Kavanaugh's fair application of the law, his mentorship of young lawyers, and his commitment to constitutional principles and an independent judiciary demonstrate I believe that he would be an excellent Supreme Court Justice, and I strongly support his confirmation.

Thank you.

[The prepared statement of Professor Mascott appears as a submission for the record.]

Chairman GRASSLEY. Professor Shane.

Thank you, Professor Mascott.

STATEMENT OF PETER M. SHANE, JACOB E. DAVIS AND JACOB E. DAVIS II CHAIR IN LAW, OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, COLUMBUS, OHIO

Professor SHANE. Thank you. Chairman Grassley, Senator Whitehouse, and distinguished Committee Members, thank you for the opportunity to address you today.

This Committee's consideration of any potential Supreme Court Justice inevitably immerses you in profound constitutional issues. No issue before you now is more important than Judge Brett Kavanaugh's approach to questions of Presidential power and accountability. One straightforward constitutional principle frames any sound analysis of these questions. That principle is that no one, including the President, is above the law.

My concern is that Judge Kavanaugh, both on and off the bench, has crusaded for an extreme interpretation of the President's constitutional powers that could effectively undermine a President's accountability to law and to this Congress. It is by no means the view historically associated with conservative constitutionalism.

In the coming years, the Supreme Court may face a host of issues, testing the Justices' commitment to a Presidency subject to effective checks and balances. Some issues may arise because our President and some of his closest associates stand at the center of an ongoing investigation of an election campaign tainted by covert foreign involvement and multiple potential crimes. Some issues have already emerged because this President has refused to distance the performance of his public duties from those commercial activities that enrich his private fortunes. Let me list some of these questions for you.

One is, whether a President is potentially liable for obstruction of justice if he, and I am quoting the statute, "corruptly endeavors to influence, obstruct, or impede the due and proper administration of the law," unquote, to an official act. The President's lawyers say no, which is almost certainly both wrong and dangerous.

Another is, whether a President may relieve himself of criminal liability through self-pardon, a power that President Trump has said he "absolutely" has.

A third is, whether an incumbent President may be indicted while in office.

A fourth issue is, whether Congress or a court may subpoena Presidential records and even Presidential testimony in connection with investigations into the 2016 campaign.

A fifth is, whether a President is constitutionally entitled to personally direct the activities of all Federal criminal prosecutors, including Special Counsel Robert Mueller.

With regard to the President's business dealings, a case is already underway concerning the President's attempt to exempt himself from the reach of the Constitution's Emoluments Clauses. The President takes the position that unless a payment is made to him personally for services rendered, the profits he pockets from foreign and State governments patronizing his properties are not the business of this Congress.

I am fearful of Judge Kavanaugh refereeing these questions for three reasons: First, he explicitly adheres to the tenets of a theory of the Constitution called unitary executive theory. This extreme theory could give the President total control over the actions and decisions of any executive branch official. If it became law, Congress would be unable, for example, to enact statutory limits on a scope of Presidential supervisory power over an independent prosecutor. It is a theory subversive of effective checks and balances, which misreads our constitutional history and which the Supreme Court has so far wisely rejected.

Second, Judge Kavanaugh's service in the George W. Bush White House coincided with that administration's advocacy of a host of dangerous and unprecedented claims for the reach of Presidential power. During his first 6 years in office, President Bush raised nearly 1,400 constitutional reservations regarding roughly 1,000 provisions of over 100 statutes, more than three times the total number of objections raised by his 42 predecessors combined.

After Judge Kavanaugh left his role as staff secretary, the pace of Bush signing statements slacked off. This fact raises the question to what degree Judge Kavanaugh was responsible for urging unfounded claims of Presidential power.

Finally, while on the bench, Judge Kavanaugh has approached issues of Executive power with an advocate's agenda. His most important opinions on the D.C. Circuit rooted in unitary Executive theory appear in cases where the court had no need to reach constitutional issues at all. He has shown himself willing to craft constitutional doctrine from whole cloth in order to advance his precommitment to extreme Presidentialism.

Our current President daily expresses his contempt for the democratic institutions and the rule of law. He believes that all three branches of Government, not to mention the press and the private sector, should heel to his personal command. He chafes at the Constitution's constraints on his power. Now is a dangerous moment to elevate to the Supreme Court any Justice who would weaken the President's accountability to law. I have elaborated on these points in my written testimony and would be happy to discuss them further in response to your questions.

Thank you so much.

[The prepared statement of Professor Shane appears as a submission for the record.]

Chairman GRASSLEY. Before I take my 5 minutes, I would like to, since this is—I am going to turn this over to Senator Kennedy to finish the meeting. He will moderate. But I thought I ought to, first of all, thank the whole panel for participating, and then I want to thank all my colleagues on the Committee, both Republican and Democrat, for their cooperation throughout these 4 days of hearings. And except for the first hour and 15 minutes on Tuesday, they all went very well.

Senator WHITEHOUSE. Even that went well.

Chairman GRASSLEY. In the end.

Senator KENNEDY. He is looking at you, Senator Whitehouse.

[Laughter.]

Chairman GRASSLEY. So anyway, I do appreciate the cooperation that we have had for the last 31-and-a-half hours.

My first question is to Professor Heinzerling and Professor Shane. This is not a question that I had my staff prepare, but both of you spoke very highly of the fear of Presidential power and what he thinks about that. So I am asking you more of a process question than a substance question.

Is it because you fear having a voice like that on the Supreme Court under any conditions, or is it because you think that his being on the Supreme Court may make a majority, understanding the present eight members of the committee, that that would make a majority and make it more dangerous than just having one voice?

Professor HEINZERLING. I have been worried about Presidential power for decades and across administrations. And so it is not just the present moment, although the present moment does make me more fearful of Presidential power. It is striking, I will say—even having said that, I will say that there will be a clear five-Justice majority for what I consider to be quite extreme views about Presidential power.

Chairman GRASSLEY. And would you have anything to add, Professor Shane, to what she said?

Professor SHANE. My views would be very similar, and I would echo what Mr. Dean said, that I am worried about having the most Executive-power-indulgent Supreme Court since the end of World War II.

Chairman GRASSLEY. Okay. Professor White, I think you heard a question I asked the last panel. We have had people express their constitutional rights in demonstrating at this hearing. You have had my colleagues ask views about whether or not Judge Kavanaugh has any concern about people of less means, and you heard it specifically from people on the previous panel. So how do you feel his experience shows or does not show that he would take those concerns into mind?

Professor WHITE. Sure. Well, the challenge for any judge is to see the case at hand through the eyes of all parties to the case and those who are affected by the case. In administrative law, a real challenge—I teach it, and before that I practiced it, and a real challenge is to see administrative law through the eyes of those who are regulated as much as through the eyes of the regulator.

It is easy to be a professor or to be a high-powered lawyer and see yourself as someday wielding the power of an agency, and, of course, you want to be independent, of course, you want the courts to defer to you. But knowing that regulatory power has significant impacts on not just big corporations but on landowners, homeowners, farmers, that is important as well.

So when the Supreme Court in recent cases became more critical of the EPA's impositions on landowners, claiming authority to regulate wetlands, when Judge Kavanaugh took pause at the impacts the EPA's unprecedented program for greenhouse gas regulations could have on small businesses and churches that fell within the regulatory ambit the EPA was claiming, those too I think deserve to be part of this conversation about the impact of Government power on people without the means to fight back against it.

Chairman GRASSLEY. Thank you.

And, Mr. Clement, since you appear so much before courts, and I guess I said 90 cases you have argued before the Supreme Court,

tell me what type of a judge you see Judge Kavanaugh being during the times of oral arguments.

Mr. CLEMENT. Senator Grassley, I think he has been an exemplary judge on the bench. I think I would describe him as an active judge, but he actively questions both sides. I think as an active questioner he is going to fit right in, were he confirmed, to the Supreme Court. I think the Supreme Court right now is about the hottest bench that the Supreme Court has ever been. I think each of the last Justices that have been confirmed by this Committee have tended to ask more questions than the Justice they replaced.

So I think he will fit right in to what he referred to as the Team of Nine, and I think from an advocate's perspective, that is what you want. You want somebody who is going to push you but is going to push your adversary in the argument and ask the hard questions of both sides, and I think that is what you would get—that is what you are already getting with Judge Kavanaugh on the D.C. Circuit, and I think that is what you would see on the Supreme Court of the United States.

Chairman GRASSLEY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman.

Mr. Dean, I do not know if you have been watching the hearings, but my take on what we have seen is that, for a number of very good reasons, including that Minnesota Law Review article in which Judge Kavanaugh expressed a policy desire that the President be immunized from law enforcement investigation, and the Kavanaugh comment that *U.S. v. Nixon* was wrongly decided, and the Georgetown Law Journal episode in which he was asked as a matter of law can a President be indicted and put up his hand “no,” with those who agreed that a President was beyond indictment, it was a very live issue through these hearings about whether the President could properly be the subject of an ongoing criminal investigation. Of course, we know that this President is the subject of an ongoing criminal investigation, and we further know a separate criminal investigation in which this President has been identified as a named director of the criminal activity.

So in that circumstance, what I heard over and over was Judge Kavanaugh citing his assertion that *U.S. v. Nixon* was one of his top four cases. And all other facts being equal you would say, okay, these other things do not matter very much. But since he said *U.S. v. Nixon* was one of his top four cases, then obviously that will overwhelm all these other things and we can count on him to do the right thing.

But a little bell kept ringing in my mind, because whenever he said that, he seemed to just drop in very quietly that it was a trial court subpoena in *U.S. v. Nixon*. He never raised that point. He never said this would be very different and separated the two arguments. But it strikes me that if his famous top-four *U.S. v. Nixon* decision is limited to a trial court subpoena and does not protect the ability of law enforcement to proceed through, for instance, a grand jury subpoena, he played a little game with us to try to have the best of both worlds, to reserve a little escape hatch for himself to be able to shut down, for instance, the Mueller investigation or the Southern District of New York investigation subpoenas while

still purporting to uphold *U.S. v. Nixon* as a big favorite decision of his. Would you respond to that?

Mr. DEAN. I would agree with your analysis. And as I said in my opening statement, I was not clear at all that he had reversed his position on *U.S. v. Nixon* when he said that he was not sure it was properly decided.

He also used it in the 2016 Law Journal article, along with *Marbury v. Madison*, *Youngstown*, and *Brown v. Board of Education*, in the context of a judge needing a backbone. He did not say it was rightly decided, and he repeated that several times during the hearings.

So, I do not think he has informed this Committee of his real position on that very important case.

Senator WHITEHOUSE. Yes, and actually through a rather clever subterfuge, which I think is a shame, if that is the case. We will pursue the question further.

Ms. Heinzerling, you have made some powerful statements today, perhaps the best of which was that there is liberty on both sides of the regulatory equation. As you know, we usually see in politics the polluter big-money side heavily engaged, and then good luck to the individual victim, like Hunter Lachance here earlier with his asthma, and we very often see phony-baloney studies that are put together that look at the cost/benefit of regulation, but only look at the cost to the polluter, to the regulated industry, and totally omit what happens on the other side.

Could you speak a little bit more about the liberty side of the beneficiary of the regulation and how they stand up on the political side in terms of the balance of political power on this question?

Senator KENNEDY [presiding]. If you could give us about 30 seconds, Professor.

Professor HEINZERLING. Yes, I would be happy to.

The laws that engage the administrative agencies in protecting against the kind of harm I mentioned range across a very broad area, and the people who are protected by those rules are the ones who are left unprotected when Judge Kavanaugh says that Congress has no authority to grant that broad a power or to give the power, for example, to an independent agency. And we do not hear about that in his opinions at all. We only hear about the liberty of the regulated group.

So I wonder to what extent he thinks about the people on the other side. And if you think about it and you think about the witnesses who were on the panel before this one, it is basic things like going outside, being able to go to school on certain days and so forth. Those are basic elements of liberty that I think weigh just as heavily in the legal equation.

Senator WHITEHOUSE. Or ought to.

Professor HEINZERLING. Yes.

Senator KENNEDY. Thank you. Thank you, Professor.

Senator Coons.

My order says Coons and then Klobuchar.

Senator WHITEHOUSE. We have Klobuchar, Coons, Hirono, and Blumenthal as our order.

Senator KENNEDY. Well, I would never argue with you, Senator. [Laughter.]

Senator KENNEDY. Senator Klobuchar.

Senator WHITEHOUSE. In that case, let's talk about some things. [Laughter.]

Senator KENNEDY. Okay.

Senator KLOBUCHAR. All right. Thank you very much.

Thank you to all of you. I think I will sort of start where we were ending over there.

I spoke, of course, in my questions with Judge Kavanaugh at length about the 2009 article in the Minnesota Law Review, given it is from my State, in which he argued that a President should not be subject to investigations while in office. Judge Kavanaugh actually, Mr. Dean, suggested that Congress can always impeach the President if there is evidence of wrongdoing, because I asked similar questions that you raised in your testimony: Well, what if she committed a murder, the President? What if she did this? And he has a differentiating word of a "dastardly" crime, which I did not get to the bottom of, really. But then also said that, well, you can always impeach the President.

And one of the questions that I asked was, well, in the modern day, these investigations have been done not by Congress but with the special counsel, the independent counsel. And could you talk about the difficulty, if we do not actually have an ability to have an investigation, in terms of an impeachment proceeding?

Mr. DEAN. I was one who believed very strongly in the independent counsel law. I think that was when Congress did express itself that indeed a sitting President could be investigated, and that withstood several tests on its constitutionality.

We are currently, with the expiration of the sunset clause of the independent counsel law, putting an end to that. We now do it through the regulations of the Department of Justice, and there are certainly no restrictions other than a policy right now at the Department of Justice that prohibits investigation of a President.

The history of that policy, people seem to forget why it was written. It happened in 1973 when a Vice President was under investigation by a Maryland grand jury and defending himself by saying you cannot indict me, you can only impeach me. An opinion was requested of Office of Legal Counsel, and they concluded, and I think it was a predetermined solution to a problem, that indeed the Vice President could be indicted but the President could not be indicted, and that policy has stood since then.

Senator KLOBUCHAR. And you have previously drawn parallels between Watergate and where we are today. How important was the independence of the Federal judiciary in helping our country to weather the Watergate scandal? Just really quickly because I have one other question.

Mr. DEAN. It was vital. Let me put it that way.

Senator KLOBUCHAR. Okay. I would assume that it was.

Professor Heinzerling, thank you for being here. I had asked Judge Kavanaugh about how the White House noted that he has overturned agency action 75 times. When they announced his nomination, they said he was a leader in overturning these agency decisions. And when I asked him about it, he responded to me by stating that he has also ruled in favor of agencies at times.

What did you think of his response, and how do you view his record in this area of law overall?

Professor HEINZERLING. It would be astonishing if he ruled against the agency in every case. That would be a sign of something seriously amiss. So if there is a handful of cases—I think he may have mentioned about six cases, something like that, in which he ruled in favor of environmentalists. I think most of them were not brought by environmentalists. But if there were a handful of cases, there would be nothing surprising about that, and also nothing about it that would indicate that he was evenhanded, quite frankly, about the environment.

He has issued a number of major decisions narrowing the environmental laws, requiring a cost/benefit balancing in the face of either clear or arguably ambiguous language, and he has forwarded this message from case after case in the big cases. In the little easy cases, it is no surprise if an agency might win some of them, or if the environmentalists might win some of them if it is an easy case on a procedural matter. But in the big cases, the big environmental cases, he has been all on the other side. And I will just say, the Supreme Court only takes big cases.

Senator KLOBUCHAR. Thank you very much.

Senator KENNEDY. Senator Crapo, you are not interested in asking questions? Okay.

Senator Coons.

Senator COONS. Thank you, Senator Kennedy.

I would like to ask unanimous consent to enter into the record a report on the nomination of Judge Kavanaugh by the Lawyers Committee for Civil Rights Under Law, and by the NAACP Legal Defense and Educational Fund.

Senator KENNEDY. Without objection.

[The information appears as submissions for the record.]

Senator COONS. Mr. Dean, thank you for your written testimony and for appearing before us today. You alone in this panel have the unique historical experience that I think is directly relevant to the question of what happens when Presidential power is unchecked and the President is not accountable.

Based on your experience, what are the dangers of a Presidency that does not face strong checks in the Supreme Court and Congress? And what would have happened in Watergate if President Nixon had been able to avoid compliance with a subpoena or if he had been able to fire the special prosecutor without some consequential response by Congress?

Mr. DEAN. Well, of course, when he fired the special prosecutor, he reacted to the negative publicity it had generated and the interest of Congress suddenly in impeachment. So he thought he could possibly stem that tide by bringing a new, he thought initially, favorable and maybe not as aggressive investigation with the appointment of Leon Jaworski. The second special prosecutor, however, was equally as effective as the original one, Archibald Cox, which I do not think the White House had anticipated.

As far as the courts and the rulings, we would have had a very different history had the Supreme Court not dealt with the tapes case as they did. It would have resulted in Nixon surviving. Without the tapes, it was my word against his, and in the polling, while

I was out-polling him at times, it was not enough to resolve the problem.

Senator COONS. So without the smoking gun, which was made possible by the Supreme Court's decision in *U.S. v. Nixon*, Presidential accountability might not have occurred. We might not really know what role the President had played, and we might not have avoided the constitutional crisis of confidence, and we might not have removed a criminal President.

Professor Shane, I questioned Judge Kavanaugh fairly aggressively on his view of the scope of Presidential authority. Based on his writings, his speeches, his opinions as a judge, I am concerned he has a view of Presidential power that is dangerously unbounded.

You have had a chance to review his work. Do you share my concerns? And what do you make of his enthusiastic and repeated embrace of Scalia's dissent in *Morrison*?

Professor SHANE. There is a lot to that question, Senator, so I will try to keep it brief.

What most concerns me about Judge Kavanaugh's position is not just that he has embraced the tenets of the unitary executive theory but that he has gone to such lengths to try to create a kind of legal foundation for it in the D.C. Circuit in cases that had nothing to do with unitary executive theory.

There was much discussion during Mr. Olson's panel about the case of *Morrison v. Olson*, and Judge Kavanaugh, of course, has famously said that he would like to put the final nail in that case. But in the *PHH* case that was being discussed—this was a case that the D.C. Circuit unanimously resolved on purely statutory grounds—Judge Kavanaugh saw fit to write an extensive opinion for the panel on the constitutional issue that later got overturned en banc. The opinion he issued for the panel pulled out of thin air this completely unmoored theory about why a single-headed independent agency was unconstitutional. It was full of arguments that would be perfectly fine for Congress to entertain as a matter of policy, but they had nothing to do with the Constitution.

With regard to *Morrison v. Olson*, it is still good law in the Supreme Court that independent agencies are constitutional. Whether they are a good or a bad idea is up to Congress, which has the power to make all laws necessary and proper not only for carrying into execution the powers of Congress but the powers of all officers and offices of the United States Government.

Senator COONS. Thank you, Professor.

If I might, a last question to Professor Heinzerling. Since we went around and around about this several times, Judge Kavanaugh and myself, in trying to explain his reliance on or his interest in, or I would say his fixation with Scalia's dissent in *Morrison*, Judge Kavanaugh tried to describe it as a sort of one-off case about a now-expired independent counsel statute, and I kept coming back to this dissent in *PHH* which Professor Shane was just referencing.

Do you think that dissent lays out the unitary executive theory and displays some significant enthusiasm for it that is a well-founded justification for my having concerns about Judge Kavanaugh's views on Presidential power?

Professor HEINZERLING. Absolutely.

Senator KENNEDY. Professor, just to be fair to everybody, if you could give us about 30 seconds?

Professor HEINZERLING. Yes. Absolutely, yes. He would have struck down a major Federal statute that was very new that set up the Consumer Financial Protection Bureau in which Congress had made a judgment about the degree of independence and the structure of the agency that was necessary in order to counterbalance the power of the financial industry, and he wrote a dissent from an en banc denial in that case. So, yes, absolutely, you are right to be concerned.

Senator COONS. I would like to thank the whole panel and just conclude by pointing out that the reason I raised these concerns in pressing Judge Kavanaugh was that it is exactly his quotes about *U.S. v. Nixon*, his enthusiasm for the dissent in *Morrison*, his dissent in *PHH*, that leads me to still have concerns that he would not hold the President accountable to an investigation tied to a subpoena or to testimony in a way that we need in our current environment.

Thank you, Mr. Chairman.

Senator KENNEDY. Senator Hirono.

Thank you, Senator.

Senator HIRONO. Thank you, Mr. Chairman.

Welcome to the panelists.

Mr. Dean, in your written statement you explain that if Judge Kavanaugh is confirmed, we will have the most pro-Presidential-powers Supreme Court in the modern era. Most recently in *Trump v. Hawaii*, the Court upheld the President's basically bald assertion of national security as a way to sustain his Muslim ban. At least one Justice, Justice Sotomayor, said that she saw parallels to *Korematsu*. So that is already pretty far down the road as far as Presidential power.

So what current controversies do you think might come before this Court that you have serious concerns as to how Judge Kavanaugh, if he gets on the Court, will support the President?

Mr. DEAN. In answer to your question, I must say that one of the things I did before I came to Washington was talk to some academic friends that I think know an awful lot about Presidential powers, the people I turn to with whom I have discussed these things at great length. They cited that case as one of the examples of how things quickly are slipping out of bounds and where we are headed.

The fact that we have a President who is unchecked right now by other branches makes it particularly timely to be worried afresh given the Kavanaugh positions on so many cases that would enhance Presidential power. I could see him as the leader of the 5-4 that would enhance Presidential powers.

Senator HIRONO. And he did not respond affirmatively to any questions as to whether he would recuse himself should these kind of questions come before this Supreme Court.

Mr. DEAN. Exactly.

Senator HIRONO. Professor Heinzerling, I found your testimony really interesting because in my review of Judge Kavanaugh's decisions there are various patterns, and I do think he creates some new, novel ways to decide agency action cases, for example. When

Judge Gorsuch came before us, there were a lot of questions regarding what we would call, “the frozen trucker case,” in which Judge Gorsuch, in my view, his decision or dissent was just outrageous and defied common sense. I would look at the *SeaWorld of Florida* case as Judge Kavanaugh’s frozen trucker case.

Are you familiar with—

Professor HEINZERLING. Yes, yes.

Senator HIRONO. So do you think that this is an example of how far Judge Kavanaugh would go to protect the corporate interest over an individual?

Professor HEINZERLING. Yes, I do. Thank you for that question. In *SeaWorld*, he took a clear statute, a statute that really fit the situation like a glove, and held that it did not fit that situation because he could imagine that the single enforcement action based on a single day at a single amusement park might be deployed, that theory might be deployed to rule out tackles in football, and that cannot be what Congress meant.

And so he took clear language about assuring a reasonable workplace against recognized harms that were avoidable and that the agency had held in an evidentiary hearing all of those circumstances were met in that case, and he said no. In dissent, he said no, I do not believe this is covered by the statute because I cannot believe Congress meant to rule out tackles in football.

That was not what the case was about, and it was absolutely, in my opinion, a departure from both the language of the statute and the interpretation by the agency, and common sense.

Senator HIRONO. I think there is a pattern of that kind of decisionmaking by Judge Kavanaugh. Let me cite a couple of other examples.

Standing is one of the threshold issues. If you do not have standing, you are out of court. So, for example, in *Public Citizen v. National Highway Traffic Safety Administration*, there was a public interest group challenging the adequacy of tire safety standards because they thought that this may increase the risk of harm, and he found that that was way too speculative an interest to articulate, so this public interest group was out.

On the other hand, in *Grocery Manufacturers Association v. EPA*, where the grocery manufacturers’ food processing people challenged EPA action saying what you are making us do might increase prices for them and that would just be too much, he said that was not just speculative. So when a business interest comes forward and says this is going to cost us money maybe, but when a public interest group comes out and says this is going to harm people, he finds that too speculative.

Have you seen this kind of pattern in his decisionmaking?

Professor HEINZERLING. Yes, and I will say this is a pattern I think across standing cases, where the courts have, in my opinion, wrongly made it very difficult for public interest groups and particular groups like environmental groups to come to court to complain about violations of Federal law, and they make it very easy for business groups to do that. So that is a very, in some ways, subtle way of loading the dice against the public interest groups that we have been talking about.

Senator HIRONO. The Roberts Court is already heading toward—they are much more oriented toward protecting corporate interests over individual rights. We do not need another Justice going in that direction.

Thank you, Mr. Chairman.

Senator KENNEDY. Thank you, Senator.

Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Kennedy.

Welcome to you all, and thank you for being here. I know some of you have come from a far distance, but you recognize, as we do, the importance of this decision for us.

I want to begin by perhaps asking Mr. Dean a couple of questions.

Sir, when you came forward, which was before the *United States v. Nixon* case, you did not write an anonymous op-ed, did you?

Mr. DEAN. No, I did not.

Senator BLUMENTHAL. You came forward—

Mr. DEAN. Actually, I did send—my only discussion with the media was having my secretary read a quickly dictated line to get to my superiors that they were making a mistake if they were going to make me the scapegoat of their activities.

Senator BLUMENTHAL. In effect, you announced to the world what you were going to do.

Mr. DEAN. I did.

Senator BLUMENTHAL. And to your superiors.

Mr. DEAN. Yes.

Senator BLUMENTHAL. And the result was a bombshell.

Mr. DEAN. Yes.

Senator BLUMENTHAL. And the *United States v. Nixon* case produced evidence that corroborated the evidence that you had provided. Correct?

Mr. DEAN. Well, I had testified that I believed I had been recorded. That prompted the Senate staff to ask Mr. Butterfield if that was possible. He said it is very possible and very likely. The Special Counsel filed immediately for those tapes. The tape cases and the fight in the Court started. The whole dynamics of Watergate changed and it became all about obtaining the tapes and whether they would corroborate or not my testimony.

Senator BLUMENTHAL. And I can remember vividly the picture of Alexander Butterfield revealing those tapes, and it was also a bombshell. Correct?

Mr. DEAN. July 16th, 1973. It was.

Senator BLUMENTHAL. And we could go through the history here, but where I am going with my point is that it was not just, or maybe even primarily, the United States Supreme Court in *United States v. Nixon*. It was a number of individuals who had the backbone and guts to come forward, whatever motives at the time, and speak that truth to power. Correct?

Mr. DEAN. Yes.

Senator BLUMENTHAL. So we tend here to talk about the law, about *U.S. v. Nixon*, about a unitary President, about all kinds of concepts that mean little to the American people, but we are talking about basic courage to stop a constitutional crisis.

Mr. DEAN. The system is important to those who do want to rely on it.

Senator BLUMENTHAL. There is now arguably a cancer on the Presidency as malignant and metastasizing as there was then. Correct?

Mr. DEAN. Yes, I would agree with that.

Senator BLUMENTHAL. And the only way to really stop it is not by relying on laws alone but on people respecting the laws, taking acts of personal courage, and coming forward to speak that truth to power. Would you agree?

Mr. DEAN. Even with anonymous op-eds.

Senator BLUMENTHAL. Even with anonymous op-eds, which could lead others to come forward—

Mr. DEAN. Yes.

Senator BLUMENTHAL [continuing]. Non-anonymously.

Mr. DEAN. Yes.

Senator BLUMENTHAL. But cases are not built on anonymous sources. Eventually, there have to be witnesses willing to testify—

Mr. DEAN. True.

Senator BLUMENTHAL [continuing]. And speak that truth to power. You have said that your belief is that President Trump would never resign because he—I am going to paraphrase—is shameless. I think you said something like that.

Mr. DEAN. Yes.

Senator BLUMENTHAL. Would you give us, in your view, your analysis, knowing Richard Nixon as you did, the reasons why he resigned? I suspect it had something to do with the fact that he saw impeachment coming and he was told by Hugh Scott and Everett Dirksen that he lacked the votes in the Senate to avoid conviction. But let me ask you your—

Mr. DEAN. It was very much the fact that he was going to lose in an impeachment battle, that the House would impeach and the Senate would find him guilty and remove. That appeared to be the case. But I think also Richard Nixon had done something that made it very awkward for him. He had pulled people aside and told them a falsehood that he had had nothing to do with the cover-up until I had told him about it, which was a flat-out lie, and he had been caught in that by the release of the so-called smoking-gun tape. But even more basically, I think he left because the man at his core had a respect for the rule of law. That is one of the differences I find today in Mr. Trump and the reason I do not think he would resign. He could care less about the rule of law.

Senator KENNEDY. Thank you. If you could begin to wrap up. Yes sir, Senator, one more.

Senator BLUMENTHAL. Ultimately, also it was those Republicans in the United States Senate who delivered the message, “We won’t stand for it.”

Mr. DEAN. That is correct.

Senator BLUMENTHAL. Thank you.

Senator KENNEDY. Okay. Thank you.

I am going to ask a few questions. I would love to be able to ask all of you questions. I just do not know if I have time.

Let me start with Ms. Mastal. Did I say your name—

Ms. MASTAL. Yes, that is correct.

Senator KENNEDY. I am going to be sure I understand. Judge Kavanaugh coached your daughter?

Ms. MASTAL. Yes.

Senator KENNEDY. And his daughter was not on the team at that time?

Ms. MASTAL. Correct.

Senator KENNEDY. And when he finished coaching the kids, at the end of the season he wrote them all personal notes?

Ms. MASTAL. Yes, a detailed evaluation of things to work on, things you did well, and then the final note, which is what I read.

Senator KENNEDY. Does he generally do that for his teams, or do you know?

Ms. MASTAL. I think he does it for everybody on the team for every team he has coached.

Senator KENNEDY. Okay. I want to switch gears. I think I heard Professor White and—is it Professor “Henserling”?

Professor HEINZERLING. “Heinzerling.”

Senator KENNEDY. “Heinzerling.” My apologies. Talk a little bit about a transfer of power from Congress to the President, and thinking of it in terms of the *Chevron* doctrine. I would like you to each quickly help me out on this.

Here is my problem with the *Chevron* deference: I just do not understand how it is constitutional, and here is why. I look at the APA, which, of course, Congress passed, and Congress says this is the law. The reviewing court, not the agency, the reviewing court shall decide all relevant questions of the law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. That is a statute, 5 USC Section 706, as I am sure both of you know better than I do.

So how can the courts construe that congressional directive as giving the power to an agency? I mean, that was clearly not Congress’ intent.

Could you each give me about 30 seconds on that?

Professor HEINZERLING. This is a great question, and it is a puzzle in administrative law a little bit. The text of the Administrative Procedure Act says what you say it says, and it has been sort of hidden from view, in a way, for a number of years.

But I think the answer would be that even where a court defers to an administrative agency on the interpretation it is offering, it is still making the legal judgments, the relevant legal judgments. It is deciding, in the first instance, is the statute so clear that it should not defer at all? And in the second instance, even if the statute is not clear, it is making the judgment about whether that interpretation is permissible.

Senator KENNEDY. Not to interrupt you, but I have to keep us on schedule.

Professor HEINZERLING. That is fine.

Senator KENNEDY. So you think that *Chevron* deference is unconstitutional here?

Professor HEINZERLING. No, I think it is consistent with the language of the Administrative Procedure Act. I do not think it is unconstitutional, no.

Senator KENNEDY. Okay.

Professor White.

Professor WHITE. One of the interesting things about *Chevron* and its relatively short history is that you had critics and proponents on both sides of the aisle. The most eloquent case for *Chevron*'s constitutionality and propriety came from Justice Scalia in a 1989 Duke Law Journal article.

That said, there has been an increasing awareness, I think, on both sides that in the biggest cases, *Chevron* deference illustrates either a delegation of judicial power to an agency, or it respects a delegation of legislative power to an agency. That is why you see, I think most recently in the *King v. Burwell* case, where Chief Justice Roberts, with Justices—

Senator KENNEDY. I have to stop you—

Professor WHITE. I was going to say with Ginsburg, Breyer, and others, set aside *Chevron*.

Senator KENNEDY. Okay. I got it. You have helped me a lot there.

Professor "Mascott"—did I say it correctly?

Professor MASCOTT. Yes, Senator.

Senator KENNEDY. Did you ever see Judge Kavanaugh take politics into consideration in deciding a case?

Professor MASCOTT. No. Judge Kavanaugh spent his time learning the record inside out, looking at the law, statutes, and principles.

Senator KENNEDY. But you were with him a year?

Professor MASCOTT. Yes, sir.

Senator KENNEDY. You never saw him take politics—

Professor MASCOTT. No.

Senator KENNEDY. Ever.

Professor MASCOTT. No.

Senator KENNEDY. Not once.

Professor MASCOTT. No.

Senator KENNEDY. Okay, fair enough.

Mr. Clement, should the Supreme Court televise oral arguments?

Mr. CLEMENT. Well, that is an excellent question.

Senator KENNEDY. We have 42 seconds.

Mr. CLEMENT. Sure. I think that that is an excellent question. It is a question that the Justices are ultimately going to have to answer at some point, unless Congress forces their hands by passing a statute, and then there will be a very interesting question whether that statute is constitutional.

My own view, for what it is worth, is that televising Supreme Court arguments makes an awful lot of sense. It is one of the odd realities that everybody seems to think that, until they become a Supreme Court Justice, and then they tend to have a different view.

But as I sit here as a Supreme Court advocate, I honestly do not see a particularly compelling argument why the public should not get to see the proceedings televised. And I think if they did, they would have a very high opinion of the Supreme Court of the United States.

Senator KENNEDY. Well, I appreciate that. You are a hell of a lawyer.

All right. I let Senator Hirono go over, so I am going to go over 20 seconds.

Mr. Dean, I do not care about your politics, I really do not. I have friends on both sides of the aisle. Like Senator Blumenthal, I remember vividly the early 1970s as well, when you worked in the White House. I think you and your co-conspirators hurt my country. I believe in second chances, and you did the right thing ultimately, but you only did it when you were cornered like a rat.

It is hard for me to take your testimony seriously, and I am going to give you a chance to respond. But I could not sleep tonight if I did not tell you that. I am going to give you a chance to respond.

Mr. DEAN. The President has also called me a rat, and I do not think you understand—

Senator KENNEDY. I am not calling you a rat, though, in the sense—

Mr. DEAN. No.

Senator KENNEDY [continuing]. Of what you did with the prosecutor. That is not what I mean. But I honestly feel that way as an American. I think you hurt our country.

Mr. DEAN. I wrote a book based on all the Watergate conversations that were secretly recorded, learned a lot that I had not known. Out of the thousand conversations that Nixon had on Watergate, I was involved in 39 of them. I think every conversation I had with him I am trying to warn him, alert him, find out how much he does know or does not know.

I tried internally to end the cover-up. I did not succeed. That is the day I think I met Richard Nixon. I did not know the man and had not had dealings with him. There is a great misconception about what an early 30s White House Counsel could do around a White House.

So maybe you want to—I will send you a copy of that book, and it might give you some insights into what really did happen in there.

Senator KENNEDY. Okay.

All right. Well, we are done. I want to thank this panel very much. I am going to say what I said to the earlier panels. I know this testimony does not just write itself, and you all spent a lot of time on it, and I really want to thank you. I think all of us get a lot out of this part of the confirmation process.

The record will remain open until noon on Monday, and that is consistent with other Supreme Court nominee practices.

With that, thanks to everyone.

These hearings are adjourned.

[Whereupon, at 4:15 p.m., the Committee was recessed.]

[Additional material submitted for the record for Day 4 follows Day 5 of the hearing.]

**CONTINUATION OF THE
CONFIRMATION HEARING ON THE
NOMINATION OF HON. BRETT M. KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES**

THURSDAY, SEPTEMBER 27, 2018

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Charles E. Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Hatch, Graham, Cornyn, Lee, Cruz, Sasse, Flake, Crapo, Tillis, Kennedy, Feinstein, Leahy, Durbin, Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Booker, and Harris.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Chairman GRASSLEY. This morning, we continue our hearing on the nomination of Judge Brett Kavanaugh to serve as Associate Justice on our Supreme Court.

We will hear from two witnesses, Dr. Christine Blasey Ford and Judge Kavanaugh. Thanks, of course, to Dr. Ford and Judge Kavanaugh for accepting our Committee's invitation to testify and also thank them for their volunteering to testify before we even invited.

Both Dr. Ford and Judge Kavanaugh have been through a terrible couple weeks. They and their families have received vile threats. What they have endured ought to be considered by all of us as unacceptable and a poor reflection on the state of civility in our democracy. So I want to apologize to you both for the way you have been treated, and I intend, hopefully, for today's hearing to be safe, comfortable, and dignified for both of our witnesses. I hope my colleagues will join me in this effort of a show of civility.

With that said, I lament that this hearing—how this hearing has come about. On July 9, 2018, the President announced Judge Kavanaugh's nomination to serve on the Supreme Court. Judge Kavanaugh has served on the most important Federal appellate court for 12 years. Before that, he held some of the most sensitive positions in the Federal Government. The President added Judge Kavanaugh to his short list of Supreme Court more than 9 months ago in November 2017.

As part of Judge Kavanaugh's nomination to the Supreme Court, the FBI conducted its sixth full-field background investigation of Judge Kavanaugh since 1993, 25 years ago. Nowhere in any of these six FBI reports, which Committee investigators have reviewed on a bipartisan basis, was there a whiff of any issue, any issue at all, related in any way to inappropriate sexual behavior.

Dr. Ford first raised her allegations in a secret letter to the Ranking Member nearly 2 months ago in July. This letter was secret from July 30th, September 13th to—no, July 30th until September 13th when I first heard about it. The Ranking Member took no action. The letter was not shared with me, our colleagues, or my staff. These allegations could have been investigated in a way that maintained the confidentiality that Dr. Ford requested.

Before his hearing, Judge Kavanaugh met privately with 65 Senators, including the Ranking Member. But the Ranking Member did not ask Judge Kavanaugh about the allegations when she met with him privately in August.

The Senate Judiciary Committee held its 4-day public hearing from September 4th to September 7th. Judge Kavanaugh testified for more than 32 hours in public. We held a closed session for Members to ask sensitive questions on the last evening, which the Ranking Member did not attend.

Judge Kavanaugh answered nearly 1,300 written questions submitted by Senators after the hearing, more than all prior Supreme Court nominees. Throughout this period, we did not know about the Ranking Member's secret evidence.

Then, only at an eleventh hour, on the eve of Judge Kavanaugh's confirmation vote, did the Ranking Member refer the allegations to the FBI. And then, sadly, the allegations were leaked to the press, and that is where Dr. Ford was mistreated. This is a shameful way to treat our witness, who insisted on confidentiality, and, of course, Judge Kavanaugh, who has had to address these allegations in the midst of a media circus.

When I received Dr. Ford's letter on September the 13th, my staff and I recognized the seriousness of these allegations and immediately began our Committee's investigation, consistent with the way the Committee has handled such allegations in the past. Every step of the way, the Democratic side refused to participate in what should have been a bipartisan investigation. As far as I know on all of our judgeships throughout at least the last 4 years—or 3 years, that has been the way it has been handled.

After Dr. Ford's identity became public, my staff contacted all the individuals she said attended the 1982 party described in The Washington Post article. Judge Kavanaugh immediately submitted to an interview under penalty of felony for any knowingly false statements. He denied the allegations categorically. Democratic staff was invited to participate and could have asked any questions they wanted to, but they declined, which leads me then to wonder. If they are really concerned with going to the truth, why would you not want to talk to the accused?

The process and procedure is what the Committee always does when we receive allegations of wrongdoing. My staff reached out to other individuals allegedly at the party—Mark Judge, Patrick Smyth, Leland Keyser. All three submitted statements to the Sen-

ate under penalty of felony denying any knowledge of the events described by Dr. Ford. Dr. Ford's lifelong friend, Ms. Keyser, stated she does not know Judge Kavanaugh and does not recall ever attending a party with him.

My staff made repeated requests to interview Dr. Ford during the past 11 days, even volunteering to fly to California to take her testimony. But her attorneys refused to present her allegations to Congress. I, nevertheless, honored her request for a public hearing, so Dr. Ford today has the opportunity to present her allegations under oath.

As you can see, the Judiciary Committee was able to conduct thorough investigations into allegations—or thorough investigations into allegations. Some of my colleagues, consistent with their stated desires to obstruct Kavanaugh's nomination by any means precisely—by any means necessary, pushed for FBI investigations into the allegations. But I have no authority to force the executive branch agency to conduct an investigation into a matter it considers to be closed. Moreover, once the allegations became public, it was easy to identify all the alleged witnesses and conduct our own investigations.

Contrary to what the public has been led to believe, the FBI does not perform any credibility assessments or verify the truth of any events in these background investigations. I will quote then-Chairman Joe Biden during Justice Thomas' confirmation hearing. This is what Senator Biden said: "The next person who refers to an FBI report as being worth anything obviously does not understand anything. The FBI explicitly does not, in this or any other case, reach a conclusion, period. They say 'he said, she said, they said,' period. So when people wave an FBI report before you, understand they do not, they do not, they do not reach conclusions. They do not make recommendations," end of Senator Biden's quote.

The FBI provided us with the allegations. Now it is up to the Senate to assess their credibility, which brings us to this very time. I look forward to a fair and respectful hearing. That is what we promised Dr. Ford.

Some of my colleagues have complained about the fact that an expert on this side investigating sex crimes will be questioning the witness. I see no basis for complaint other than just plain politics.

The testimony we will hear today concerns allegations of sexual assault, very serious allegations. This is an incredibly complex and sensitive subject to discuss, and it is not an easy one to discuss. That is why the Senators on this side of the dais believe an expert who has deep experience and training in interviewing victims of sexual assault and investigating sexual assault-led allegations should be asking questions. This will be a stark contrast to the grandstanding and chaos that we saw from the other side during the previous 4 days in this hearing process.

I can think of no one better equipped to question the witnesses than Rachel Mitchell. Ms. Mitchell is a career prosecutor, civil servant with decades of experience investigating and prosecuting sex crimes. She has dedicated her career to seeking justice for survivors of sex-related felonies.

Most recently, Rachel was a Division Chief of the Special Victims Division, Maricopa County Attorney's Office, which prosecutes sex

crimes and family violence. Then-Democratic Governor Janet Napolitano previously recognized her as the Outstanding Arizona Sexual Assault Prosecutor of the Year, and she has spent years instructing prosecutors, detectives, and child protection workers on how to properly interview victims of sexual assault and abuse. With her aid, I look forward to a fair and productive hearing.

I understand that there are two other public allegations. Today's hearing was scheduled in close consultation with Dr. Ford's attorneys, and her testimony will be the subject of this hearing.

We have been trying to investigate other allegations. At this time, we have not had cooperation from attorneys representing other clients, and they have made no attempt to substantiate their claims. My staff has tried to secure testimony and evidence from attorneys for both Deborah Ramirez and Julie Swetnick.

My staff made eight requests—yes, eight requests—for evidence from attorneys for Ms. Ramirez and six requests for evidence for attorneys for Ms. Swetnick. Neither attorney has made their clients available for interview. The Committee cannot do an investigation if attorneys are stonewalling. I hope you all understand that we have attempted to seek additional information, as we do a lot of times when there are holes in what we call the “BI reports.”

Additionally, all the witnesses should know—by when I say “all the witnesses,” I mean Dr. Ford and I mean Judge Kavanaugh. All the witnesses should know that they have the right under Senate Rule 26.5 to ask that the Committee to go into closed session if a question requires an answer that is a clear invasion of their right to privacy. If either Dr. Ford or Judge Kavanaugh feel that Senate Rule 26.5 ought to be involved, they should simply say so.

Senator Feinstein.

**OPENING STATEMENT OF HON. DIANNE FEINSTEIN,
A U.S. SENATOR FROM THE STATE OF CALIFORNIA**

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

I will make just a brief comment on your references to me. Yes, I did receive a letter from Dr. Ford. It was conveyed to me by a Member of Congress, Anna Eshoo. The next day, I called Dr. Ford. We spoke on the phone. She reiterated that she wanted this held confidential, and I held it confidential up to a point where the witness was willing to come forward.

And I think as I make my remarks, perhaps you will see why. Because how women are treated in the United States with this kind of concern is really wanting a lot of reform, and I will get to that for a minute.

But in the meantime, good morning, Dr. Ford. Thank you for coming forward and being willing to share your story with us. I know this was not easy for you.

But before you get to your testimony, and the Chairman chose not to do this, I think it is important to make sure you are properly introduced. And I have to—

Chairman GRASSLEY. By the way, I was going to introduce her. But if you want to introduce her, I will be glad to have you do that. But I want you to know I did not forget to do it, because I would do that just as she was about to speak.

Senator FEINSTEIN. Thank you.

I have to say when I saw your CV, I was extremely impressed. You have a bachelor's degree from the University of North Carolina-Chapel Hill; two master's degrees, one from Stanford and one Pepperdine; and a Ph.D. from the University of Southern California, better known to Senator Harris and I as USC. You are a professor affiliated with both Stanford University and Palo Alto University. You have published over 65 peer-reviewed articles and have received numerous awards for your work and research.

And as if that were not enough, you are a wife, a mother of two sons, and a constituent from California. So I am very grateful to you for your strength and your bravery in coming forward. I know it is hard.

But before I turn it over, I want to say something about what is to be discussed today and where we are as a country. Sexual violence is a serious problem and one that largely goes unseen. In the United States, it is estimated by the Centers for Disease Control, one in three women and one in six men will experience some form of sexual violence in their lifetime.

According to the Rape, Abuse, and Incest National Network, 60 percent of sexual assaults go unreported. In addition, when survivors do report their assaults, it is often years later due to the trauma they suffered and fearing their stories will not be believed.

Last week, I received a letter from a 60-year-old California constituent who told me that she survived an attempted rape at age 17. She described as being terrified and embarrassed. She never told a soul until much later in life. The assault stayed with her for 43 years.

I think it is important to remember these realities as we hear from Dr. Ford about her experience. There has been a great deal of public discussion about the #MeToo movement today versus the Year of the Woman almost 27 years ago. But while young women are standing up and saying "no more," our institutions have not progressed in how they treat women who come forward. Too often, women's memories and credibility come under assault. In essence, they are put on trial and forced to defend themselves and often re-victimized in the process.

Twenty-seven years ago, I was walking through an airport when I saw a large group of people gathered around the TV to listen Anita Hill tell her story. What I saw was an attractive woman in a blue suit before an all-male Judiciary Committee speaking of her experience of sexual harassment. She was treated badly, accused of lying, attacked, and her credibility put to the test throughout the process.

Today, Dr. Christine Blasey Ford has come forward to tell her story of being assaulted and fearing for her life when she was a teenager. Initially, as I said, Dr. Ford did not want to make her story public.

Then, within 36 hours of coming forward, Republicans scheduled a hearing without talking to her or even inviting her to testify. She was told she had to show up or the Committee would move forward with a vote. It took a public outcry for the Majority to back down and give her even a few days to come before the Committee.

Republicans also scheduled this hearing with Dr. Ford without having her allegations investigated by the FBI. In 1991, Anita

Hill's allegations were reviewed by the FBI, as is the normal process and squarely within its jurisdiction.

However, despite repeated requests, President Trump and the Republicans have refused to take this routine step and direct the FBI to conduct an impartial investigation. This would clearly be the best way to ensure a fair process to both Judge Kavanaugh and to Dr. Ford.

In 1991, the Senate heard from 22 witnesses over 3 days. Today, while rejecting an FBI investigation, Republicans are refusing to hear testimony from any other witness, including Mark Judge, who Dr. Ford identified as being in the room when the attack took place. And we believe Judge should be subpoenaed so the Committee can hear from him directly.

Republicans have also refused to call anyone who could speak to the evidence that would support or refute Dr. Ford's claim, and not one witness who could address credibility and character of either Ford or Kavanaugh has been called. What I find most inexcusable is this rush to judgment, the unwillingness to take these kinds of allegations at face value and look at them for what they are, a real question of character for someone who is asking for a lifetime appointment on the Supreme Court.

In 1991, Republicans belittled Professor Hill's experience, saying, and I quote, "It will not make a bit of difference in the outcome." And the burden of proof was on Professor Hill. Today, our Republican colleagues are saying this is a hiccup. Dr. Ford is mixed up and declaring, "I will listen to the lady, but we are going to bring this to a close."

What is worse, many of our colleagues on the other side of the aisle have also made it clear that no matter what happens today, the Senate will plow right through and ensure Judge Kavanaugh would be elevated within a week. In fact, on Tuesday, the Majority went ahead and scheduled a vote on the nomination before we heard one word of testimony regarding allegations of sexual assault and misconduct by Brett Kavanaugh.

Republican leadership even told Senators they should plan to be in over this weekend so the nomination can be pushed through without delay. This is despite the fact that in the last few days, two more women have come forward with their own serious allegations of sexual assault involving Brett Kavanaugh.

This past Sunday, we learned about Debbie Ramirez, who was a student at Yale with Brett Kavanaugh. She, too, did not want to come forward. But after being approached by reporters, she told her story.

She was at a college party, where Kavanaugh exposed himself to her. She recalls pushing him away and then seeing him laughing and pulling his pants up.

Then yesterday, Julie Swetnick came forward to say that she had experiences of being at house parties with Brett Kavanaugh and Mark Judge. She recounted seeing Kavanaugh engage, and I quote, "in abusive and physically aggressive behavior toward girls," including attempts to "remove or shift girls' clothing," not taking "no for an answer," grabbing girls "without their consent," and targeting "particular girls so that they could be taken advantage of."

Each of these stories are troubling on their own, and each of these allegations should be investigated by the FBI. All three women have said they would like the FBI to investigate. Please do so. All three have said they have other witnesses and evidence to corroborate their accounts, and yet Republicans continue to blindly push forward.

So today, we are moving forward with a hearing and being asked to assess the credibility of Brett Kavanaugh. He has made several statements about how his focus was on school, basketball, service projects, and going to church. He declared that he “never” drank so much he could not remember what happened and he has “always treated women with dignity and respect.”

And while he has made these declarations, more and more people have come forward challenging his characterization of events and behaviors. James Roche, his freshman roommate at Yale, stated Kavanaugh was, and I quote again, “frequently incoherently drunk,” and that was “when he became aggressive and belligerent,” when he was drunk.

Liz Swisher, a friend of his from Yale, said, and I quote, “There is no medical way I can say that he was blacked out, but it is not credible for him to say that he has no memory lapses in the nights that he drank to excess.”

Lynne Brookes, a college classmate, said the picture Kavanaugh is trying to paint does not match her memories of him. And I quote, “He is trying to paint himself as some kind of choir boy. You cannot lie your way onto the Supreme Court. And with that statement out, he has gone too far. It is about the integrity of the institution.”

Ultimately, Members and ladies and gentlemen, I really think that is the point. We are here to decide whether to evaluate this nominee to the most prestigious Court in our country. It is about the integrity of that institution and the integrity of this institution.

The entire country is watching how we handle these allegations. I hope the Majority changes their tactics, opens their mind, and seriously reflects on why we are here. We are here for one reason, to determine whether Judge Kavanaugh should be elevated to one of the most powerful positions in our country.

This is not a trial of Dr. Ford. It is a job interview for Judge Kavanaugh. Is Brett Kavanaugh who we want on the most prestigious Court in our country? Is he the best we can do?

Thank you, Mr. Chairman.

Chairman GRASSLEY. Yes. I am sorry you brought up about the unsubstantiated allegations of other people because we are here for the sole purpose of listening to Dr. Ford and will consider other issues at other times.

I would like to have you rise so I can swear you.

Now, do you swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Dr. FORD. I do.

Chairman GRASSLEY. Thank you very much. Please be seated.

And before you give your statement, I want to say to everybody that she has asked for—any time you ask for a break, you get a break. Anytime there is something that you need you do not have, just ask us, and you can have as much time for your opening state-

ment as you want. And just generally let us know if there is any issues.

Proceed, please.

STATEMENT OF CHRISTINE BLASEY FORD, Ph.D., PROFESSOR OF PSYCHOLOGY, PALO ALTO UNIVERSITY, PALO ALTO, CALIFORNIA, AND RESEARCH PSYCHOLOGIST, STANFORD UNIVERSITY SCHOOL OF MEDICINE, STANFORD, CALIFORNIA

Dr. FORD. Thank you, Senator Grassley. I think, after I read my opening statement, I anticipate needing some caffeine, if that is available.

Chairman GRASSLEY. Okay. Can you pull the microphone just a little bit closer to you, please? Can the whole box go a little bit closer?

Mr. BROMWICH. That is what I am trying, Senator. No.

Chairman GRASSLEY. Okay. Well, then—

Dr. FORD. I'll lean forward.

Chairman GRASSLEY. Thank you. Thank you.

Dr. FORD. Is this good?

Chairman GRASSLEY. Yes.

Dr. FORD. Okay. Thank you, Chairman Grassley and Ranking Member Feinstein, Members of the Committee.

My name is Christine Blasey Ford. I am a professor of psychology at Palo Alto University and a research psychologist at the Stanford University School of Medicine. I won't detail my educational background since it has already been summarized.

I have been married to Russell Ford since 2002, and we have two children.

I am here today not because I want to be. I am terrified. I am here because I believe it is my civic duty to tell you what happened to me while Brett Kavanaugh and I were in high school. I have described the events publicly before. I summarized them in my letter to Ranking Member Feinstein and again in a letter to Chairman Grassley. I understand and appreciate the importance of your hearing from me directly about what happened to me and the impact that it has had on my life and on my family.

I grew up in the suburbs of Washington, DC. I attended the Holton-Arms School in Bethesda, Maryland, from 1978 to 1984. Holton-Arms is an all-girls school that opened in 1901.

During my time at the school, girls at Holton-Arms frequently met and became friendly with boys from all-boys schools in the area, including the Landon School, Georgetown Prep, Gonzaga High School, as well as our country clubs and other places where kids and families socialized. This is how I met Brett Kavanaugh, the boy who sexually assaulted me.

During my freshman and sophomore school years, when I was 14 and 15 years old, my group of friends intersected with Brett and his friends for a short period of time. I had been friendly with a classmate of Brett's for a short time during my freshman and sophomore year, and it was through that connection that I attended a number of parties that Brett also attended. We did not know each other well, but I knew him, and he knew me.

In the summer of 1982, like most summers, I spent most every day at the Columbia Country Club in Chevy Chase, Maryland,

swimming and practicing diving. One evening that summer, after a day of diving at the club, I attended a small gathering at a house in the Bethesda area. There were four boys I remember specifically being at the house—Brett Kavanaugh, Mark Judge, a boy named P.J., and one other boy whose name I cannot recall. I also remember my friend Leland attending.

I do not remember all of the details of how that gathering came together, but like many that summer, it was almost surely a spur of the moment gathering. I truly wish I could be more helpful with more detailed answers to all of the questions that have and will be asked about how I got to the party and where it took place and so forth. I don't have all the answers, and I don't remember as much as I would like to. But the details that—about that night that bring me here today are the ones I will never forget. They have been seared into my memory and have haunted me episodically as an adult.

When I got to the small gathering, people were drinking beer in a small living room/family room-type area on the first floor of the house. I drank one beer. Brett and Mark were visibly drunk.

Early in the evening, I went up a very narrow set of stairs leading from the living room to a second floor to use the restroom. When I got to the top of the stairs, I was pushed from behind into a bedroom across from the bathroom. I couldn't see who pushed me.

Brett and Mark came into the bedroom and locked the door behind them. There was music playing in the bedroom. It was turned up louder by either Brett or Mark once we were in the room. I was pushed onto the bed, then Brett got on top of me.

He began running his hands over my body and grinding into me. I yelled, hoping that someone downstairs might hear me, and I tried to get away from him, but his weight was heavy. Brett groped me and tried to take off my clothes. He had a hard time because he was very inebriated and because I was wearing a one-piece bathing suit underneath my clothing.

I believed he was going to rape me. I tried to yell for help. When I did, Brett put his hand over my mouth to stop me from yelling. This is what terrified me the most, and this had the most lasting impact on my life. It was hard for me to breathe, and I thought that Brett was accidentally going to kill me.

Both Brett and Mark were drunkenly laughing during the attack. They seemed to be having a very good time. Mark seemed ambivalent, at times urging Brett on and at times telling him to stop. A couple of times, I made eye contact with Mark and thought he might try to help me, but he did not.

During this assault, Mark came over and jumped on the bed twice while Brett was on top of me. Then the last time that he did this, we toppled over, and Brett was no longer on top of me. I was able to get up and run out of the room. Directly across from the bedroom was a small bathroom. I ran inside the bathroom and locked the door.

I waited until I heard Brett and Mark leave the bedroom laughing and loudly walk down the narrow stairway, pinballing off the walls on the way down. I waited, and when I did not hear them come back up the stairs, I left the bathroom, went down the same

stairwell, through the living, and left the house. I remember being on the street and feeling an enormous sense of relief that I had escaped that house and that Brett and Mark were not coming outside after me.

Brett's assault on me drastically altered my life. For a very long time, I was too afraid and ashamed to tell anyone these details. I did not want to tell my parents that I, at age 15, was in a house without any parents present, drinking beer with boys. I convinced myself that because Brett did not rape me, I should just move on and just pretend that it didn't happen.

Over the years, I told very, very few friends that I had this traumatic experience. I told my husband before we were married that I had experienced a sexual assault. I had never told the details to anyone, the specific details, until May 2012 during a couples counseling session.

The reason this came up in counseling is that my husband and I had completed a very extensive, very long remodel of our home, and I insisted on a second front door, an idea that he and others disagreed with and could not understand. In explaining why I wanted a second front door, I began to describe the assault in detail.

I recall saying that the boy who assaulted me could someday be on the U.S. Supreme Court and spoke a bit about his background at an elitist all-boys school in Bethesda, Maryland. My husband recalls that I named my attacker as Brett Kavanaugh.

After that May 2012 therapy session, I did my best to ignore the memories of the assault because recounting them caused me to relive the experience and cause panic and anxiety. Occasionally, I would discuss the assault in an individual therapy session, but talking about it caused more reliving of the trauma. So I tried not to think about it or discuss it.

But over the years, I went through periods where I thought about the attack. I had confided in some close friends that I had had an experience with sexual assault. Occasionally, I stated that my assailant was a prominent lawyer or judge, but I did not use his name. I do not recall each person I spoke to about Brett's assault, and some friends have reminded me of these conversations since the publication of The Washington Post story on September 16, 2018, but until July 2018, I had never named Mr. Kavanaugh as my attacker outside of therapy.

This changed in early July 2018. I saw press reports stating that Brett Kavanaugh was on the short list of a list of very well-qualified Supreme Court nominees. I thought it was my civic duty to relay the information I had about Mr. Kavanaugh's conduct so that those considering his nomination would know about this assault.

On July 6th, I had a sense of urgency to relay the information to the Senate and the President as soon as possible before a nominee was selected. I did not know how specifically to do this. I called my congressional Representative and let her receptionist know that someone on the President's short list had attacked me.

I also sent a message to the encrypted Washington Post confidential tip line. I did not use my name, but I provided the names of Brett Kavanaugh and Mark Judge. I stated that Mr. Kavanaugh

had assaulted me in the 1980s in Maryland. This was an extremely hard thing for me to do, but I felt that I couldn't not do it.

Over the next 2 days, I told a couple of close friends on the beach in Aptos, California, that Mr. Kavanaugh had sexually assaulted me. I was very conflicted as to whether to speak out.

On July 9th, I received a return phone call from the office of Congresswoman Anna Eshoo after Mr. Kavanaugh had become the nominee. I met with her staff on July 18th and with her on July 20th, describing the assault and discussing my fears about coming forward.

Later, we discussed the possibility of sending a letter to Ranking Member Feinstein, who is one of my State Senators, describing what occurred. My understanding is that Representative Eshoo's office delivered a copy of my letter to Senator Feinstein's office on July 30th. The letter included my name, but also a request that it be kept confidential.

My hope was that providing the information confidentially would be sufficient to allow the Senate to consider Mr. Kavanaugh's serious misconduct without having to make myself, my family, or anyone's family vulnerable to the personal attacks and invasions of privacy that we have faced since my name became public.

In a letter dated August 31st, Senator Feinstein wrote that she would not share the letter without my explicit consent, and I appreciated this commitment. Sexual assault victims should be able to decide for themselves when and whether their private experience is made public.

As the hearing date got closer, I struggled with a terrible choice. Do I share the facts with the Senate and put myself and my family in the public spotlight? Or do I preserve our privacy and allow the Senate to make its decision without knowing the full truth of his past behaviors?

I agonized daily with this decision throughout August and September 2018. The sense of duty that originally motivated me to reach out confidentially to The Washington Post and to Anna Eshoo's office when there was still a list of extremely qualified candidates and to Senator Feinstein was always there, but my fears of the consequences of speaking out started to exponentially increase.

During August 2018, the press reported that Mr. Kavanaugh's confirmation was virtually certain. Persons painted him as a champion of women's rights and empowerment, and I believed that if I came forward, my single voice would be drowned out by a chorus of powerful supporters. By the time of the confirmation hearings, I had resigned myself to remaining quiet and letting the Committee and the Senate make their decision without knowing what Mr. Kavanaugh had done to me.

Once the press started reporting on the existence of the letter I had sent to Senator Feinstein, I faced mounting pressure. Reporters appeared at my home and at my workplace, demanding information about the letter in the presence of my graduate students. They called my bosses and coworkers and left me many messages, making it clear that my name would inevitably be released to the media.

I decided to speak out publicly to a journalist who had originally responded to the tip I had sent to The Washington Post and who had gained my trust. It was important for me to describe the details of the assault in my own words.

Since September 16th, the date of The Washington Post story, I have experienced an outpouring of support from people in every State of this country. Thousands and thousands of people who have had their lives dramatically altered by sexual violence have reached out to share their experience and have thanked me for coming forward.

We have received tremendous support from our friends and our community. At the same time, my greatest fears have been realized, and the reality has been far worse than what I expected. My family and I have been the target of constant harassment and death threats, and I have been called the most vile and hateful names imaginable.

These messages, while far fewer than the expressions of support, have been terrifying and have rocked me to my core. People have posted my personal information and that of my parents online on the Internet. This has resulted in additional emails, calls, and threats. My family and I were forced to move out of our home.

Since September 16th, my family and I have been visiting in various secure locales, at times separated and at times together, with the help of security guards. This past Tuesday evening, my work email was hacked, and messages were sent out trying to recant my description of the sexual assault.

Apart from the assault itself, these past couple of weeks have been the hardest of my life. I've had to relive this trauma in front of the world, and I've seen my life picked apart by people on television, on Twitter, other social media, other media, and in this body who have never met me or spoken with me.

I have been accused of acting out of partisan political motives. Those who say that do not know me. I am an independent person, and I am no one's pawn. My motivation in coming forward was to be helpful and to provide facts about how Mr. Kavanaugh's actions have damaged my life so that you could take into a serious consideration as you make your decision about how to proceed.

It is not my responsibility to determine whether Mr. Kavanaugh deserves to sit on the Supreme Court. My responsibility is to tell you the truth.

I understand that a professional prosecutor has been hired to ask me questions, and I'm committed to doing my very best to answer them. I have never been questioned by a prosecutor, and I will do my best.

At the same time, because the Committee Members will be judging my credibility, I do hope to be able to engage directly with each of you, and at this point, I will do my best to answer your questions—and would request some caffeine.

Mr. BROMWICH. A Coke or something?

Dr. FORD. That sounds good. That would be great.

Thank you.

[The prepared statement of Dr. Christine Blasey Ford appears as a submission for the record.]

Chairman GRASSLEY. Thank you very much.

Before I use my 5 minutes of questioning, I thought that I would try to remind my colleagues and, in this case, Ms. Mitchell as well, that 5 minutes, the way I traditionally have done, if you ask a question before your time runs out and even though you go over your time, as long as you are not filibustering, I will let you ask your question.

And I am going to make sure that both Dr. Ford and Judge Kavanaugh—as Chairman of the Committee, I know that they are going to get a chance to answer the questions fully beyond that 5 minutes. But when that—when either Dr. Ford or Judge Kavanaugh gets done, then we immediately go to the next person. So I hope that that will be done in a—and Dr. Ford, I am told that you want a break right now, and if you do, that is fine.

Dr. FORD. I am okay. I got the coffee. Thank you very much. I think I can proceed and sip on the coffee.

Chairman GRASSLEY. Nobody can mix up my coffee right. So I—

[Laughter.]

Chairman GRASSLEY. So you are pretty fortunate.

So now, with that, Ms. Mitchell, you have my 5 minutes to ask questions.

[For Chairman Grassley.]

Ms. MITCHELL. Thank you, Mr. Chairman.

Good morning, Dr. Ford. We have not met. My name is Rachel Mitchell.

Dr. FORD. Nice to meet you.

Ms. MITCHELL. I just wanted to tell you the first thing that struck me from your statement this morning was that you were terrified, and I just wanted to let you know I am very sorry. That is not right.

I know this is stressful, and so I would like to set forth some guidelines that maybe will alleviate that a little bit. If I ask you a question that you do not understand, please ask me to clarify it or ask it in a different way.

When I ask questions, sometimes I will refer back to other information you have provided. If I do that and I get it wrong, please correct me.

Dr. FORD. Okay.

Ms. MITCHELL. I am not going to ask you to guess. I know it was a long time ago. If you do estimate, please let me know that you are estimating, okay?

Dr. FORD. Fair.

Ms. MITCHELL. We have put before you, and I am sure you have copies of them anyway, five pieces of information, and I wanted to go over them. The first is a screen shot of a WhatsApp texting between you and somebody at The Washington Post. Do you have that in front of you?

Dr. FORD. Yes.

Ms. MITCHELL. The first two texts were sent by you on July 6th. Is that correct?

Dr. FORD. Correct.

Ms. MITCHELL. And then the last one sent by you was on July 10th?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. Are those three comments accurate?

Dr. FORD. I will read them.

Mr. BROMWICH. Take your time.

Dr. FORD. Yes.

Mr. BROMWICH. Take your time.

Dr. FORD. So there is one correction.

Ms. MITCHELL. Okay.

Dr. FORD. I've misused the word "bystander" as an adjective.

Ms. MITCHELL. Okay.

Dr. FORD. Bystander means someone that is looking at an assault, and the person named P.J. was not technically a bystander. I was writing very quickly and with a sense of urgency. So I would not call him a bystander. He was downstairs, and you know, what I remember of him was he was a tall and very nice person. I didn't know him well, but that he was downstairs, not anywhere near the event.

Ms. MITCHELL. Okay. Thank you for—

Dr. FORD. I'd like to take that word out if it's possible.

Ms. MITCHELL. Okay. Thank you for clarifying that.

The second is the letter that you wrote to Senator Feinstein dated July 30th of this year.

Dr. FORD. Yes.

Ms. MITCHELL. Did you write the letter yourself?

Dr. FORD. I did.

Ms. MITCHELL. And since it is dated July 30th, did you write it on that date?

Dr. FORD. I believe so. It sounds right. I was in Rehoboth, Delaware, at the time. I could look into my calendar and try to figure that out.

Ms. MITCHELL. Was it written on or about that date?

Dr. FORD. Yes. Yes. I traveled, I think, the 26th of July to Rehoboth, Delaware. So that makes sense because I wrote it from there.

Ms. MITCHELL. Okay. Is the letter accurate?

Dr. FORD. I'll take a minute to read it.

Ms. MITCHELL. Okay.

Dr. FORD. I can read fast.

Mr. BROMWICH. Take your time.

[Witness reads the letter.]

Dr. FORD. Okay. So I have three areas that I'd like to address.

Ms. MITCHELL. Okay.

Dr. FORD. In the second paragraph, where it says, "The assault occurred in a suburban Maryland area home."

Ms. MITCHELL. Yes.

Dr. FORD. "At a gathering that included me and four others," I can't guarantee that there weren't a few other people there, but they are not in my purview of my memory.

Ms. MITCHELL. Would it be fair to say there were at least four others?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. What's the second correction?

Dr. FORD. Oh, okay. The next sentence begins with, "Kavanaugh physically pushed me into the bedroom." I would say I can't promise that Mark Judge didn't assist with that. I don't know. I was pushed from behind. So I don't want to put that solely on him.

Ms. MITCHELL. Okay.

Dr. FORD. Okay.

Chairman GRASSLEY. Ms. Mitchell, I do not know whether this is fair for me to interrupt, but I want to keep people within 5 minutes. Is that a—is that a major problem for you in the middle of a question? Because we have got to—I have got to treat everybody the same.

Ms. MITCHELL. I understand that.

Chairman GRASSLEY. Can I go to Senator Feinstein, or do you—

Ms. MITCHELL. Yes, sir. Sorry. I did not see the light was red. Please do.

Chairman GRASSLEY. Okay. Senator Feinstein.

[Pause.]

Chairman GRASSLEY. For the benefit of Dr. Ford, I think she will continue that after the 5 minutes here.

Dr. FORD. Okay.

Senator FEINSTEIN. Mr. Chairman, I would like to begin by putting some letters in the record.

Chairman GRASSLEY. Without objection, so ordered.

[The letters appear as submissions for the record.]

Senator FEINSTEIN. Thank you.

Chairman GRASSLEY. Do you want to tell me what—

Senator FEINSTEIN. One hundred forty letters from friends and neighbors of the witness and 1,000 female physicians across the country. Those are what the letters are.

Senator FEINSTEIN. I want to thank you very much for your testimony. I know how very, very hard it is.

Why—why have you held it to yourself all these years? As you look back, can you indicate what the reasons are?

Dr. FORD. Well, I haven't held it in all these years. I did disclose it in the confines of therapy, where I felt like it was an appropriate place to cope with the sequelae of the event.

Senator FEINSTEIN. Well, can you tell us what impact the events had on you?

Dr. FORD. Well, I think that the sequelae of sexual assault varies by person. So, for me personally, anxiety, phobia, and PTSD-like symptoms are the types of things that I've been coping with. So more specifically, claustrophobia, panic, and that type of thing.

Senator FEINSTEIN. Is that the reason for the second door, front door—

Dr. FORD. Correct.

Senator FEINSTEIN [continuing]. Is claustrophobia?

Dr. FORD. Correct. It doesn't—our house does not look aesthetically pleasing from the curb.

Senator FEINSTEIN. I see. And do you have that second front door?

Dr. FORD. Yes.

Senator FEINSTEIN. It prevailed, yes?

Dr. FORD. And it now is a place to host Google interns because we live near Google. So we get to have—and other students can—

Senator FEINSTEIN. Can you tell us, is there any other way this has affected your life?

Dr. FORD. The primary impact was in the initial 4 years after the event. I struggled academically. I struggled very much in Chapel Hill in college. When I was 17 and went off to college, I had a very hard time, more so than others, forming new friendships and especially friendships with boys, and I had academic problems.

Senator FEINSTEIN. What were the—when we spoke and it became very clear how deeply you felt about this and the need that you wanted to remain confidential, can you talk a little bit about that?

Dr. FORD. Yes. So I was watching carefully throughout the summer. Well, my original intent, I just want to remind, was to communicate with everyone when there was still a list of candidates who all seemed to be, just from my perspective from what I could read, equally qualified, and I was in a hurry to try to get the information forward but didn't quite know how to do that.

However, once he was selected, and it seemed like he was popular and was a sure vote, I was calculating daily the risk-benefit for me of coming forward and wondering whether I would just be jumping in front of a train that was headed to where it was headed anyway and that I would just be personally annihilated.

Senator FEINSTEIN. How did you decide to come forward?

Dr. FORD. Ultimately, because reporters were sitting outside of my home and trying to talk to my dog through the window to calm the dog down. And a reporter appeared in my graduate classroom, and I mistook her for a student. And she came up to ask me a question, and I thought that she was a student, and it turned out that she was a reporter.

So at that point, I felt like enough was enough. People were calling my colleagues at Stanford and leaving messages on their voicemails and on their emails saying that they knew my name. Clearly, people knew my address because they were out in front of my house, and it just—the mounting pressure seemed like it was time to just say what I needed to say.

Senator FEINSTEIN. I want—I am sorry. I want to ask you one question about the attack itself. You were very clear about the attack. Being pushed into the room, you say you do not know quite by whom, but that it was Brett Kavanaugh that covered your mouth to prevent you from screaming, and then you escaped.

How are you so sure that it was he?

Dr. FORD. The same way that I'm sure that I'm talking to you right now, just basic memory functions and also just the level of norepinephrine and epinephrine in the brain that sort of, as you know, encodes—that neurotransmitter encodes memories into the hippocampus, and so the trauma-related experience then is kind of locked there, whereas other details kind of drift.

Senator FEINSTEIN. So what you are telling us is this could not be a case of mistaken identity?

Dr. FORD. Absolutely not.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Chairman GRASSLEY. Ms. Mitchell for Senator Hatch.

[For Senator Hatch.]

Ms. MITCHELL. Thank you, Mr. Chairman.

When we were stopped, you were going to tell us a third correction that you wanted to make on that statement—or, I am sorry, the letter to Senator Feinstein?

Dr. FORD. It's—it wasn't a correction, but I just wanted to comment on it since we were looking at this letter, that I did see Mark Judge once at the Potomac Village Safeway after the time of the attack. And it would be helpful with anyone's resources if—to figure out when he worked there, if people are wanting more details from me about when the attack occurred. If we could find out when he worked there, then I could provide a more detailed timeline as to when the attack occurred.

Ms. MITCHELL. Okay. And so that is not a correction in your statement?

Dr. FORD. It's just—no.

Ms. MITCHELL. Okay. You also wrote out a handwritten statement for the polygrapher when you took your polygraph test. Is that correct?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. And I see corrections on that where you crossed out. So I will go on to The Washington Post article—

Dr. FORD. Okay.

Ms. MITCHELL [continuing]. That was originally published on September 16th of this year.

Dr. FORD. Then should I just not look at this for accuracy, or we're just going to leave that be?

Ms. MITCHELL. We may come back to it if you need to refer to it.

Dr. FORD. Okay, okay.

Ms. MITCHELL. On The Washington Post article, did you submit to an interview by a reporter with The Washington Post for that article to be written?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. And then finally was the statement that you provided this morning. I assume that to the best of your recollection, that that was accurate?

Dr. FORD. That this whole article is accurate?

Ms. MITCHELL. No, no, no. The statement that you made this morning.

Dr. FORD. Yes.

Ms. MITCHELL. Okay. I want to talk to you about the day that this happened leading up to the gathering.

Dr. FORD. Okay.

Ms. MITCHELL. In your statement this morning, have you told us everything that you remember about the day leading up to that?

Dr. FORD. Yes.

Ms. MITCHELL. Let me ask just a few questions to make sure that you have thought of everything, okay? You indicated that you were at the country club swimming that day?

Dr. FORD. That's my best estimate of how this could have happened.

Ms. MITCHELL. Okay. And when you say "best estimate," is that based on the fact that you said you went there pretty much every day?

Dr. FORD. Mm-hmm.

Ms. MITCHELL. Is that a "yes"?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. Do you recall prior to getting there—so I am only talking about up to the gathering—

Dr. FORD. Okay.

Ms. MITCHELL [continuing]. Had you had anything to drink?

Dr. FORD. Not at all.

Ms. MITCHELL. Were you on any sort of medication?

Dr. FORD. None.

Ms. MITCHELL. Okay. Do you recall knowing before you went who was going to be at that gathering?

Dr. FORD. I recall that expecting that Mark Judge and Leland would be at that gathering.

Ms. MITCHELL. Okay. Do you recall an expectation that Brett Kavanaugh would be there?

Dr. FORD. I don't recall whether or not I expected that.

Ms. MITCHELL. Okay. Now let us talk about the gathering up from the time you arrived until right when you went up the stairs, just that period of time, okay? What was the atmosphere like at the gathering?

Dr. FORD. Mr. Kavanaugh and Mr. Judge were extremely inebriated. They had clearly been drinking prior, and the other people at the party were not. The living room—

Ms. MITCHELL. Can I ask you, just to follow up on that, when you said it was clear that they had been drinking prior, do you mean prior to the time you had gotten there or prior to the time they had arrived?

Dr. FORD. Prior to the time that they arrived. I don't recall who arrived first, though, whether it was me or them.

Ms. MITCHELL. Okay. Please continue.

Dr. FORD. Okay. So I recall that I can—I can sketch a floor plan. I recall that it was a sparsely furnished, fairly modest living room, and it was not really a party, like the news has made it sound. It was not—it was just a gathering that I assumed was going to lead to a party later on that those boys would attend because they tended to have parties later at night than I was allowed to stay out. So it was kind of a pre-gathering.

Ms. MITCHELL. Was it loud?

Dr. FORD. No. Not in the living room.

Ms. MITCHELL. Besides the music that you have described that was playing in the bedroom, was there any other music or television or anything like that that was adding?

Dr. FORD. No.

Ms. MITCHELL. Okay. So there was not a stereo playing downstairs?

Dr. FORD. No.

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Dr. Ford, thank you for being here.

Mr. Chairman, you know, the way to make this inquiry truly credible is to do what we have always done when new information about a nominee comes to light. To use your words this morning, you want to reach the truth. The easy way to do that, ask the FBI to investigate. It is what we have always done.

Let them investigate, report back to us. The same applies to the serious allegations made by Deborah Ramirez and Julie Swetnick. Let us have a nonpartisan, professional investigation and then take the time to have these witnesses testify.

Chairman, you and I were both here 27 years ago. At that time, the Senate failed Anita Hill. I said I believed her, but I am concerned that we are doing a lot less for these three women today. That is my personal view.

Now, Dr. Ford, no matter what happens with this hearing today, no matter what happens to this nomination, I know and I hear from so many in my own State of Vermont, there are millions of victims and survivors out there who have been inspired by your courage. I am.

Bravery is contagious. Indeed, that is the driving force behind the #MeToo movement, and you sharing your story is going to have a lasting positive impact on so many survivors in our country. We owe you a debt of gratitude for that, Doctor.

Now some Senators have suggested you were simply mixed up about who assaulted you. An ally of Judge Kavanaugh in the White House even promoted a wild theory about a Kavanaugh look-alike. You immediately rejected that theory. As did the innocent man who had been called that look-alike.

In fact, he sent a letter to this Committee forcefully rejecting this absurd theory. I ask consent to enter that in the record.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator LEAHY. Now how did you know Brett Kavanaugh and Mark Judge, and is it possible that you would mix them up with somebody else?

Dr. FORD. No, it is not. And the person that was blamed for the incident is actually the person who introduced me to them originally. So he was a member of Columbia Country Club, and I don't want to talk about him because I think it's unfair. But he is the person that introduced me to them.

Senator LEAHY. But you—you would not mix up somebody else with Brett Kavanaugh. Is that correct?

Dr. FORD. Correct.

Senator LEAHY. Or Mark Judge?

Dr. FORD. Correct.

Senator LEAHY. Well, then let us go back to the incident. What is the strongest memory you have? The strongest memory of the incident, something that you cannot forget. Take whatever time you need.

Dr. FORD. Indelible in the hippocampus is the laughter, the uproarious laughter between the two and their having fun at my expense.

Senator LEAHY. You have never forgotten that laughter. You have never forgotten them laughing at you?

Dr. FORD. They were laughing with each other.

Senator LEAHY. And you were the object of the laughter?

Dr. FORD. I was, you know, underneath one of them while the two laughed. Two friends having a really good time with one another.

Senator LEAHY. Let me enter into the record a statement by the National Task Force to End Domestic Violence.

Chairman GRASSLEY. Without objection, so ordered.

[The statement appears as a submission for the record.]

Senator LEAHY. And a letter from 24 Members of the House of Representatives urging the Committee to use the NTF's trauma-informed approach in questioning Dr. Ford.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator LEAHY. And a letter from another 116 Members of the House asking to delay until all this has been heard.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as a submission for the record.]

Senator LEAHY. And Dr. Ford has at times been criticized for what she does not remember from 36 years ago, but we have numerous experts, including a study by the U.S. Army Military Police School of Behavior Sciences Education, that lapses of memory are wholly consistent with severe trauma and stress of assault. I would ask consent that be entered.

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Senator LEAHY. And Dr. Ford, I will just conclude with this. You do remember what happened, do you not?

Dr. FORD. Very much so.

Senator LEAHY. Thank you. Thank you, Mr. Chairman.

Now Ms. Mitchell for Senator Graham, and then it is my understanding that that is where you would like to take a break?

Dr. FORD. If that works for you? Does that work for you as well?

Chairman GRASSLEY. We are here to accommodate you, not you accommodate us.

Dr. FORD. Oh, thank you. I'm used to being collegial. So—

[Laughter.]

Chairman GRASSLEY. Okay. Go ahead. Ms. Mitchell for Senator Graham.

[For Senator Graham.]

Ms. MITCHELL. Thank you, Mr. Chairman.

You told Senator Feinstein in your letter that you and four others were present. You have corrected that today to say it was at least four others.

When you were interviewed by The Washington Post, you said that there were four boys present at the party, and then in your polygraph statement, you said there were four boys and two girls. When you say "two girls," was that you and another, or was that two other girls?

Dr. FORD. That was me and one other girl.

Ms. MITCHELL. And that other girl's name?

Dr. FORD. Leland.

Ms. MITCHELL. Leland Keyser now?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. So, then, would it be fair to say at least P.J., Brett Kavanaugh, Mark Judge, Leland—Ingham at the time—and yourself were present, and possibly others?

Dr. FORD. And one—one other boy. So there were four, there were four boys. I just don't know the name of the other boy.

Ms. MITCHELL. Have you been contacted by anybody saying, "Hey, I was at that party, too"?

Dr. FORD. No, I haven't talked with anyone from that party.

Ms. MITCHELL. Okay. Now you have been detailed about what happened once you got up the stairs, and so I do not need to go through that again. I am sorry. Go ahead.

Dr. FORD. You know, I'm sorry. I just realized that I said something that was inaccurate. I said I hadn't spoke with anyone from the party since that—I've spoken with Leland.

Ms. MITCHELL. Thank you for correcting that. I appreciate that.

You have gone into detail about what happened once you went up the stairs. So I do not feel like it is necessary to go over those things again.

Dr. FORD. Okay. Thank you.

Ms. MITCHELL. Have you told us everything that you do remember about it?

Dr. FORD. I believe so, but if there are other questions, I will—I can attempt to answer them.

Ms. MITCHELL. Okay. You said that the music was solely coming from that room. Is that correct?

Dr. FORD. Correct.

Ms. MITCHELL. And it was turned up once the three of you were inside that room. Is that correct?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. At some point, do you recall it being turned down?

Dr. FORD. I don't remember if it was turned down once I was leaving the house. I don't remember.

Ms. MITCHELL. Okay.

Dr. FORD. Likely, since I could hear them walking down the stairs very clearly from the bathroom.

Ms. MITCHELL. Okay. And the bathroom was—door was closed when you heard this. Is that correct?

Dr. FORD. I could hear them very clearly hitting the walls going down the stairwell.

Ms. MITCHELL. In fact, in your letter, you said that they went down the stairs, and they were talking with other people in the house.

Dr. FORD. Mm-hmm. Correct.

Ms. MITCHELL. Were you able to hear that conversation?

Dr. FORD. I was not able to hear that conversation, but I was aware that they were downstairs and that I would have to walk past them to get out of the house.

Ms. MITCHELL. Now let me make sure we are on the same page. Were you not able to hear the conversation or not able to understand the conversation?

Dr. FORD. I couldn't hear the conversation. I was upstairs.

Ms. MITCHELL. Okay. How do you know there was a conversation?

Dr. FORD. I'm just assuming since it was a social gathering, people were talking. I don't know.

Ms. MITCHELL. Okay. In your letter, you—

Dr. FORD. I could hear them talking as they went down the stairwell. They were laughing and—

Ms. MITCHELL. Okay. In your letter, you wrote, “Both loudly stumbled down the stairwell, at which point other persons at the house were talking with them.” Does that ring a bell?

Dr. FORD. Yes, I had to walk past everyone to leave the house.

Ms. MITCHELL. Your letter—

Dr. FORD. Maybe I’m not understanding, I’m sorry.

Ms. MITCHELL. Okay. Your next sentence, let me try to clarify this. After you said other persons at the house were talking with them, the letter goes on with the very next sentence, “I exited the bathroom, ran outside of the house, and went home.”

Dr. FORD. Correct.

Ms. MITCHELL. Okay. You said that you do not remember how you got home. Is that correct?

Dr. FORD. I do not remember.

Ms. MITCHELL. Okay.

Dr. FORD. Other than I did not drive home.

Ms. MITCHELL. Okay. I am going to show you, if somebody could provide to you, a map of the various people’s houses at the time, and if you could verify that this is where you were living at the time?

Dr. FORD. Where I was living at the time?

Ms. MITCHELL. Yes.

Dr. FORD. Okay.

Senator HARRIS. Mr. Chairman, do we have a copy of these documents?

Chairman GRASSLEY. You do not have a copy, but I suppose if you want one, we can get you one.

Senator HARRIS. Yes. Before the questions begin. So we can follow the testimony.

Chairman GRASSLEY. Okay. My staff says that we should not provide the copy.

[Voice off microphone.] No, we will provide the copy. We will provide the copy.

Chairman GRASSLEY. Oh. Well, speak plainly with me, please.

Senator HARRIS. Oh, sure. I would like to see what she is looking at.

Chairman GRASSLEY. Not you.

[Laughter.]

Chairman GRASSLEY. You have another 30 seconds now because I was rudely interrupted.

Ms. MITCHELL. Okay. Mr. Chairman, Senator Harris, we do have a blown-up copy of this for the Members to view, if that is helpful?

Dr. FORD. Okay. I’m going to put checkmarks next to homes that I can confirm are the correct locations and then an “X” or a “?” when I don’t know where these people live.

Ms. MITCHELL. I am only asking you to confirm if that map accurately shows where you were living at the time.

Dr. FORD. Where I lived at the time. So I can’t see the street name, but I’m happy to refer to the address or the neighborhood.

Ms. MITCHELL. Okay. Could you tell us that?

Dr. FORD. Yes. It’s River Falls.

Ms. MITCHELL. Okay.

Dr. FORD. Near the—what is the place called, the Naval Research Center on Clara Barton Parkway.

Ms. MITCHELL. Okay. Was that a house or an apartment?

Dr. FORD. It was my parents' home.

Ms. MITCHELL. Okay.

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Mr. Chairman, I ask consent to enter into the record letters of support for Dr. Ford from her classmates at Holton-Arms School; 1,200 alumni of the school; 195 of your colleagues, students, and mentors; 1,400 women and men who attended DC schools; and 15 members of the Yale Law School faculty who are calling for a full FBI investigation. I ask consent to enter these into the record.

Chairman GRASSLEY. Without objection, so ordered.

[The letters appear as submissions for the record.]

Senator DURBIN. Dr. Ford, as difficult as this experience must be, I want you to know that your courage in coming forward has given countless Americans the strength to face their own life-shattering past and begin to heal their wounds. By example, you have brought many families into an honest and sometimes painful dialogue that should have occurred a long time ago.

I am sorry for what this has done to you and your family. No one, no one should face harassment, death threats, and disparaging comments by cheap-shot politicians simply for telling the truth. You and your family should know that for every scurrilous charge and every pathetic tweet, there have been thousands of Americans, women and men, who believe you, support you, and thank you for your courage.

Watching your experience, it is no wonder that many sexual assault survivors hide their past and spend their lives suffering in pained silence. You had absolutely nothing to gain by bringing these facts to the Senate Judiciary Committee. The fact that you are testifying here today, terrified though you may be, the fact that you have called for an FBI investigation of this incident, the fact that you are prepared to name both Judge Kavanaugh and eyewitness Mark Judge stands in sharp contrast to the obstruction we have seen on the other side.

The FBI should have investigated your charges, as they did in the Anita Hill hearing, but they did not. Mark Judge should be subpoenaed from his Bethany Beach hideaway and required to testify under oath, but he has not. Judge Kavanaugh, if he truly believes there is no evidence, no witnesses that can prove your case, should be joining us in demanding a thorough FBI investigation, but he has not.

Today, you come before this Committee and before this Nation alone. I know you are joined by counsel and family. The prosecutor on the Republican side will continue to ask questions to test your memory and veracity. After spending decades trying to forget that awful night, it is no wonder your recollection is less than perfect.

A polished liar can create a seamless story, but a trauma survivor cannot be expected to remember every painful detail. That is what Senator Leahy has mentioned earlier.

One question is critical. In Judge Kavanaugh's opening testimony, which we will hear after you leave, this is what he says, "I never had any sexual or physical encounter of any kind with Dr.

Ford. I am not questioning that Dr. Ford may have been sexually assaulted by some person in some place at some time.”

Last night, the Republican staff of this Committee released to the media a timeline that shows that they have interviewed two people who claim they were the ones who actually assaulted you. I am asking you to address this new defense of mistaken identity directly.

Dr. Ford, with what degree of certainty do you believe Brett Kavanaugh assaulted you?

Dr. FORD. One hundred percent.

Senator DURBIN. One hundred percent. In the letter which you sent to Senator Feinstein, you wrote, “I have not knowingly seen Kavanaugh since the assault. I did see Mark Judge once at the Potomac Village Safeway, where he was extremely uncomfortable in seeing me.”

Would you please describe that encounter at the Safeway with Mark Judge and what led you to believe he was uncomfortable?

Dr. FORD. Yes. I was going to the Potomac Village Safeway. This is the one on the corner of Falls and River Road, and I was with my mother, and I was a teenager. So I wanted her to go in one door and me go in the other. So I chose the wrong door because the door I chose was the one where Mark Judge was—looked like he was working there and arranging the shopping carts.

And I said hello to him, and his face was white and very uncomfortable saying hello back. And we had previously been friendly at the times that we saw each other over the previous 2 years, albeit not very many times. We had always been friendly with one another. I wouldn’t characterize him as not friendly. He was just nervous and not really wanting to speak with me. And he looked a little bit ill.

Senator DURBIN. How long did this occur after the incident?

Dr. FORD. I would estimate 6 to 8 weeks.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman GRASSLEY. Before we take a break, I cannot let what Durbin, Senator Durbin said—by the way, he is my friend. We work on a lot of legislation together. But you talked about the obstruction from the other side. I cannot let it go by what you have heard me say so many times that between July 30th and September 13th, there were 45 days this Committee could have been investigating this situation, and her privacy would have been protected.

So something happened here in between on your side that the whole country—well, not the whole country should have known about it—no, not know about. We should have investigated it.

We will take a break now for 15 minutes.

[Whereupon, at 11:27 a.m., the Committee was recessed.]

[Whereupon, at 11:47 a.m., the Committee reconvened.]

Chairman GRASSLEY. Dr. Ford, let me ask you a process question here. We were going to schedule a break for 12:05. This last break came just a little bit later. I did not call it at the right time. We are going to have a vote at 12:40, so would it be possible for you to go from now until 12:40 without a break?

Dr. FORD. Yes.

Chairman GRASSLEY. Okay. Now it is Senator Cornyn's time, so proceed, Ms. Mitchell.

[For Senator Cornyn.]

Ms. MITCHELL. Thank you, Senator.

I have a blow-up here to my right of the map that was shown to you. The address that's indicated on here as belonging to your family is what all the property tax records showed as being your address.

Dr. FORD. Okay.

Ms. MITCHELL. Just to put it in perspective, I'd like to show you a further-out, a zoomed-out picture so that we can put it in perspective, so we can show the greater Washington area. Of course, you can see the Beltway on that, the Beltway area.

Dr. FORD. Okay.

Ms. MITCHELL. And then, number 3, if we could look at that. We drew a 1-mile radius around the country club, and then we calculated from the furthest point—

Senator HARRIS. Mr. Chairman, again, we do not have these documents.

Chairman GRASSLEY. You are looking at them.

Senator HARRIS. No, we are not. That is why she showed three different documents, because they depict three different things. So we would like to see all three documents, please, so we can follow along.

Chairman GRASSLEY. Proceed, please.

Ms. MITCHELL. Okay. Looking at the third thing here, we calculated the distance from the closest point to your house from a mile radius of the country club and then the farthest point. You can see it's 6.2 and, of course, 8.2 miles. And you've described this as being near the country club, wherever this house was. Is that right?

Dr. FORD. I would describe it as somewhere between my house and the country club, in that vicinity that's shown in your picture.

Ms. MITCHELL. Okay.

Dr. FORD. And the country club is about a 20-minute drive from my parents' home.

Ms. MITCHELL. A 20-minute drive. And, of course, I've marked as the crow flies.

Dr. FORD. Yes.

Ms. MITCHELL. Would it be fair to say that somebody drove you somewhere, either to the party or home from the party?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. Has anyone come forward to say to you, "Hey, remember, I was the one that drove you home"?

Dr. FORD. No.

Ms. MITCHELL. Okay. In your July 6th text to The Washington Post that you looked at earlier, you said that this happened in the mid-'80s. In your letter to Senator Feinstein, you said it occurred in the early '80s.

In your polygraph statement, you said it was high school summer in '80s, and you actually had written in—and this is one of the corrections I referred to—"early," and then you crossed that out.

Later in your interview with The Washington Post, you were more specific. You believed it occurred in the summer of 1982, and you said the end of your sophomore year.

Dr. FORD. Yes.

Ms. MITCHELL. You said the same thing, I believe, in your prepared statement. How were you able to narrow down the time-frame?

Dr. FORD. I can't give the exact date, and I would like to be more helpful about the date. And if I knew when Mark Judge worked at the Potomac Safeway, then I would be able to be more helpful in that way. So I'm just using memories of when I got my driver's license. I was 15 at the time, and I did not drive home from that party or to that party. And once I did have my driver's license, I liked to drive myself, so—

Ms. MITCHELL. I assume the legal driving age was 16?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. Now, you've talked about attending therapy. In your text to The Washington Post dated 7/6—so that's the very first statement we have from you—you put in there, "Have therapy records, talking about it." I want to make sure I understand that. Did you already have your therapy records at that time?

Dr. FORD. I had looked at them online to see if they existed, yes.

Ms. MITCHELL. Okay. So this was something that was available to you via a computer, like a patient portal?

Dr. FORD. Actually, no. It was in the office of a provider.

Ms. MITCHELL. Okay.

Dr. FORD. She helped me go through the record to locate whether I had had a record of this conversation that I had remembered.

Ms. MITCHELL. Did you show a full or partial set of those marriage therapy records to The Washington Post?

Dr. FORD. I don't remember. I remember summarizing for her what they said, so I'm not quite sure if I actually gave her the record.

Ms. MITCHELL. Okay. So it's possible that the reporter did not see these notes?

Dr. FORD. I don't know if she—I can't recall whether she saw them directly or if I just told her what they said.

Ms. MITCHELL. Okay. Have you shown them to anyone else besides your counsel?

Dr. FORD. Just the counsel.

Ms. MITCHELL. Okay. Would it be fair to say that Brett Kavanaugh's name is not listed in those notes?

Dr. FORD. His name is not listed in those notes.

Ms. MITCHELL. Would it also be fair to say that the therapist notes that we've been talking about, say that there were four boys in the room?

Dr. FORD. It describes the sexual assault, and it says "erroneously by four boys," so the therapist got the content of it wrong.

Ms. MITCHELL. And you corrected that to The Washington Post reporter, correct?

Dr. FORD. Correct.

Chairman GRASSLEY. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Thank you, Dr. Blasey Ford. A lot of people are proud of you today.

From a prosecutor's view, one of the hardest things that we have to do is to speak to somebody who has come forward with an allegation of sexual assault and let them know that we cannot provide the evidence to go forward to trial. It is a hard day for the prosecutor to do that. And so, both because making a sincere and thorough investigative effort is such an important consolation to the victim in that circumstance, and because it is what you are obliged to do professionally. Sincere and thorough investigation is critical to these claims in a prosecutor's world. It may be the most basic thing that we owe a victim or a witness coming forward, is to make sure that we give them a full, thorough, and sincere investigation.

You have met all of the standards of what I might call "preliminary credibility" with your initial statement. You have vivid, specific, and detailed recollections, something prosecutors look for. Your recollections are consistent with known facts. You made prior consistent statements, something else prosecutors and lawyers look for. You were willing to and did take a lie detector test. And you were willing to testify here—here you are—subject to professional cross-examination by a prosecutor.

So you have met any condition any prosecutor could expect to go forward, and yet there has been no sincere or thorough investigation of your claims.

You specifically asked for an FBI investigation, did you not?

Dr. FORD. Yes.

Senator WHITEHOUSE. And are you aware that when the FBI begins investigating, they might find corroborative evidence and they might find exculpatory evidence?

Dr. FORD. I don't know what exculpatory evidence is.

Senator WHITEHOUSE. Not helpful to your recollection and version of events, helpful to the accused.

Dr. FORD. Understood, yes.

Senator WHITEHOUSE. So it could go either way?

Dr. FORD. Yes.

Senator WHITEHOUSE. And you were still not just willing but insistent that the FBI should investigate your recollection and your claim?

Dr. FORD. Yes, I feel like it would—I could be more helpful if that was the case in providing some of the details that maybe people are wanting to know about.

Senator WHITEHOUSE. And as we know, they did not. And I submit that never, never in the history of background investigations, has an investigation not been pursued when new, credible derogatory information was brought forward about the nominee or the candidate. I do not think this has ever happened in the history of FBI background investigations. Maybe somebody can prove me wrong, but it is wildly unusual and out of character. And in my view, it is a grave disservice to you, and I want to take this moment to apologize to you for that and to report to anybody who might be listening that, when somebody is willing to come forward, even under those circumstances, even having been not given the modicum of courtesy and support of a proper investigation, you have shown yourself particularly proud in doing that. And the re-

sponsibility for the decision to have this be, I think, the only background investigation in history to be stopped as derogatory information came forward belongs with 13 men: the President, Director Wray of the FBI, and the 11 Members of the Majority of this Committee.

As to the Committee's investigation, the fact that Mr. Kavanaugh's alleged accomplice has not been subpoenaed, has not been examined and cross-examined under oath, has not been interviewed by the FBI, tells you all you need to know about how credible this performance is.

The very bare minimum that a person who comes from is owed is sincere and thorough investigation—and you have been denied that. And I will make a personal pledge to you here that, however long it takes, in whatever forum I can do it, whenever it is possible, I will do whatever is in my power to make sure that your claims get a full and proper investigation and not just this.

Thank you for being here.

Dr. FORD. Thank you.

Chairman GRASSLEY. Since this issue has come up so many times, I would like to comment. The New Yorker published an anonymous account of allegations September the 14th. Two days later Dr. Ford identified herself as the victim in The Post article detailing her allegations. I immediately directed my staff to investigate. September the 17th, Dr. Ford's counsel went on several television shows requesting that her client have an opportunity to tell her story. The same day I scheduled a hearing for Monday, September the 24th, giving Dr. Ford a week to prepare her testimony and come to Washington, DC.

On September the 17th, Committee investigative staff reached out to Dr. Ford and Judge Kavanaugh to schedule follow-up interviews with Republican and Democrat investigators. Judge Kavanaugh accepted the opportunity to speak to the investigators under criminal penalty. Dr. Ford declined. In his interview on September the 17th, Judge Kavanaugh denied the allegations and requested a hearing as soon as possible. Democratic staff refused to participate in that interview.

The next day, September the 18th, Committee investigative staff contacted Mark Judge requesting an interview. Committee staff also learned the identity of two other alleged party-goers and requested interviews. Mark Judge submitted a statement under penalty of felony, denying knowledge of the party described by Dr. Ford, and states that he never saw Brett in the manner described by Dr. Ford. And I can go on and on about that, but we have got to realize that what we have done in this case, all the time you go through a background investigation by the FBI, then it comes to us, and there are always some holes in it that we have to follow up on. And, besides—

Senator KLOBUCHAR. Mr. Chairman?

Chairman GRASSLEY [continuing]. We are responding to Dr. Ford's request to tell her story. That is why we are here.

Senator KLOBUCHAR. Mr. Chairman? Mr. Chairman?

Chairman GRASSLEY. Ms. Mitchell, go for Senator—

Senator KLOBUCHAR. Mr. Chairman, I just want to point out that, to support what Senator Whitehouse said, in the Anita Hill case—

Senator CORNYN. Could we hear from Dr. Ford?

Senator KLOBUCHAR [continuing]. George Bush ordered that the investigation be opened again.

Chairman GRASSLEY. Ms. Mitchell, will you proceed for Senator Lee.

[For Senator Lee.]

Ms. MITCHELL. Thank you, Mr. Chairman.

Dr. Ford, The Washington Post reported in their September 16th article that you did show them therapist notes. Is that incorrect?

Dr. FORD. I don't remember physically showing her a note.

Ms. MITCHELL. Okay.

Dr. FORD. Perhaps my counsel did. I don't remember physically showing her my copy of the note.

Ms. MITCHELL. Okay.

Dr. FORD. But I just don't remember. I'm sorry. I have retrieved a physical copy of those medical records.

Ms. MITCHELL. Okay. Thank you.

You also attended individual therapy. Did you show any of those notes to the reporter from The Washington Post?

Dr. FORD. Again, I don't remember if I showed her like something that I summarized or if I just spoke about it or if she saw it in my counsel's office. I can't—I don't know for sure. But I certainly spoke with her about the 2013 record with the individual therapist.

Ms. MITCHELL. And Brett Kavanaugh's name is not in those notes. Is that correct?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. In reading The Washington Post article, it mentions that this incident that we're here about contributed to anxiety and PTSD problems with which you have struggled. The word "contributed," does that mean that there are other things that have happened that have also contributed to anxiety and PTSD?

Dr. FORD. I think that's a great question. I think the etiology of anxiety and PTSD is multifactorial, so that was certainly a critical risk that—we would call it a "risk factor" in science, so that would be a predictor of the symptoms that I now have. It doesn't mean that other things that have happened in my life would have—would make it worse or better if there are other risk factors as well.

Ms. MITCHELL. So have there been other things then that have contributed to the anxiety and PTSD that you suffered?

Dr. FORD. Well, I think there's sort of biological predispositions that everyone in here has for particular disorders, so I can't rule out that I would have some biological predisposition to be an anxious-type person.

Ms. MITCHELL. What about environmental?

Dr. FORD. Environmentally, not that I can think of.

Ms. MITCHELL. Okay.

Dr. FORD. Certainly nothing as striking as that event.

Ms. MITCHELL. Okay. In your interview with The Washington Post, you said that you told your husband early in your marriage

that you had been a victim of, and I quote, “physical abuse.” In your statement you said that before you were married, you told him that you had experienced “a sexual assault.” Do these two things refer to the same incident?

Dr. FORD. Yes.

Ms. MITCHELL. And at either point on these two times, did you use any names?

Dr. FORD. No.

Ms. MITCHELL. Okay. May I ask, Dr. Ford, how did you get to Washington?

Dr. FORD. In an airplane.

Ms. MITCHELL. Okay. I ask that because it’s been reported by the press that you would not submit to an interview with the Committee because of your fear of flying. Is that true?

Dr. FORD. Well, I was willing—I was hoping that they would come to me, but then realized that was an unrealistic request.

Ms. MITCHELL. It would have been a quicker trip for me.

[Laughter.]

Dr. FORD. Yes. So that was certainly what I was hoping, was to avoid having to get on an airplane. But I eventually was able to get up the gumption with the help of some friends and get on the plane.

Ms. MITCHELL. When you were here in the Mid-Atlantic area back in August—end of July, August, how did you get here?

Dr. FORD. Also by airplane. I come here once a year during the summer to visit my family.

Ms. MITCHELL. Okay.

Dr. FORD. I’m sorry. Not here. I go to Delaware.

Ms. MITCHELL. Okay. In fact, you fly fairly frequently for your hobbies and you’ve had to fly for your work. Is that true?

Dr. FORD. Correct, unfortunately.

Ms. MITCHELL. You were a consulting biostatistician in Sidney, Australia. Is that right?

Dr. FORD. I’ve never been to Australia, but the company that I worked for is based in Australia, and they have an office in San Francisco, California.

Ms. MITCHELL. Okay.

Dr. FORD. I don’t think I’ll make it to Australia.

Ms. MITCHELL. It is long. I also saw in your C.V. that you list the following interests of surf travel and you, in parentheses, put Hawaii, Costa Rica, South Pacific Islands, and French Polynesia. Have you been all to those places?

Dr. FORD. Correct.

Ms. MITCHELL. By airplane?

Dr. FORD. Yes.

Ms. MITCHELL. And your interests also include oceanography, Hawaiian and Tahitian culture. Did you travel by air as a part of those interests?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. Thank you very much.

Dr. FORD. Easier for me to travel going that direction when it is a vacation.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you, Mr. Chairman. Thank you for being here, Dr. Ford.

You know, in my old job as a prosecutor, we investigated reports like this, so it gave me a window on the types of cases that hurt women and hurt all of us. And I would always tell the women that came before us that they were going to have to tell their story before a jury box of strangers. And you have had to tell your story before the entire Nation.

For so many years, people swept cases like yours under the rug. They would say what happens inside a house did not belong in the courthouse. Well, the times have changed, so I just want to thank you for coming forward today and for sharing your report with us.

Now, I understand that you have taken a polygraph test, Dr. Ford, that found that you were being truthful when you described what happened to you. Can you tell us why you decided to take that test?

Dr. FORD. I was meeting with attorneys, I was interviewing various attorneys, and the attorneys asked if I was willing to take it, and I said absolutely. That said, it was almost as anxiety-provoking as an airplane flight.

Senator KLOBUCHAR. Okay. And you have talked about your recollections and seeing Mark Judge at that Safeway. If there had been an appropriate reopening of this background check and FBI interviews, would that have helped you find the time period if you knew when he worked at that Safeway?

Dr. FORD. I feel like I could be much more helpful if I could be provided with that date through employment records or the IRS or something, anything that would help.

Senator KLOBUCHAR. Thank you. I would assume that is true.

Dr. Ford, under Federal law—and I do not expect you to know this, but statements made to medical professionals are considered to be more reliable. There is a Federal Rule of Evidence about this. You told your counselor about this back in 2012. Is that right?

Dr. FORD. My therapist?

Senator KLOBUCHAR. Yes.

Dr. FORD. My individual therapist, correct.

Senator KLOBUCHAR. Right. And I understand that your husband was also present when you spoke about this incident in front of a counselor, and he recalls you using Judge Kavanaugh's name. Is that right?

Dr. FORD. Yes. I just have to slow down a minute because I might have been confusing. So there were two separate incidents where it's reflected in my medical record. I had talked about it more than those two times. But therapists don't typically write down content as much as they write down process. They usually are tracking your symptoms and not your story and the facts. I just happened to have it in my record twice. So the first time is in 2012 with my husband in couples therapy with the quibbling over the remodel, and then in 2013 with my individual therapist.

Senator KLOBUCHAR. Okay. So if someone had actually done an investigation, your husband would have been able to say that you named his name at that time?

Dr. FORD. Correct.

Senator KLOBUCHAR. Okay. I know you have been concerned—

Dr. FORD. 2012.

Senator KLOBUCHAR [continuing]. With your privacy throughout the process, and you first requested that your account be kept confidential. Can you briefly tell us why?

Dr. FORD. Yes. So as I stated before, once I was unsuccessful in getting my information to you before the candidate was chosen, my original intent was to get the information when there was still a list of other candidates available. And once that was not successful and I saw that persons were very supportive of the nominee, I tracked it—

Senator KLOBUCHAR. Okay.

Dr. FORD [continuing]. All summer and realized that when I was calculating that risk/benefit ratio, that it looked like I was going to just, you know, suffer only for no reason.

Senator KLOBUCHAR. Okay. You know, from my experience with memory, I remember distinctly things that happened to me in high school or happened to me in college, but I do not exactly remember the date. I do not exactly remember the time. I sometimes may not even remember the exact place where it occurred, but I remember the interaction. And many people are focused today on what you are not able to remember about that night. I actually think you remember a lot. I am going to phrase it a little differently. Can you tell us what you do not forget about that night?

Dr. FORD. The stairwell; the living room; the bedroom, the bed on the right side of the room—as you walk into the room, there was a bed to the right; the bathroom in close proximity; the laughter, the uproarious laughter; and the multiple attempts to escape, and the final ability to do so.

Senator KLOBUCHAR. Thank you very much, Dr. Ford.

Chairman GRASSLEY. Dr. Ford, I want to correct the record, but it is not something that I am saying that you stated wrongly, because you may not know the fact that when you said that you did not think it was possible for us to go to California as a Committee or our investigators to go to California to talk to you, we did, in fact, offer that to you, and we had the capability of doing it, and we would have done it anywhere or anytime.

Dr. FORD. Thank you.

Senator KLOBUCHAR. And, Mr. Chairman, could I put the polygraph results on the record, please? The polygraph results in the record. Is there any objection?

Chairman GRASSLEY. Well, let us see the chart.

Senator KLOBUCHAR. The polygraph? You want to all see it?

Chairman GRASSLEY. Would you hold just a minute, please?

Senator KLOBUCHAR. I think you may have it.

Chairman GRASSLEY. Can we have the underlying charts, too?

Senator KLOBUCHAR. The underlying charts? I have the polygraph results that I would just like to put in the record. I will deal with the charts after that. Could I put the polygraph test in the record?

Mr. BROMWICH. Mr. Chairman, we were—

Chairman GRASSLEY. Go ahead.

Mr. BROMWICH. We had proposed having the polygraph examiner testify, as you know. If that had happened, the full panoply of materials that he had supporting his examination would have been

provided. You rejected that request, so what we did provide was the polygraph report, which is what Members of the Committee currently have.

Senator KLOBUCHAR. And on September 26th, Mr. Chairman, this was actually sent to your Chief Counsel, and I just want to share it with America so that they have this report as well.

Chairman GRASSLEY. Okay. We will accept, without objection, what you have asked us to include, but we are also requesting and expect the other materials that I have just stated.

[The polygraph report appears as a submission for the record.]

Senator KLOBUCHAR. But, Mr. Chairman, you would not allow the underlying witness who performed the polygraph test to testify, nor would you allow Mark Judge to testify. And so I would just like to point out—thank you for allowing this report in the record, but that is the reason that we do not have the underlying information for you.

Chairman GRASSLEY. You got what you wanted. I think you would be satisfied.

Senator KLOBUCHAR. I am satisfied with that. Thank you.

Senator GRAHAM. Mr. Chairman?

Chairman GRASSLEY. Senator, go ahead.

Senator GRAHAM. When was the polygraph administered?

Senator KLOBUCHAR. It was administered on August 7, 2018—

Senator GRAHAM. When was it—

Senator KLOBUCHAR [continuing]. And it was—the date of the report is August 10, 2018.

Senator GRAHAM. When was it provided to the Committee?

Chairman GRASSLEY. Let us just see if we cannot do this in a more orderly way.

Senator KLOBUCHAR. Well, he was asking, and I have it right here, and you have it as well. It was—

Chairman GRASSLEY. We have accepted—

Senator KLOBUCHAR [continuing]. September 26th.

Chairman GRASSLEY. We have accepted it.

Senator KLOBUCHAR. All right.

Chairman GRASSLEY. Ms. Mitchell for Senator Cruz.

[For Senator Cruz.]

Ms. MITCHELL. Thank you.

Dr. Ford, we have talked about the day and the night that you have described in the summer of 1982, and thank you for being willing to do that. I know it is difficult. I would like to shift gears and discuss the last several months.

Dr. FORD. Okay.

Ms. MITCHELL. In your statement you said that on July 6th, you had a “sense of urgency” to relay the information to the Senate and the President. Did you contact either the Senate or the President on or before July 6th?

Dr. FORD. No, I did not. I did not know how to do that.

Ms. MITCHELL. Okay. Prior to July 6th, had you spoken to any Member of Congress—and when I say Congress, I mean the Senate or the House of Representatives—or any congressional staff members about your allegations?

Dr. FORD. No.

Ms. MITCHELL. Why did you contact The Washington Post then on July 6th?

Dr. FORD. So I was panicking because I knew the timeline was short for the decision, and people were giving me advice on the beach, people who don't know about the processes but they were giving me advice, and many people told me, "You need to hire a lawyer." And I didn't do that. I didn't understand why I would need a lawyer. As somebody said, "Call The New York Times." "Call The Washington Post." "Put in an anonymous tip." "Go to your Congressperson." And when I weighed those options, I felt like the best option was to try to do the civic route, which is to go to my Congressperson, who happens to be Anna Eshoo. So I called her office, and I also put in the anonymous tip to The Washington Post. And neither—unfortunately, neither got back to me before the selection of the nominee.

Ms. MITCHELL. You testified that Congresswoman Eshoo's office contacted you on July 9th. Is that right?

Dr. FORD. They contacted me the date that the nominee was announced, so that seems likely.

Ms. MITCHELL. Had you talked about your allegations with anyone in her office before the date of July 9th?

Dr. FORD. I told the receptionist on the phone.

Ms. MITCHELL. Okay. On July 10th, you texted The Washington Post again—which was really the third time. Is that right? Second date, third time.

Dr. FORD. Let's see. Correct.

Ms. MITCHELL. And you texted, "Been advised to contact Senators or New York Times. Haven't heard back from Washington Post." Who advised you to contact Senators or The New York Times?

Dr. FORD. Beach friends, coming up with ideas of how I could try to get to people, because people weren't responding to me very quickly. So very quickly, they responded to that text for what unknown reason, that once I sent that encrypted text, they responded very quickly.

Ms. MITCHELL. Did you contact The New York Times?

Dr. FORD. No.

Ms. MITCHELL. Why not?

Dr. FORD. I wasn't interested in pursuing the media route particularly, so I felt like one was enough, The Washington Post, and I was nervous about doing that. My preference was to talk with my Congressperson.

Ms. MITCHELL. Okay. The Washington Post texted back that someone would get in touch—get you in touch with a reporter. Did you subsequently talk to a reporter with The Washington Post?

Dr. FORD. Yes, under the encrypted app and off the record.

Ms. MITCHELL. Okay. Who was that reporter?

Dr. FORD. Emma Brown.

Ms. MITCHELL. Okay. The person who ultimately wrote the story on September 16th?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. Did you talk to any Member of Congress—and, again, remember, Congress includes the Senate or the House of Representatives—or any congressional staff members about your

allegations between July 10th and July 30th, which was the date of your letter to Senator Feinstein?

Dr. FORD. Yes. I met with Congresswoman Eshoo's staff, and I think that's July 18th, the Wednesday, and then on the Friday I met with the Congresswoman herself.

Ms. MITCHELL. Okay. When you met with her, did you meet with her alone or did someone come with you?

Dr. FORD. I was alone. She had a staff person.

Ms. MITCHELL. Okay. What did you talk about with Congresswoman Eshoo and her staff on July 18th and the 20th?

Dr. FORD. I described the night of the incident, and we spent time speaking about that. And I asked her how to—what my options were in terms of going forward and how to get that information relayed forward, and also talked to her about fears of whether this was confidential information, and she discussed the constituent confidentiality principle.

Ms. MITCHELL. Thank you.

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Chairman Grassley.

I would like to ask unanimous consent to submit for the record five articles, including one titled, "Why Sexual Assault Memories Stick," and one entitled, "Why didn't Kavanaugh accuser come forward earlier? Police often ignore sexual assault allegations."

Chairman GRASSLEY. Without objection, so ordered.

[The information appears as submissions for the record.]

Senator COONS. Dr. Ford, I want to begin by thanking you for coming to testify in front of us today. You came forward with very serious and relevant information about a nominee for a lifetime position on our Supreme Court. You did not have to, and I know you have done it at great personal cost. This is a public service, and I want you to know that I am grateful to have the opportunity to hear from you directly today.

I would like to just first follow up on that line of questioning Ms. Mitchell was following, because I think a lot of people do not realize that you chose to come forward with your concerns about Judge Kavanaugh before he was nominated to the Supreme Court.

Do I understand correctly that when you first reached out to Congresswoman Eshoo and to The Washington Post tipline, that was when he was on the short list but before he was nominated to the Supreme Court. Is that correct?

Dr. FORD. Correct.

Senator COONS. And if I understood your testimony earlier, it is that you were motivated by a sense of civic duty and, frankly, a hope that some other highly qualified nominee might be picked, not out of a motivation at a late stage to have an impact on the final decision?

Dr. FORD. Correct. I felt it was very important to get the information to you, but I did not know how to do it while there was still a short list of candidates.

Senator COONS. Thank you, Doctor.

According to Justice Department data, about two-thirds of sexual assault survivors do not report their assaults. Based on your experience, I would be interested in hearing from you about this because you bore this alone. You bore this alone for a very long time,

and it would be helpful for us to better understand the ways that that has impacted your whole life.

Dr. FORD. Well, it's impacted me at different stages of the development of my life, so the immediate impact was probably the worst, so the first 4 years—I think I described earlier a fairly disastrous first 2 years of undergraduate studies at University of North Carolina where I was finally able to pull myself together. And then once coping with the immediate impacts, the short-term impacts, I experienced like longer-term impacts of anxiety and relationship challenges.

Senator COONS. Thank you for sharing that. And yet you went on to get a Ph.D. from USC. Is that correct?

Dr. FORD. Correct.

Senator COONS. As you predicted, there was a wide range of responses to your coming forward. Some thousands of survivors have been motivated and inspired by your courage. Others have been critical, and as I have reviewed the wide range of reactions, I have been really troubled by the excuse offered by too many that this was a high school incident and boys will be boys. To me that is just far too low a standard for the conduct of boys and men in our country.

If you would, I would appreciate your reaction to the excuse that boys will be boys.

Dr. FORD. I can only speak for how it has impacted me greatly for the last 36 years even though I was 15 years old at the time, and I think the younger you are when these things happen, it can possibly have worse impact than when you are a full—than when your brain is fully developed and you have better coping skills that you have developed.

Senator COONS. You know, experts have written about how it is common for sexual assault survivors to remember some facts about the experience very sharply and very clearly but not others, and that has to do with the survival mode that we go into in experiencing trauma. Is that your experience and is that something you can help the lay person understand?

Dr. FORD. Yes, I was definitely experiencing the fight or flight mode. Is that what you're referring to? Yes, so I was definitely experienced the surge of adrenaline and cortisol and norepinephrine and credit that a little bit for my ability to get out of the situation, but also some other lucky events that occurred that allowed me to get out of the event.

Senator COONS. Dr. Ford, we are grateful that you came through it and that you shared your account with us and the American people, and I think you have provided important information, and I would like to thank you for meeting your civic duty. I wish we could have provided for you a more thorough hearing today. I think asking for the FBI to investigate this matter thoroughly was not asking too much. I think asking to have the other individual involved in your assault, Mark Judge, appear before us today was not asking too much.

I am grateful you came forward, and I am thankful for your courage, which set an important example. Thank you, Dr. Ford.

Chairman GRASSLEY. Ms. Mitchell for Senator Sasse.

[For Senator Sasse.]

Ms. MITCHELL. Dr. Ford, we were talking about you meeting in July with Congresswoman Eshoo. Did you talk about your allegations with any Republican Member of Congress or congressional staff?

Dr. FORD. I did not. Where I live, the Congressman is a Democrat.

Ms. MITCHELL. Okay. Was it communicated to you by your counsel or someone else that the Committee had asked to interview you and that they offered to come out to California to do so?

Mr. BROMWICH. We are going to object, Mr. Chairman, to any call for privileged conversations between counsel and Dr. Ford. It was a privileged conversation we had.

Senator GRAHAM. Could you validate the fact that the offer was made without her saying a word?

Senator LEAHY. Wait a minute.

Chairman GRASSLEY. Is it possible for that question to be answered without violating any counsel relationships?

Dr. FORD. Can I say something to you—do you mind if I say something to you directly?

Chairman GRASSLEY. Yes.

Dr. FORD. I just appreciate that you did offer that. I wasn't clear on what the offer was. If you were going to come out to see me, I would have happily hosted you and had you—been happy to speak with you out there. I just did not—it wasn't clear to me that that was the case.

Chairman GRASSLEY. Okay. Does that take care of your question?

Ms. MITCHELL. Yes. Thank you, Mr. Chairman.

Chairman GRASSLEY. Proceed then.

Ms. MITCHELL. Before July 30th, the date on your letter to Senator Feinstein, had you retained counsel with regard to these allegations?

Dr. FORD. No. I didn't think—I didn't understand why I would need lawyers, actually. I just didn't know.

Ms. MITCHELL. A lot of people have that feeling.

Let's talk about the letter that you wrote on July 30th. You asked Senator Feinstein to maintain confidentiality, quote, "until"—

Mr. BROMWICH. Wait until she retrieves it.

Ms. MITCHELL. Oh, I'm sorry.

Dr. FORD. I'm just trying to look for it.

Chairman GRASSLEY. Stop the clock, will you?

Dr. FORD. Oh, I found it. Sorry.

Ms. MITCHELL. Okay. You asked Senator Feinstein to maintain confidentiality, "until we have had further opportunity to speak," and then said you were available to speak further, vacationing in the Mid-Atlantic until August 7th. Is that correct?

Dr. FORD. The last line, is that what you're—I'm now just catching up with you. Sorry. I'm a little slower. My mind is getting a little tired. "I am available to speak further should you wish to discuss"—yes, I was in Delaware until August 7th.

Ms. MITCHELL. Okay.

Dr. FORD. And after that I went to New Hampshire and then back to California.

Ms. MITCHELL. Did you talk with anybody about this letter before you sent it?

Dr. FORD. I talked with Anna Eshoo's office.

Ms. MITCHELL. Okay. And why did you talk to Congresswoman Eshoo's office about that letter?

Dr. FORD. Because they were willing to hand-deliver it to Senator Feinstein.

Ms. MITCHELL. Okay. Did anyone help you write the letter?

Dr. FORD. No.

Ms. MITCHELL. Okay. After you sent your letter, did you, or anyone on your behalf, speak to Senator Feinstein personally or with any Senate staffer?

Dr. FORD. Yes. I had a phone call with Senator Feinstein.

Ms. MITCHELL. Okay. And when was that?

Dr. FORD. That was while I was still in Delaware, so before August 7th.

Ms. MITCHELL. Okay. And how many times did you speak with Senator Feinstein?

Dr. FORD. Once.

Ms. MITCHELL. Okay. What did you talk about?

Dr. FORD. She asked me some questions about the incident, and I answered those questions.

Ms. MITCHELL. Okay. Was that the extent of the gist of the conversation?

Dr. FORD. Yes. It was a fairly brief phone call.

Ms. MITCHELL. Okay. Did you ever give Senator Feinstein or anyone else the permission to release that letter?

Dr. FORD. Not that I know of, no.

Ms. MITCHELL. Okay. Between the letter date, July 30th, and August the 7th, did you speak with any other person about your allegations?

Dr. FORD. Could you say the dates again?

Ms. MITCHELL. Between the letter date of July 30th and August 7th, so while you were still in Delaware, did you speak with any other person about your allegations?

Dr. FORD. I'm just trying to remember what dates that ...

Chairman GRASSLEY. Stop the—

Mr. BROMWICH. You're asking her, with the exclusion of any lawyers that she may have—

Chairman GRASSLEY. Stop the clock.

Mr. BROMWICH. Spoken with. Correct?

Ms. MITCHELL. Correct.

Dr. FORD. Correct. I think correct then. I was interviewing lawyers, but I was not—

Chairman GRASSLEY. Start the clock.

Ms. MITCHELL. Okay.

Dr. FORD [continuing]. Speaking personally about it.

Ms. MITCHELL. Aside from lawyers that you were seeking to possibly hire to represent you, did you speak to anybody else about it during that period of time?

Dr. FORD. No.

Ms. MITCHELL. Okay.

Dr. FORD. I was staying with my parents at the time.

Ms. MITCHELL. Did you talk to them about it?

Dr. FORD. Definitely not.

Ms. MITCHELL. Okay. So would it be fair to say that you retained counsel during that time period of July 30th to August 7th?

Dr. FORD. I can't remember the exact date, but it was—I was interviewing lawyers during that period of time sitting in the car in the driveway and in the Walgreens parking lot in Rehoboth, Delaware, and trying to figure out how the whole system works of interviewing lawyers and how to pick one, et cetera.

Ms. MITCHELL. You testified earlier that you had—you didn't see the need for lawyers, and now you're trying to hire them. What made you change your mind?

Dr. FORD. It seemed like most of the individuals that I had told, which didn't—the total number, the total was not very high, but those persons advised me to at this point get a lawyer for advice about whether to push forward or to stay back.

Ms. MITCHELL. Did that include Congresswoman Eshoo and Senator Feinstein?

Dr. FORD. No.

Ms. MITCHELL. Okay.

Chairman GRASSLEY. I want to thank Dr. Ford for what you said about acknowledging that we had said we would come to California.

Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman.

I want to join in thanking you for being here today and just tell you I have found your testimony powerful and credible, and I believe you. You are a teacher, correct?

Dr. FORD. Correct.

Senator BLUMENTHAL. Well, you have given America an amazing teaching moment, and you may have other moments in the classroom, but you have inspired and you have enlightened America. You have inspired and given courage to women to come forward, as they have done to every one of our offices and many other public places. You have inspired and you have enlightened men in America to listen respectfully to women survivors, and men, who have survived sexual attack. And that is a profound public service, regardless of what happens with this nomination. And so the teachers of America, people of America, should be really proud of what you have done.

Let me tell you why I believe you, not only because of the prior consistent statements and the polygraph test and your request for an FBI investigation and your urging that this Committee hear from other witnesses who could corroborate, or dispute, your story; but also you have been very honest about what you cannot remember. And someone composing a story can make it all come together in a seamless way, but someone who is honest—I speak from my experience as a prosecutor as well—is also candid about what she or he cannot remember.

The Senators on the other side of the aisle have been silent. This procedure is unprecedented in a confirmation hearing. But I want to quote one of my colleagues, Senator Lindsey Graham, in a book that he wrote in 2015 when he was describing his own service and very distinguished and able service as a trial lawyer—

Senator GRAHAM. Air Force.

Senator BLUMENTHAL. I am not under oath.

[Laughter.]

Senator BLUMENTHAL. He said, of his prosecutions of rape cases, “I learned how much unexpected courage from a deep and hidden place it takes for a rape victim or sexually abused child to testify against their assailant.”

“I learned how much . . . courage from a deep and hidden place it takes for a rape victim or sexually abused child to testify against their assailant.”

If we agree on nothing else today, I hope on a bipartisan basis we can agree on how much courage it has taken for you to come forward. And I think you have earned America’s gratitude.

Now, there has been some talk about your requesting an FBI investigation, and you mentioned a point just a few minutes ago that you could better estimate the time that you ran into Mark Judge if you knew the time that he was working at that supermarket. That is a fact that could be uncovered by an FBI investigation that would help further elucidate your account. Would you like Mark Judge to be interviewed in connection with the background investigation and the serious credible allegations that you have made?

Dr. FORD. That would be my preference. I’m not sure it’s really up to me, but I certainly would feel like I could be more helpful to everyone if I knew the date that he worked at the Safeway so that I could give a better—a more specific date of the assault.

Senator BLUMENTHAL. Well, it is not up to you. It is up to the President of the United States, and his failure to ask for an FBI investigation, in my view, is tantamount to a cover-up.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Now it is time for Senator Flake. Ms. Mitchell for Senator Flake.

[For Senator Flake.]

Ms. MITCHELL. Thank you.

We’ve heard this morning several times that you did take a polygraph, and that was on August the 7th. Is that right?

Dr. FORD. I believe so. It was the day I was flying from BWI to Manchester, New Hampshire.

Ms. MITCHELL. Okay. Why did you decide to take a polygraph?

Dr. FORD. I didn’t see any reason not to do it.

Ms. MITCHELL. Were you advised to do that?

Mr. BROMWICH. Again, you are seeming to call for communications between counsel and client. I do not think you mean to do that. If you do, she should not have to answer that.

Chairman GRASSLEY. Counsel, could you let her answer the extent to which it does not violate the relationship between you and Dr. Ford?

[Counsel confers with the witness.]

Dr. FORD. Based on the advice of the counsel, I was happy to undergo the polygraph test, although I found it extremely stressful, much longer than I anticipated. I told my whole life story, I felt like, but I endured it. It was fine.

Ms. MITCHELL. I understand they can be that way.

Have you ever taken any other polygraphs in your life?

Dr. FORD. Never.

Ms. MITCHELL. Okay. You went to see a gentleman by the name of Jeremiah Hannifin to serve as the polygrapher. Did anyone advise you on that choice?

Dr. FORD. Yes. I believe his name was Jerry.

Ms. MITCHELL. Jerry Hannifin.

Dr. FORD. Yes.

Ms. MITCHELL. Okay. Did anyone advise you on that choice?

Dr. FORD. I didn't choose him myself. He was the person that came to do the polygraph test.

Ms. MITCHELL. Okay. He actually conducted the polygraph not in his office in Virginia but actually at the hotel next to Baltimore-Washington Airport. Is that right?

Dr. FORD. Correct.

Ms. MITCHELL. Why was that location chosen for the polygraph?

Dr. FORD. I had left my grandmother's funeral at Fort Lincoln Cemetery that day and was on a tight schedule to get a plane to Manchester, New Hampshire, so he was willing to come to me, which was appreciated.

Ms. MITCHELL. So he administered a polygraph on the day that you attended your grandmother's funeral?

Dr. FORD. Correct. Or it might have been the next day. I spent the night in a hotel. I don't remember the exact day.

Ms. MITCHELL. Have you ever had discussions with anyone besides your attorneys on how to take a polygraph?

Dr. FORD. Never.

Ms. MITCHELL. And I don't just mean counter-measures, but I mean just any sort of tips or anything like that.

Dr. FORD. No. I was scared of the test itself, but was comfortable that I could tell the information and the test would reveal whatever it was going to reveal. I didn't expect it to be as long as it was going to be, so it was a little bit stressful.

Ms. MITCHELL. Have you ever given tips or advice to somebody who was looking to take a polygraph test?

Dr. FORD. Never.

Ms. MITCHELL. Did you pay for the polygraph yourself?

Dr. FORD. I don't—I don't think so.

Ms. MITCHELL. Okay. Do you know who did pay for the polygraph?

Dr. FORD. Not yet, no.

Ms. MITCHELL. You have the handwritten statement that you wrote out. Did anyone assist you in writing that statement?

Dr. FORD. No, but you can tell how anxious I was by the terrible handwriting.

Ms. MITCHELL. Did you—we touched on it earlier. Did you know that the Committee has requested not only the charts from the polygraph test but also any audio or video recording of the polygraph test?

Dr. FORD. No.

Ms. MITCHELL. Were you audio and video recorded when you were taking that test?

Dr. FORD. Okay, so I remember being hooked up to a machine, like, being placed onto my body and being asked a lot of questions and crying a lot. That's my primary memory of that test. I don't know—I know he took laborious detail into explaining what he was

going to be doing, but I was just focused on kind of what I was going to say and my fear about that. I wasn't listening to every detail about whether it was audio or video recorded.

Ms. MITCHELL. Well, you were in a hotel room, right?

Dr. FORD. Correct.

Ms. MITCHELL. Regular hotel room with a bed and bathroom?

Dr. FORD. No, no, no. It was a conference room, so I was sitting in a chair and he was behind me.

Ms. MITCHELL. Did you note any cameras in the room?

Dr. FORD. Well, he had a computer set up, so I guess I assumed that he was somehow taping and recording me.

Ms. MITCHELL. Okay. So you assumed you were being video and audio recorded?

Dr. FORD. Correct.

Ms. MITCHELL. But you don't know for sure?

Dr. FORD. I don't know for sure.

Ms. MITCHELL. Okay. Thank you.

Chairman GRASSLEY. We're going to recess now for a half-hour for lunch. Thank you, Dr. Ford.

[Whereupon, at 12:42 p.m., the Committee was recessed.]

[Whereupon, at 1:12 p.m., the Committee reconvened.]

Chairman GRASSLEY. Dr. Ford, you tell me when you're ready.

Dr. FORD. I'm just organizing my papers. I'll be ready in 20 seconds.

Chairman GRASSLEY. Take as long as you need.

Dr. FORD. Thank you.

[Brief pause.]

Dr. FORD. I'm ready.

Chairman GRASSLEY. Okay. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. Mr. Chairman, is it your intent to cede all Republican Senators' time to your prosecutor rather than they themselves ceding their time to her?

Chairman GRASSLEY. Yes.

Senator HIRONO. We all know that the prosecutor, even though this clearly is not a criminal proceeding, is asking Dr. Ford all kinds of questions about what happened before and after, but basically not during the attack. The prosecutor should know that sexual assault survivors often do not remember peripheral information, such as what happened before or after the traumatic event. And yet she will persist in asking these questions, all to undermine the memory and basically the credibility of Dr. Ford. But we all know Dr. Ford's memory of the assault is very clear.

Dr. Ford, the Republican's prosecutor has asked you all kinds of questions about who you called and when, asking details that would be asked in a cross-examination of a witness in a criminal trial, but this is not a criminal proceeding. This is a confirmation proceeding. I think I know what she's trying to get at, so I'll just ask you very plainly. Dr. Ford, is there a political motivation for your coming forward with your account of the assault by Brett Kavanaugh?

Dr. FORD. No, and I'd like to reiterate that, again, I was trying to get the information to you while there was still a list of other—thank you—what looked like equally qualified candidates.

Senator HIRONO. And yet they're not here to testify. Dr. Ford, I'd like to join my colleagues who have thanked you for coming forward today, and I—and we all admire you for what you're doing. And I understand why you have come forward. You wanted us and the American people to know what you knew about the character, the character of the man we are considering for a lifetime appointment to the Supreme Court.

I want to take a moment also to note the significant personal sacrifices you've made to come forward to share your traumatic experience with us and the American people. You've had to move. You've had death threats. All manner of basically re-victimization experiences have come your way. But by coming forward, you have inserted the question of character into this nomination and hopefully back into American life, and rightly so. We should be made to face the question of who it is we are putting in positions of power and decisionmaking in this country.

We should look the question square in the face: Does character matter? Do our values, our real values about what is right and what is wrong and about whether we treat our fellow human beings with dignity and respect, do they matter anymore? I believe they do, and I believe the reaction we have seen to this coverage right now and your courage all over this country shows us that we're not alone, you're not alone, that women and men all across America are disgusted and sick and tired of the way basic human decency has been driven from our public life.

The President admits on tape to assaulting women. He separates children from their parents. He takes basic healthcare protections from those who need them most. He nominates and stands behind a man who stands credibly accused of a horrible act. I again, want to thank you for coming forward.

Mr. Chairman, I ask unanimous consent that six items, consisting of various statements, letters, fax sheet posts, are inserted into the record.

Chairman GRASSLEY. Is that one request, or do you want me to wait for six?

Senator HIRONO. Well, I have six separate items.

Chairman GRASSLEY. Okay.

Senator HIRONO. Because I can go over them for you.

Chairman GRASSLEY. Well, okay, no.

Senator HIRONO. I would like to—

Chairman GRASSLEY. Let me not interrupt you. Your request is requested without objection.

Senator HIRONO. Thank you.

[The information appears as submissions for the record.]

Senator HIRONO. And I would like to read from an item that has already been entered into the record, but this is from a letter from the National Task Force to End Sexual and Domestic Violence. The letter states, and I quote this letter: "This moment has become a crucible. It's a test of our progress. Do we start by believing victims of sexual assault and treating them with dignity or don't we? So far, Senate leaders are failing that test: pre-judging the outcome of a hearing, sympathizing with her perpetrator, attacking her credibility. They send a message to every victim of sexual violence that their pain doesn't matter, that they do not deserve justice, and that

for them fair treatment is out of reach. This will only serve to drive victims into the shadows and further embolden abusers.”

Once again, Dr. Ford, thank you very much. This is a moment for our country. Mahalo.

Chairman GRASSLEY. Ms. Mitchell for Senator Crapo.

[For Senator Crapo.]

Ms. MITCHELL. Good afternoon.

Dr. FORD. Hi.

Ms. MITCHELL. When we left off, we were still talking about the polygraph, and I believe you said it hasn't been paid for yet. Is that correct?

Ms. KATZ. Let me put an end to this mystery. Her lawyers have paid for her polygraph.

Mr. BROMWICH. As is routine.

Ms. KATZ. As is routine.

Ms. MITCHELL. Dr. Ford, do you expect the price of that polygraph to be passed on to you?

Dr. FORD. I'm not sure yet. I haven't taken a look at all of the costs involved in this. We've relocated now twice, so I haven't kept track of all of all that paperwork, but I'm sure I have a lot of work to do to catch up on all of that later.

Ms. MITCHELL. I get you have a lot going on and you've had that for several months. But is it your understanding that someone else is going to assist you with some of these fees, including the cost for your polygraph?

Dr. FORD. I'm aware that there's been several GoFundMe sites, but I haven't had a chance to figure out how to manage those because I've never had one.

Ms. MITCHELL. And I'm sorry, several what?

Dr. FORD. Go—

Mr. BROMWICH. GoFundMe.

Dr. FORD. GoFundMe sites that have raised money, primarily for our security detail. So, I'm not even quite sure how to collect that money or how to distribute it yet. I haven't been able to focus on that.

Ms. MITCHELL. Okay. In your testimony this morning, you stated that Senator Feinstein sent you a letter on August 31st of this year. Is that right?

Dr. FORD. Let me see.

Chairman GRASSLEY. Stop the clock.

Dr. FORD. I sent her a letter on July 30th, and I don't have the date. I'd have to pull up my email to find out the date of her email to me saying that—it was right before the hearings that she was going to maintain the confidentiality of the—of the letter.

Ms. MITCHELL. Say that again. It was until right before the hearing that what?

Dr. FORD. That's my memory, but I can look it up for you. If you would like the exact date, I could pull it up on my email.

Ms. MITCHELL. Oh, yes, I just—I want to make sure—

Mr. BROMWICH. Do you have the date, Counsel?

Ms. MITCHELL. I want to make sure I understood what she—you said.

Ms. KATZ. That document has been turned over to—in response to request for documents. You have it.

Ms. MITCHELL. Thank you, Counsel. I want to make sure I understood what you said. Was it your understanding it was going to be kept confidential up until right before the hearing?

Dr. FORD. It was my understanding that it was going to be kept confidential, period.

Ms. MITCHELL. Period? Okay. Between your polygraph on August the 7th and your receipt of the letter from Senator Feinstein, did you or anyone on your behalf speak to any Member of Congress or congressional staff about these allegations?

Dr. FORD. I personally did not.

Ms. MITCHELL. So, my question was did you or anybody on your behalf?

Dr. FORD. I don't—what do you mean? Did someone speak for me?

Ms. MITCHELL. Somebody that worked—is working with your or helping you. Did somebody at your behest, on your behalf speak to somebody in Congress or staff?

Dr. FORD. I'm not sure.

Ms. MITCHELL. Okay.

Dr. FORD. I'm not sure how those exchanges went, but I didn't speak to anyone.

Ms. MITCHELL. Okay. Is it possible that somebody did?

Dr. FORD. I think so. It would be possible. I'm guessing it would be possible, but I don't know.

Ms. KATZ. Excuse me. You've asked her not to guess, and now you're asking her what's possible. So, I think if you want to ask her what she knows, you should ask her what she knows.

Ms. MITCHELL. Is that an objection, Counsel?

Ms. KATZ. It is an objection.

Ms. MITCHELL. I'll have the Chair rule on that.

Dr. FORD. I don't know—I don't understand.

Chairman GRASSLEY. You should—you should answer the question unless there's a legal reason for not answering it on advice of your counsel.

Dr. FORD. So, I don't totally understand the question, but I didn't speak with anyone during that timeframe other than my counsel.

Ms. MITCHELL. Okay. You've said repeatedly that you did not think that that letter that you wrote on July 30th was going to be released to the public. Is that correct?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. And is it true that you did not authorize it to be released at any time?

Dr. FORD. Correct.

Ms. MITCHELL. Okay. Besides your attorneys, did you provide—you provided that letter to Senator Feinstein. Is that correct?

Dr. FORD. I provided her a letter on July 30th.

Ms. MITCHELL. We're talking about the July 30th letter.

Dr. FORD. Okay. Okay.

Ms. MITCHELL. Did you—and you provided that letter to Senator Feinstein, correct?

Dr. FORD. Mm-hmm.

Ms. MITCHELL. Is that a "yes"?

Dr. FORD. Yes.

Ms. MITCHELL. And you provided the letter to Representative Eshoo to deliver it to Senator Feinstein.

Dr. FORD. Yes.

Ms. MITCHELL. Besides those two individuals, Representative Eshoo, and Senator Feinstein, and your attorneys, did you provide that letter to anyone else?

Dr. FORD. No.

Ms. MITCHELL. Okay. Do you know how that letter became public?

Dr. FORD. No.

Ms. MITCHELL. Okay. After that letter was made public or leaked, did you reach back out to The Washington Post?

Dr. FORD. I reached out to the Washington—well, they were continuously reaching out to me, and I was not responding. But the time that I did respond and agreed to do the sit down was once the reporters started showing up at my home and at my workplace.

Ms. MITCHELL. Okay.

Chairman GRASSLEY. Senator Booker.

Senator BOOKER. Thank you, Mr. Chairman. Dr. Ford, thank you for being here. I just want to remind everyone that this is not a courtroom. This is not a legal proceeding. You are here under your volition. And though a prosecutor has been engaged here to represent my colleagues, you're here, as you said, out of a civic duty. And I want to join my colleagues that it's really more than that, you know.

Our founding documents talk about civic duty or the Declaration of Independence talks about for this country, pledging your lives, your fortunes, and your sacred honor. And anybody who's read your testimony knows what you've had to sacrifice by coming forward. Your life has been upended. You have received vicious, hateful threats, death threats. You've had to move out of your family home to some expense, I imagine, to you and your family. You've had to engage security to some expense. You've had to deal with incredible challenges.

And what's amazing, and I want to join my colleagues in thanking you for your courage and bravery in coming forward, all to help us deal with one of the most important obligations a Senator has, to advise and consent on one of the branches of our Government, the highest courts in the land, an individual going before a lifetime appointment. And you even said that the President had a lot of folks on that list, and your fear was that this individual, who assaulted you, would ascend to that seat. That's correct, right?

Dr. FORD. Correct.

Senator BOOKER. Yes, and it is correct that you have given a lot of resources, taken a lot of threats to come forward, correct?

Dr. FORD. Correct.

Senator BOOKER. Assaults on your dignity and your humanity?

Dr. FORD. Absolutely.

Senator BOOKER. How has it affected your children?

Dr. FORD. They're doing fairly well considering. Thank you for asking.

Senator BOOKER. And your husband?

Dr. FORD. Doing fairly well, considering. Yes. Thank you. We have a very supportive community.

Senator BOOKER. That's good to hear. I want to use a different word for your courage because this is more—as much as this hearing is about a Supreme Court Justice, the reality is by you coming forward, your courage, you are affecting the culture of our country. We have a wonderful Nation, an incredible culture, but there are dark elements that allow unconscionable levels of—unacceptable levels of sexual assault and harassment that are affecting girls and boys and affecting men and women, from big media outlets, to corporations, to factory floors, to servers in restaurants, to our intimate spaces in homes and apartments all around this country.

I stepped out during the break and was deluged with notes from friends all around the country, social media posts, that there are literally hundreds of thousands of people watching your testimony right now. And note after note that I got, people in tears, feeling pain and anguish, not just feeling your pain, but feeling their own, who have not come forward. You are opening up to open air hurt and pain that goes on across this country.

And for that, the word I would use, it's nothing short of "heroic." Because what you're doing for our Nation right now, besides giving testimony germane to one of the most sacred obligations of our offices, is, you are speaking truth that this country needs to understand. And how we deal with survivors who come forward right now is unacceptable, and the way we deal with this unfortunately allows for the continued darkness of this culture to exist. And your brilliance in shining a light under this, speaking your truth, is nothing short of heroic.

But to the matter at hand, one of my colleagues who I have a lot of respect for, and I do consider him a friend, went to the Senate floor and spoke truth to both sides of the political aisle. Senator Flake said yesterday, "This is a lifetime appointment, and this is said to be a deliberative body. In the interest of due diligence and fairness, her claims must be fully aired and considered." I agree with him. But you've asked for things that would give a full airing from corroborating witnesses to be called. You've submitted to an intrusive polygraph test.

Can you answer for me how do you feel that all the things that could have been done thoroughly to help this deliberative body have not been honored in this so-called investigation?

Dr. FORD. I wish that I could be more helpful and that others could be more helpful, and that we could collaborate in a way that would get at more information.

Senator BOOKER. Thank you very much. Mr. Chairman, I'd just like to introduce for the record seven letters by—from Lambda Legal, from Mormon Women for Ethical Government, youth-led organizations around this country, the international unions, bricklayers, allied craft workers, a letter from 295 survivors of sexual violence in support of Dr. Ford, and a letter from 1,600 men—it's a campaign in support of Dr. Ford—and those who want to assert, men and women, that survivors of sexual violence are not opportunists, do not have political axes to grind, but are coming forward with courage and with heart to speak their truth and try to end the scourge of sexual assault and violence in our country.

Chairman GRASSLEY. Without objection, so ordered.

[The letters appear as submissions for the record.]

Chairman GRASSLEY. Ms. Mitchell for Senator Tillis.

[For Senator Tillis.]

Ms. MITCHELL. Dr. Ford, in choosing attorneys, did anyone help you with the choice on who to choose?

Dr. FORD. Various people referred me to lawyers that they knew in the Washington, DC, area. So, as you know, I grew up in this area, so I asked some family members and friends, and they would—they referred me to, like, divorce attorneys that might know somebody, that might know somebody. And I ended up interviewing several law firms from the DC area.

Ms. MITCHELL. And did anybody besides friends and family refer you to any attorneys?

Dr. FORD. I think that the staff of Diane Feinstein's office suggested the possibility of some attorneys.

Ms. MITCHELL. Okay. Including the two that are sitting on either side of you?

Dr. FORD. Not both of them, no.

Ms. MITCHELL. Okay. We've heard a lot of about FBI investigations.

Dr. FORD. Mm-hmm.

Ms. MITCHELL. When did you personally first request an FBI investigation?

Dr. FORD. How many weeks ago? I guess when we first started talking about the possibility of a hearing. I was hoping that there would be a more thorough investigation.

Ms. MITCHELL. Would that investigation have been something that you would've submitted to an interview?

Dr. FORD. I would be happy to cooperate with the FBI, yes.

Ms. MITCHELL. Would you have been happy to submit to an interview by staff members from this Committee?

Dr. FORD. Absolutely.

Ms. MITCHELL. Okay. Besides—you mentioned some GoFundMe accounts. Besides those, are there any other efforts outside of your own personal finances to pay for your legal fees or any of the costs occurred—incurred?

Dr. FORD. It's my understanding that some of my team is working on a pro bono basis, but I don't know the exact details, and there are members of the community in Palo Alto that have the means to contribute to help me with the security detail, et cetera.

Ms. MITCHELL. Okay. Have you been provided—

Mr. BROMWICH. I think I can help you with that. Both her counsel are doing this pro bono. We are not being paid, and we have no expectation of being paid.

Ms. MITCHELL. Thank you, Counsel. Have you seen any of the questions that I was going to ask you today?

Dr. FORD. No.

Ms. MITCHELL. Have you—you've been asked a few questions by other people as well. Have you seen any of those questions in advance?

Dr. FORD. No.

Ms. MITCHELL. Have you been told them in advance?

Dr. FORD. No.

Ms. MITCHELL. And likewise with my questions, have you been told my questions in advance?

Dr. FORD. Definitely not.

Ms. MITCHELL. Okay. You mentioned about some possible information, such as when Mark Judge worked at the supermarket. I want to ask you about someone else. You mentioned that there was a classmate who was really sort of the connection between you and Brett Kavanaugh. Who was this person?

Dr. FORD. I think that that case with Mr. Whalen, who was looking at my LinkedIn page and then trying to blame the person, I just don't feel like it's right for us to be talking about that.

Ms. MITCHELL. I'm not trying to blame anybody. I just want to know who the common friend that you and—

Dr. FORD. The person that Mr. Whalen was trying to say looked like Mr. Kavanaugh.

Ms. MITCHELL. Okay. How long did you know this person?

Dr. FORD. Mm-hmm, maybe for a couple of months we socialized, but he also was a member of the same country club, and I knew his younger brother as well.

Ms. MITCHELL. Okay. So, a couple of months before this took place?

Dr. FORD. Yes.

Ms. MITCHELL. Okay. How would you characterize your relationship with him both before and after this took place, this person?

Dr. FORD. He was somebody that, we used the phrase, "I went out with"—I wouldn't say "date"—I went out with for a few months. That was how we termed it at the time. And after that, we were distant friends and ran into each other periodically at Columbia Country Club. But I didn't see him often.

Ms. MITCHELL. Okay.

Dr. FORD. But I saw his brother and him several times.

Ms. MITCHELL. Was this person the only common link between you and Mr.—Judge Kavanaugh?

Dr. FORD. He's the only one that I would be able to name right now that I would like to not name, but you know who I mean, and—but there are certainly other members of Columbia Country Club that were common friends, or they were more acquaintances of mine and friends of Mr. Kavanaugh.

Ms. MITCHELL. Okay. Can you describe all of the other social interactions that you had with Mr. Kavanaugh?

Dr. FORD. Briefly, yes, I can. There were—during freshman and sophomore, particularly my sophomore year, which would've been his junior year of high school, four to five parties that my friends and I attended that were attended also by him.

Ms. MITCHELL. Okay. Did anything happen at these events like we're talking about, besides the time we're talking about?

Chairman GRASSLEY. You can answer that question, then I'll go to Senator Harris. Go ahead and answer that question.

Dr. FORD. There was no sexual assault at any of those events. Is that what you're asking?

Ms. MITCHELL. Yes, I am.

Dr. FORD. Yes, those were just parties.

Ms. MITCHELL. Or anything inappropriate is what I'm asking.

Dr. FORD. Yes. Well, maybe we can go into more detail when there's more time. I feel time pressure on that question.

Ms. MITCHELL. Okay.

Dr. FORD. Yes.

Chairman GRASSLEY. Senator Harris.

Dr. FORD. I'm happy to answer in further detail if you want me to.

Chairman GRASSLEY. I'm sorry. Go ahead and finish answering your question.

Dr. FORD. Oh, okay. Did you want me to describe those parties or—

Ms. MITCHELL. One—

Mr. BROMWICH. Should we leave this to the next round, Mr. Chairman?

Chairman GRASSLEY. Answer the question.

Dr. FORD. I'm just happy to describe them if you wanted me to, and I'm happy to not. Just whatever you want.

Ms. MITCHELL. Maybe this will—

Dr. FORD. Whatever is your preference.

Ms. MITCHELL [continuing]. Cut to the chase. My question is, Was there anything else that was sexually inappropriate, any inappropriate sexual behavior on the part of Mr. Kavanaugh toward you at any of these other functions.

Dr. FORD. No.

Ms. MITCHELL. Okay.

Chairman GRASSLEY. Okay. Senator Harris.

Senator HARRIS. Dr. Ford, first of all, just so we can level set, you know you are not on trial. You are not on trial. You are sitting here before Members of the United States Senate's Judiciary Committee because you have the courage to come forward because, as you have said, you believe it was your civic duty. I was struck in your testimony by what you indicated as your intention when you first let anyone associated with these hearings know about it.

And what you basically said is you reached out to your Representative in the United States Congress hoping that person would inform the White House before Judge Kavanaugh had been named. That's extremely persuasive about your motivation for coming forward, and so, I want to thank you. I want to thank you for your courage, and I want to tell you I believe you. I believe you, and I believe many Americans across this country believe you.

And what I find striking about your testimony is you remember key, searing details of what happened to you. You told your husband and therapist, two of the most personal of your confidants, and you told them years ago about this assault. You have shared your experience with multiple friends years after that and before these hearings ever started.

I know having personally prosecuted sexual assault cases and child sexual assault cases that study after study shows trauma, shame, and the fear of consequences almost always cause survivors to, at the very least, delay reporting if they ever report at all. Police recognize that. Prosecutors recognize that. Medical and mental health professionals recognize that.

The notes from your therapy sessions were created long before this nomination and corroborate what you have said today. You have passed a polygraph and submitted the results to this Committee. Judge Kavanaugh has not. You have called for outside witnesses to testify and for expert witnesses to testify. Judge

Kavanaugh has not. But most importantly, you have called for an independent FBI investigation into the facts. Judge Kavanaugh has not. And we owe you that. We owe the American people that.

And let's talk about why this is so important. Contrary to what has been said today, the FBI does not reach conclusions. The FBI investigates. It interviews witnesses, gathers facts, and then presents that information to the United States Senate for our consideration and judgment. This Committee knows that, in spite of what you have been told.

In 1991 during a similar hearing, one of my Republican colleagues in this committee stated, "These claims were taken seriously by having the Federal Bureau of Investigation launch an inquiry to determine their validity. The FBI fulfilled its duty and issued a confidential report." Well, that could have and should have been done here.

This morning it was said that this could have been investigated confidentially back in July, but this also could have been investigated in the last 11 days since you came forward, yet that has not happened. The FBI could've interviewed Mark Judge, Patrick Smyth, Leland Keyser, you, and Judge Kavanaugh on these issues. The FBI could've examined various maps that have been presented by the prosecutor who stands in for the United States Senators on this Committee. The FBI could have gathered facts about the music, or the conversation, or any other details about the gathering that occurred that evening. That is standard procedure in a sexual assault case.

In fact, the manual that is—was signed off by Ms. Mitchell, the manual that is posted on the Maricopa County Attorney's website as a guiding principle and best practices for what should happen with sexual assault cases, highlights the details of what should happen in terms of the need for an objective investigation into any sexual assault case. It says, "Effective investigation requires cooperation with a multidisciplinary team that includes medical professionals, victim advocates, dedicated forensic interviewers, criminalists, and other law enforcement members." The manual also stresses the importance of obtaining outside witness information.

You have bravely come forward. You have bravely come forward, and I want to thank you because you clearly have nothing to gain for what you have done. You have been a true patriot in fighting for the best of who we are as a country. I believe you are doing that because you love this country, and I believe history will show that you are a true profile in courage at this moment in time in the history of our country, and I thank you.

Chairman GRASSLEY. Senator Kennedy now. So, proceed, Ms. Mitchell.

[For Senator Kennedy.]

Ms. MITCHELL. Dr. Ford, we're almost done.

Dr. FORD. Thank you.

Ms. MITCHELL. Just a couple of clean-up questions first of all. Which of your two lawyers did Senator Feinstein's office recommend?

Dr. FORD. The Katz—

Ms. MITCHELL. I'm sorry?

Dr. FORD. The Katz Firm.

Ms. MITCHELL. Okay. And when you—when you did leave that night, did Leland Keyser—now Keyser—ever follow up with you and say, hey, what happened to you?

Dr. FORD. I've had communications with her recently.

Ms. MITCHELL. Mm-hmm. I'm talking about, like, the next day or—

Dr. FORD. Oh no, she didn't know about the event. She was downstairs during the event, and I did not share it with her.

Ms. MITCHELL. Have you been—are you aware that the three people at the party besides yourself and Brett Kavanaugh have given statements under penalty of felony to the Committee?

Dr. FORD. Yes.

Ms. MITCHELL. And are you aware of what those statements say?

Dr. FORD. Yes.

Ms. MITCHELL. Are you aware that they say that they have no memory or knowledge of such a party?

Dr. FORD. Yes.

Ms. MITCHELL. Do you have any particular motives to ascribe to Leland?

Dr. FORD. I guess we could take those one at a time. Leland has significant health challenges, and I'm happy that she's focusing on herself and getting the health treatment that she needs. And she let me know that she needed her lawyer to take care of this for her, and she texted me right afterward with an apology and good wishes, and et cetera. So, I'm glad that she's taking care of herself.

I don't expect that P.J. and Leland would remember this evening. It was a very unremarkable party. It was not one of their more notorious parties because nothing remarkable happened to them that evening. They were downstairs. And Mr. Judge is a different story. I would expect that he would remember that this happened.

Ms. MITCHELL. Understood. Senator Harris just questioned you from the "Maricopa County Protocol on Sexual Assault." That's the paper she was holding out. Are you aware that—and, you know, I've been really impressed today because you've talked about norepinephrine, and cortisol, and what we call in the profession basically the neurobiological effects of trauma. Have you also educated yourself on the best way to get to memory and truth in terms of interviewing victims of trauma?

Dr. FORD. For me interviewing victims of trauma?

Ms. MITCHELL. No.

Dr. FORD. Oh.

Ms. MITCHELL. The best way to do it, the best practices for interviewing victims of trauma.

Dr. FORD. No.

Ms. MITCHELL. Okay. Would you believe me if I told you that there is no study that says that this setting in 5-minute increments is the best way to do that?

[Laughter.]

Mr. BROMWICH. We'll stipulate to that.

Ms. KATZ. We could stipulate to that.

[Laughter.]

Ms. MITCHELL. Thank you, Counsel.

Ms. KATZ. Agreed.

Ms. MITCHELL. Did you know that the best way to do it is to have a trained interviewer talk to you one-on-one in a private setting and to let you do the talking, just let you do a narrative? Did you know that?

Dr. FORD. That makes a lot of sense.

Ms. MITCHELL. It does make a lot of sense, doesn't it?

Dr. FORD. Yes.

Ms. MITCHELL. And then to follow up, obviously to fill in the details and ask for clarification. Does that make sense as well?

Dr. FORD. Yes.

Ms. MITCHELL. And the research is done by a lot of people in the child abuse field. Two of the more prominent ones in the sexual assault field are Geisel and Fisher who've talked about it, and it's called a cognitive interview. This is not a cognitive interview. Did anybody ever advise you from Senator Feinstein's office or from Representative Eshoo's office to go get a forensic interview?

Dr. FORD. No.

Ms. MITCHELL. Instead you were advised to get an attorney and take a polygraph. Is that right?

Dr. FORD. Many people advised me to get an attorney. Once I had an attorney, my attorney and I discussed using the polygraph.

Ms. MITCHELL. And instead of submitting to an interview in California, we're having a hearing here today in 5-minute increments. Is that right?

Dr. FORD. I agree that's what was agreed upon by the collegial group here.

Ms. MITCHELL. Thank you. I have no further questions.

Chairman GRASSLEY. Okay. I have something to submit for the record. We received three statements under penalty of felony from three witnesses identified by Dr. Ford: Mark Judge, Leland Keyser, and Patrick Smyth. All three denied any knowledge of the incident or gathering described by Dr. Ford. Without objection, I'll enter in the record.

[The information appears as submissions for the record.]

Senator BLUMENTHAL. Mr. Chairman, I have something for the record as well, a number of letters from the witness' family, friends, including her husband.

Chairman GRASSLEY. Okay. I'll get to you just as soon as the Ranking Member.

Senator FEINSTEIN. Mr. Chairman, I have three letters addressed to both you and the Ranking Member, and I'd ask that they be entered into the record.

Chairman GRASSLEY. Without objection.

[The information appears as submissions for the record.]

Senator FEINSTEIN. And it's also my understanding that Mr. Judge is not willing to come forward to answer our questions. As a result, we can't test his memory or make any assessment of his thoughtfulness or character, and I think that's why the failure to call him to testify is so very critical. And I hope the Majority would reconsider that.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Mr. Chairman, I ask if you have sworn statements that you're submitting for the record that we have those individuals come before us so that we can ask them questions

about those statements. I think that the nature of this proceeding would be compromised if we lack an opportunity to ask them questions about sworn statements that will be part of the record. So, frankly, Mr. Chairman, I would object to entering them in the record.

Senator KENNEDY. Mr. Chairman?

Chairman GRASSLEY. Okay. Senator Whitehouse.

Senator WHITEHOUSE. I have a number of letters that I would ask to be submitted into the record that relate to the importance of proper investigation by trained professionals in pulling these kind of investigations together, from the Leadership Conference on Civil and Human Rights, the National Women's Law Center, the National Organization for Women, and so forth.

Chairman GRASSLEY. Without objection, so ordered.

[The letters appear as submissions for the record.]

Chairman GRASSLEY. Senator Kennedy.

Senator KENNEDY. Mr. Chairman, I have a question for our Chairman. The statements that Senator Blumenthal talked about, those were statements taken by our Majority staff? Is that—

Chairman GRASSLEY. They're already in the record.

Senator KENNEDY. Yes, sir, but those statements were taken by Majority staff?

Chairman GRASSLEY. Yes.

Senator KENNEDY. Did Minority staff participate?

Chairman GRASSLEY. No.

Senator KENNEDY. Why not?

Chairman GRASSLEY. You'll have to ask them.

Senator KENNEDY. Well, were they instructed not to participate?

Chairman GRASSLEY. No.

Senator KENNEDY. They chose not to?

Chairman GRASSLEY. That's right.

Senator FEINSTEIN. If I may, Mr. Chairman, I was told the Minority staff was not notified.

Senator KENNEDY. If I could, I still think I have the floor, Mr. Chairman.

Chairman GRASSLEY. Let's listen to Senator Feinstein.

Mr. BROMWICH. Can we be excused?

Senator FEINSTEIN. I am told by staff—

Mr. BROMWICH. The witness is quite tired, and she'd like to be excused.

Chairman GRASSLEY. I'd like to—if you'd wait just a minute, I'd like to thank Dr. Ford.

Mr. BROMWICH. All right.

Chairman GRASSLEY. In fact, we're going to continue this meeting, and we can—so let's just be nice to her.

[Laughter.]

Chairman GRASSLEY. Dr. Ford. Dr. Ford, I can only speak as one of 21 Senators here, but I thank you very much for your testimony, more importantly, for your bravery coming out and trying to answer our questions as best you could remember. Thank you very much.

We will recess for 45 minutes.

[Whereupon, at 2:14 p.m., the Committee was recessed.]

[Whereupon, at 3:08 p.m., the Committee reconvened.]

Chairman GRASSLEY. Judge Kavanaugh, we welcome you. Are you ready?

Judge KAVANAUGH. I am.

Chairman GRASSLEY. I have something I want to clear up from the last meeting that doesn't affect you. So before I swear you, I would like to explain my response to Senator Kennedy right after the break.

At that time, I entered into the record the statements of three witnesses Dr. Ford said were also at the party. These statements were provided to us under penalty of felony by lying to—if you lie to Congress. As soon as my team learned the names of these three potential witnesses, we immediately reached out to them requesting an interview. In response, all three submitted statements to us denying any knowledge of the gathering Dr. Ford described.

If we had calls with them, we would have invited the Minority to join. Every time that we've received any information regarding Judge Kavanaugh, we've sought to immediately follow through and investigate. The Minority staff sat on Dr. Ford's letter for weeks, and staff told us that they believed it is "highly inappropriate to have these follow-up calls before the FBI finishes its investigation," even though the FBI had completed its background information.

When we followed up with Judge Kavanaugh after we received Dr. Ford's allegations, the Ranking Member staff didn't join us even though these calls are usually done on a bipartisan basis. They joined other calls with the Judge, but they didn't participate or ask any question.

Would you please rise, sir?

Judge KAVANAUGH. Yes.

Chairman GRASSLEY. Do you affirm that the testimony you're about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge KAVANAUGH. I do.

Chairman GRASSLEY. Like we offered to Dr. Ford, you can take whatever time you want now for your opening statement. Then we'll go to questions. So, proceed.

STATEMENT OF HON. BRETT M. KAVANAUGH, NOMINEE TO SERVE AS AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge KAVANAUGH. Mr. Chairman, Ranking Member Feinstein, Members of the Committee, thank you for allowing me to make my statement. I wrote it myself yesterday afternoon and evening. No one has seen a draft, or it, except for one of my former law clerks. This is my statement.

Less than 2 weeks ago, Dr. Ford publicly accused me of committing wrongdoing at an event more than 36 years ago, when we were both in high school. I denied the allegation immediately, categorically, and unequivocally. All four people allegedly at the event, including Dr. Ford's longtime friend, Ms. Keyser, have said they recall no such event. Her longtime friend, Ms. Keyser, said under penalty of felony that she does not know me and does not believe she ever saw me at a party, ever.

Here's the quote from Ms. Keyser's attorney's letter. Quote, "Simply put, Ms. Keyser does not know Mr. Kavanaugh, and she has

no recollection of ever being at a party or gathering where he was present, with or without Dr. Ford.” Think about that fact.

The day after the allegation appeared, I told this Committee that I wanted a hearing as soon as possible to clear my name. I demanded a hearing for the very next day. Unfortunately, it took the Committee 10 days to get to this hearing, and those 10 long days, as was predictable and as I predicted, my family and my name have been totally and permanently destroyed by vicious and false additional accusations. The 10-day delay has been harmful to me and my family, to the Supreme Court, and to the country.

When this allegation first arose, I welcomed any kind of investigation—Senate, FBI, or otherwise. The Committee now has conducted a thorough investigation, and I have cooperated fully. I know that any kind of investigation—Senate, FBI, Montgomery County Police, whatever—will clear me.

Listen to the people I know. Listen to the people who have known me my whole life. Listen to the people I’ve grown up with, and worked with, and played with, and coached with, and dated, and taught, and gone to games with, and had beers with.

Listen to the witnesses who allegedly were at this event 36 years ago. Listen to Ms. Keyser. She does not know me. I was not at the party described by Dr. Ford.

This confirmation process has become a national disgrace. The Constitution gives the Senate an important role in the confirmation process. But you have replaced advice and consent with search and destroy.

Since my nomination in July, there’s been a frenzy on the left to come up with something, anything, to block my confirmation. Shortly after I was nominated, the Democratic Senate Leader said he would, quote, “oppose me with everything he’s got.” A Democratic Senator on this Committee publicly referred to me as evil, evil—think about that word—and said that those who supported me were, quote, “complicit in evil.” Another Democratic Senator on this Committee said, quote, “Judge Kavanaugh is your worst nightmare.” A former head of the Democratic National Committee said, quote, “Judge Kavanaugh will threaten the lives of millions of Americans for decades to come.”

I understand the passions of the moment, but I would say to those Senators, your words have meaning. Millions of Americans listen carefully to you. Given comments like those, is it any surprise that people have been willing to do anything, to make any physical threat against my family, to send any violent email to my wife, to make any kind of allegation against me and against my friends, to blow me up and take me down? You sowed the wind for decades to come. I fear that the whole country will reap the whirlwind.

The behavior of several of the Democratic Members of this Committee in my hearing a few weeks ago was an embarrassment. But at least it was just a good, old-fashioned attempt at Borking. Those efforts didn’t work. When I did at least okay enough at the hearings that it looked like I might actually get confirmed, a new tactic was needed. Some of you were lying in wait and had it ready.

This first allegation was held in secret for weeks by a Democratic Member of this Committee and by staff. It would be needed only

if you couldn't take me out on the merits. When it was needed, this allegation was unleashed and publicly deployed over Dr. Ford's wishes.

And then, and then, as no doubt was expected, if not planned, came a long series of false, last-minute smears designed to scare me and drive me out of the process before any hearing occurred. Crazy stuff—gangs, illegitimate children, fights on boats in Rhode Island—all nonsense, reported breathlessly and often uncritically by the media. This has destroyed my family and my good name, a good name built up through decades of very hard work in public service at the highest levels of the American Government.

This whole 2-week effort has been a calculated and orchestrated political hit fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons, and millions of dollars in money from outside left-wing opposition groups.

This is a circus. The consequences will extend long past my nomination. The consequences will be with us for decades. This grotesque and coordinated character assassination will dissuade competent and good people of all political persuasions from serving our country. And as we all know, in the United States political system of the early 2000s, what goes around comes around.

I am an optimistic guy. I always try to be on the sunrise side of the mountain, to be optimistic about the day that is coming. But today I have to say that I fear for the future.

Last time I was here, I told this Committee that a Federal judge must be independent, not swayed by public or political pressure. I said I was such a judge, and I am. I will not be intimidated into withdrawing from this process. You've tried hard. You've given it your all. No one can question your effort. But your coordinated and well-funded effort to destroy my good name and destroy my family will not drive me out. The vile threats of violence against my family will not drive me out. You may defeat me in the final vote, but you'll never get me to quit. Never.

I'm here today to tell the truth. I've never sexually assaulted anyone, not in high school, not in college, not ever. Sexual assault is horrific. One of my closest friends to this day is a woman who was sexually abused and who in the 1990s, when we were in our thirties, confided in me about the abuse and sought my advice. I was one of the only people she consulted. Allegations of sexual assault must always be taken seriously, always. Those who make allegations always deserve to be heard.

At the same time, the person who is the subject of the allegations also deserves to be heard. Due process is the foundation of the American rule of law. Due process means listening to both sides.

As I told you in my hearing 3 weeks ago, I'm the only child of Martha and Ed Kavanaugh. They are here today. When I was 10, my mom went to law school, and as a lawyer she worked hard and overcame barriers, including the workplace sexual harassment that so many women faced at the time and still face today. She became a trailblazer, one of Maryland's earliest women prosecutors and trial judges. She and my dad taught me the importance of equality

and respect for all people, and she inspired me to be a lawyer and a judge.

Last time I was here I told you that when my mom was a prosecutor and I was in high school, she used to practice her closing arguments at the dining room table on my dad and me. As I told you, her trademark line was "Use your common sense, what rings true, what rings false." Her trademark line is a good reminder as we sit here today, some 36 years after the alleged event occurred, when there is no corroboration, and indeed it is refuted by the people allegedly there.

After I have been in the public arena for 26 years without even a hint, a whiff of an allegation like this, and when my nomination to the Supreme Court was just about to be voted on, at a time when I'm called evil by a Democratic Member of this Committee, while Democratic opponents of my nomination say people will die if I am confirmed, this onslaught of last-minute allegations does not ring true.

I'm not questioning that Dr. Ford may have been sexually assaulted by some person in some place at some time, but I have never done this to her or to anyone. That's not who I am. It is not who I was. I am innocent of this charge.

I intend no ill will to Dr. Ford and her family. The other night Ashley and my daughter, Liza, said their prayers, and little Liza, all of 10 years old, said to Ashley, "We should pray for the woman." That's a lot of wisdom from a 10-year-old. We mean no ill will.

First, let's start with my career. For the last 26 years, since 1992, I have served in many high-profile and several sensitive Government positions for which the FBI has investigated my background six separate times, six separate FBI background investigations over 26 years, all of them after the event alleged here. I have been in the public arena and under extreme public scrutiny for decades. In 1992, I worked for the Office of Solicitor General and the Department of Justice. In 1993, I clerked on the Supreme Court for Justice Anthony Kennedy. I spent 4 years at the Independent Counsel's Office during the 1990s. That office was the subject of enormous scrutiny from the media and the public.

During 1998, the year of the impeachment of President Clinton, our office generally and I personally were in the middle of an intense national media and political spotlight. I and other leading members of Ken Starr's office were opposition researched from head to toe, from birth through the present day. Recall all the people who were exposed that year of 1998 as having engaged in some sexual wrongdoing or indiscretions in their past. One person on the left even paid \$1 million for people to report evidence of sexual wrongdoing, and it worked. It exposed some prominent people. Nothing about me.

From 2001 to 2006, I worked for President George W. Bush in the White House. As staff secretary, I was by President Bush's side for 3 years and was entrusted with the Nation's most sensitive secrets. I traveled on Air Force One all over the country and the world with President Bush. I went everywhere with him, from Texas to Pakistan, from Alaska to Australia, from Buckingham Palace to the Vatican, 3 years in the West Wing, five-and-a-half years in the White House.

I was then nominated to be a judge on the D.C. Circuit. I was thoroughly vetted by the White House, the FBI, the American Bar Association, and this Committee. I sat before this Committee for two thorough confirmation hearings in 2004 and 2006. For the past 12 years, leading up to my nomination for this job, I've served in a very public arena as a Federal judge on what is often referred to as the second most important court in the country. I've handled some of the most significant and sensitive cases affecting the lives and liberties of the American people. I have been a good judge.

And for this nomination, another FBI background investigation, another American Bar Association investigation, 31 hours of hearings, 65 Senator meetings, 1,200 written questions, more than all previous Supreme Court nominees combined. Throughout that entire time, throughout my 53 years and 7 months on this earth, until last week, no one ever accused me of any kind of sexual misconduct. No one, ever, a lifetime, a lifetime of public service and a lifetime of high-profile public service, at the highest levels of American Government, and never a hint of anything of this kind. And that's because nothing of this kind ever happened.

Second, let's turn to specifics. I categorically and unequivocally deny the allegation against me by Dr. Ford. I never had any sexual or physical encounter of any kind with Dr. Ford. I never attended a gathering like the one Dr. Ford describes in her allegation. I've never sexually assaulted Dr. Ford or anyone. Again, I'm not questioning that Dr. Ford may have been sexually assaulted by some person in some place at some time, but I've never done that to her or to anyone.

Dr. Ford's allegation stems from a party that she alleges occurred during the summer of 1982, 36 years ago. I was 17 years old, between my junior and senior years of high school at Georgetown Prep, a rigorous, all-boys Catholic Jesuit high school in Rockville, Maryland. When my friends and I spent time together at parties on weekends, it was usually with friends from nearby Catholic all-girls high schools—Stone Ridge, Holy Child, Visitation, Immaculata, Holy Cross. Dr. Ford did not attend one of those schools. She attended an independent private school named Holton Arms, and she was a year behind me. She and I did not travel in the same social circles. It is possible that we met at some point at some events, although I do not recall that.

To repeat, all of the people identified by Dr. Ford as being present at the party have said they do not remember any such party ever happening. Importantly, her friend, Ms. Keyser, has not only denied knowledge of the party. Ms. Keyser said, under penalty of felony, she does not know me, does not recall ever being at a party with me, ever.

And my two male friends who were allegedly there, who knew me well, have told this Committee under penalty of felony that they do not recall any such party, and that I never did or would do anything like this.

Dr. Ford's allegation is not merely uncorroborated, it is refuted by the very people she says were there, including by a long-time friend of hers, refuted.

Third, Dr. Ford has said that this event occurred in a house near Columbia Country Club, which is at the corner of Connecticut Ave-

nue and East-West Highway in Chevy Chase, Maryland. In her letter to Senator Feinstein, she said that there were four other people at the house, but none of those people nor I lived near Columbia Country Club.

As of the summer of 1982, Dr. Ford was 15 and could not drive yet, and she did not live near Columbia Country Club. She says confidently that she had one beer at the party, but she does not say how she got to the house in question, or how she got home, or whose house it was.

Fourth, I've submitted to this Committee detailed calendars recording my activities in the summer of 1982. Why did I keep calendars? My dad started keeping detailed calendars of his life in 1978. He did so as both a calendar and a diary. He was a very organized guy, to put it mildly. Christmas time, we sit around and he regales us with old stories, old milestones, old weddings, old events from his calendars.

In ninth grade in 1980, I started keeping calendars of my own. For me also, it's both a calendar and a diary. I've kept such calendars/diaries for the last 38 years. Mine are not as good as my dad's in some years. And when I was a kid, the calendars are about what you would expect from a kid, some goofy parts, some embarrassing parts.

But I did have the summer of 1982 documented pretty well. The event described by Dr. Ford presumably happened on a weekend, because I believe everyone worked and had jobs in the summers. In any event, a drunken early evening event of the kind she describes presumably happened on a weekend. If it was a weekend, my calendars show that I was out of town almost every weekend night before football training camp started in late August. The only weekend nights that I was in DC were Friday, June 4, when I was with my dad at a pro golf tournament and had my high school achievement test at 8:30 the next morning.

I also was in DC on Saturday night, August 7th, but I was at a small gathering at Becky's house in Rockville with Matt, Denise, Laurie, and Jenny. Their names are all listed on my calendar. I won't use their last names here.

And then on the weekend of August 20th to 22nd, I was staying at the Garrets with Pat and Chris as we did final preparations for football training camp that began on Sunday the 22nd. As the calendars confirm, that weekend before a brutal football training camp schedule was no time for parties.

So let me emphasize this point: If the party described by Dr. Ford happened in the summer of 1982 on a weekend night, my calendar shows all but definitively that I was not there.

During the weekdays in the summer of 1982, as you can see, I was out of town for 2 weeks of the summer for a trip to the beach with friends and at the legendary five-star basketball camp in Honesdale, Pennsylvania. When I was in town, I spent much of my time working, working out, lifting weights, playing basketball, or hanging out and having some beers with friends as we talked about life and football and school and girls.

Some have noticed that I didn't have church on Sundays on my calendars. I also didn't list brushing my teeth. And for me, going

to church on Sundays was like brushing my teeth, automatic. Still is.

In the summer of 1981, I had worked construction. In the summer of 1982, my job was cutting lawns. I had my own business of sorts. You see some specifics about the lawn cutting listed on the August calendar page. When I had the time, the last lawn cuttings of the summer of various lawns before football training camp. I played in a lot of summer league basketball games for the Georgetown Prep team at night at Blair High School in Silver Spring. Many nights I worked out with other guys at Tobin's house. He was the great quarterback on our football team, and his dad ran workouts or lifted weights at Georgetown Prep in preparation for the football season.

I attended and watched many sporting events, as is my habit to this day. The calendars show a few weekday gatherings at friends' houses after a workout or just to meet up and have some beers. But none of those gatherings included the group of people that Dr. Ford has identified. As my calendars show, I was very precise about listing who was there, very precise. And keep in mind, my calendars also were diaries of sorts, forward-looking and backward-looking, just like my dad's. You can see, for example, that I crossed out missed workouts and the canceled doctors' appointments, and that I listed the precise people who had shown up for certain events.

The calendars are obviously not dispositive on their own. But they are another piece of evidence in the mix for you to consider.

Fifth, Dr. Ford's allegation is radically inconsistent with my record and my character from my youth to the present day. As students at an all-boys Catholic Jesuit school, many of us became friends, and remain friends to this day, with students at local Catholic all-girls schools. One feature of my life that has remained true to the present day is that I've always had a lot of close female friends. I'm not talking about girlfriends. I'm talking about friends who are women. That started in high school. Maybe it was because I'm an only child and had no sisters.

But anyway, we had no social media or text or email and we talked on the phone. I remember talking almost every night, it seemed, to my friends Amy or Julie or Kristin or Karen or Suzanne or Maura or Megan or Nikki. The list goes on, friends for a lifetime, built on a foundation of talking through school and life, starting at age 14. Several of those great women are on the seats right behind me today.

My friends and I sometimes got together and had parties on weekends. The drinking age was 18 in Maryland for most of my time in high school, was 18 in DC for all of my time in high school. I drank beer with my friends. Almost everyone did. Sometimes I had too many beers. Sometimes others did. I liked beer. I still like beer. But I do not drink beer to the point of blacking out, and I never sexually assaulted anyone.

There is a bright line between drinking beer, which I gladly do, and which I fully embrace, and sexually assaulting someone, which is a violent crime. If every American who drinks beer or every American who drank beer in high school is suddenly presumed

guilty of sexual assault, we will be in an ugly new place in this country. I never committed sexual assault.

As high school students, we sometimes did goofy or stupid things. I doubt we are alone in looking back at high school and cringing at some things. For one thing, our yearbook was a disaster. I think some editors and students wanted the yearbook to be some combination of “Animal House,” “Caddy Shack,” and “Fast Times at Ridgmont High,” which were all recent movies at that time. Many of us went along in the yearbook to the point of absurdity. This past week, my friends and I have cringed when we read about it and talked to each other.

One thing in particular we’re sad about, one of our good female friends who we admired and went to dances with had her name used on a yearbook page with the term “alumnus.” That yearbook reference was clumsily intended to show affection and that she was one of us. But in this circus, the media is interpreting the term as related to sex. It was not related to sex. As the woman herself noted in the media, on the record, she and I never had any sexual interaction at all. I’m so sorry to her for that yearbook reference.

This may sound a bit trivial given all that we are here for, but one thing I want to try to make sure of in the future is my friendship with her. She was and is a great person.

As to sex, this is not a topic I ever imagined would come up in a judicial confirmation hearing, but I want to give you a full picture of who I was. I never had sexual intercourse or anything close to it during high school or for many years after that. In some crowds I was probably a little outwardly shy about my inexperience, tried to hide that. At the same time, I was also inwardly proud of it. For me and the girls who I was friends with, that lack of major rampant sexual activity in high school was a matter of faith and respect and caution.

The Committee has a letter from 65 women who knew me in high school. They said that I always treated them with dignity and respect. That letter came together in one night, 35 years after graduation, while a sexual assault allegation was pending against me in a very fraught and public situation where they knew, they knew they’d be vilified if they defended me. Think about that. They put themselves on the line for me. Those are some awesome women, and I love all of them.

You also have a letter from women who knew me in college. Most were varsity athletes. They described that I treated them as friends and equals and supported them in their sports at a time when women sports was emerging in the wake of Title IX. I thank all them for all their texts and their emails and their support.

One of those women friends from college, a self-described liberal and feminist, sent me a text last night that said, quote, “Deep breaths. You’re a good man, a good man, a good man.”

A text yesterday from another of those women friends from college said, quote, “Brett, be strong, pulling for you to my core.”

A third text yesterday from yet another of those women I’m friends with from college said, “I’m holding you in the light of God.”

As I said in my opening statement the last time I was with you, cherish your friends, look out for your friends, lift up your friends,

love your friends. I felt that love more over the last 2 weeks than I ever have in my life. I thank all my friends. I love all my friends.

Throughout my life I've devoted huge efforts to encouraging and promoting the careers of women. I will put my record up against anyone's, male or female. I am proud of the letter from 84 women, 84 women who worked with me at the Bush White House from 2001 to 2006 and described me as, quote, "a man of the highest integrity."

Read the op-ed from Sarah Day from Yarmouth, Maine. She worked in the Oval Office operations outside of President Bush's office. Here's what she recently wrote in centralmaine.com. And today she stands by her comments. Quote, "Brett was an advocate for young women like me. He encouraged me to take on more responsibility and to feel confident in my role. In fact, during the 2004 Republican National Convention, Brett gave me the opportunity to help with the preparation and review of the President's remarks, something I never would have had the chance to do if he had not included me. And he didn't just include me in the work. He made sure I was at Madison Square Garden to watch the President's speech instead of back at the hotel watching on TV."

As a judge since 2006, I've had the privilege of hiring four recent law school graduates to serve as my law clerks each year. The law clerks for Federal judges are the best and brightest graduates of American law schools. They work for 1-year terms for judges after law school, and then they move on in their careers. For judges, training these young lawyers is an important responsibility. The clerks will become the next generation of American lawyers and leaders, judges, and senators.

Just after I took the bench in 2006, there was a major New York Times story about the low numbers of women law clerks at the Supreme Court and Federal Appeals Courts. I took notice, and I took action. A majority of my 48 law clerks over the last 12 years have been women. In a letter to this Committee, my women law clerks said that I was one of the strongest advocates in the Federal judiciary for women lawyers. And they wrote that the legal profession is fairer and more equal because of me. In my time on the bench, no Federal judge, not a single one in the country, has sent more women law clerks to clerk on the Supreme Court than I have.

Before this allegation arose 2 weeks ago, I was required to start making certain administrative preparations for my possible transfer to the Supreme Court, just in case I was confirmed. As part of that I had to, in essence, contingently hire a first group of four law clerks who could be available to clerk at the Supreme Court for me on a moment's notice. I did so, and contingently hired four law clerks. All four are women. If confirmed, I will be the first Justice in the history of the Supreme Court to have a group of all women law clerks. That is who I am. That is who I was.

Over the past 12 years I have taught constitutional law to hundreds of students, primarily at Harvard Law School, where I was hired by then Dean and now Justice Elena Kagan. One of my former women students, a Democrat, testified to this committee that I was an even-handed professor who treats people fairly and with respect.

In a letter to this Committee, my former students, male and female alike, wrote that I “displayed a character that impressed us all.”

I love teaching law. But thanks to what some of you on this side of the Committee have unleashed, I may never be able to teach again.

For the past 7 years I’ve coached my two daughters’ basketball teams. You saw many of those girls when they came to my hearing for a couple of hours. You have a letter from the parents of the girls I coach that describes my dedication, commitment, and character. I coach because I know that a girl’s confidence on the basketball court translates into confidence in other aspects of life.

I love coaching more than anything I’ve ever done in my whole life. But thanks to what some of you on this side of the Committee have unleashed, I may never be able to coach again.

I’ve been a judge for 12 years. I have a long record of service to America and to the Constitution. I revere the Constitution. I am deeply grateful to President Trump for nominating me. He was so gracious to my family and me on the July night he announced my nomination at the White House. I thank him for his steadfast support.

When I accepted the President’s nomination, Ashley and I knew this process would be challenging. We never expected that it would devolve into this. Explaining this to our daughters has been about the worst experience of our lives. Ashley has been a rock. I thank God every day for Ashley and my family.

We live in a country devoted to due process and the rule of law. That means taking allegations seriously. But if the mere allegation, the mere assertion of an allegation, a refuted allegation from 36 years ago, is enough to destroy a person’s life and career, we will have abandoned the basic principles of fairness and due process that define our legal system and our country.

I ask you to judge me by the standard that you would want applied to your father, your husband, your brother, or your son.

My family and I intend no ill will toward Dr. Ford or her family. But I swear today under oath, before the Senate and the Nation, before my family and God, I am innocent of this charge.

[The prepared statement of Judge Brett M. Kavanaugh appears as a submission for the record.]

Chairman GRASSLEY. Thank you, Judge Kavanaugh.

Before we start questions, I won’t repeat what I said this morning, but we’ll do it the same way as we did for Dr. Ford, 5-minute rounds. So we will start with Ms. Mitchell.

[For Chairman Grassley.]

Ms. MITCHELL. Good afternoon, Judge Kavanaugh. We have not met. My name is Rachel Mitchell. I’d like to go over a couple of guidelines for our question-and-answer session today.

If I ask a question—

Judge KAVANAUGH. Yes, I’m ready.

Ms. MITCHELL. Okay. If I ask a question—

Judge KAVANAUGH. Thank you.

Ms. MITCHELL. If I ask a question that you do not understand, please ask me to clarify it or ask it in a different way.

I may ask a question where I incorporate some information you've already provided. If I get it wrong, please correct me.

I'm not going to ask you to guess. If you do estimate, please let me know you're estimating.

Now, I want to make sure that all of the Committee Members have gotten a copy of the definition of "sexual behavior."

Chairman GRASSLEY. Yes, at least I have one.

Ms. MITCHELL. Okay. And you have that as well, Judge Kavanaugh?

Judge KAVANAUGH. Yes.

Ms. MITCHELL. First of all, have you been given or reviewed a copy of the questions that I will be asking you?

Judge KAVANAUGH. No.

Ms. MITCHELL. Has anyone told you the questions that I will be asking you?

Judge KAVANAUGH. No.

Ms. MITCHELL. I want you to take a moment to review the definition that's before you of "sexual behavior."

[Pause.]

Ms. MITCHELL. Have you had a chance to review it?

Judge KAVANAUGH. I have. I may refer back to it, if I can?

Ms. MITCHELL. Yes, please. I'd like to point out two specific parts. Among the examples of sexual behavior, it includes rubbing or grinding your genitals against somebody, clothed or unclothed. And I would also point out that the definition applies whether or not the acts were sexually motivated or, for example, horseplay.

Do you understand the definition I've given you?

Judge KAVANAUGH. I do.

Ms. MITCHELL. And again, if at any time you need to review that, please let me know.

Dr. Ford has stated that somewhere between five or six people were present at the gathering on this date: you, Mark Judge, Leland Ingham at the time, or Leland Keyser now, Patrick P.J. Smith, Dr. Ford, and an unnamed boy.

Do you know Mark Judge?

Judge KAVANAUGH. I do.

Ms. MITCHELL. How do you know him?

Judge KAVANAUGH. He was a friend at Georgetown Prep starting in ninth grade. He's a—someone in our group of friends. We were a very friendly group in class. You saw the letter that's been sent by my friends from Georgetown Prep. A funny guy, great writer, popular, developed a serious addiction problem that lasted decades, near death a couple of times from his addiction, suffered tremendously from—

Ms. MITCHELL. What is your relationship with him like now?

Judge KAVANAUGH. Haven't talked to him in a couple of years. We probably have been on mass emails or group emails that can go around among my high school friends.

Ms. MITCHELL. Okay. And how did you know Patrick Smith?

Judge KAVANAUGH. Also ninth grade, Georgetown Prep. He went by "P.J." then. He and I lived close to one another, played football together. He was defensive tackle. I was a quarterback, wide receiver. We carpoled to school along with Dee Davis every year, the three of us for 2 years. I didn't have a car, so one of the two of

them would drive every day, and I'd be in the—you know, they'd pick me up.

Ms. MITCHELL. What's your relationship like with him now?

Judge KAVANAUGH. He lives in the area. I see him once in a while. I haven't seen him since this, this thing.

Ms. MITCHELL. Do you know Leland Ingham or Leland Keyser?

Judge KAVANAUGH. I know of her. It's possible I saw her, met her in high school at some point at some event. Yes, I know her, I know of her. And again, I don't want to rule out having crossed paths with her in high school.

Ms. MITCHELL. Similar to your statements about knowing Dr. Ford?

Judge KAVANAUGH. Correct.

Chairman GRASSLEY. Senator Feinstein.

Senator FEINSTEIN. Judge Kavanaugh, it's my understanding that you have denied the allegations by Dr. Ford, Ms. Ramirez, and Ms. Swetnick. Is that correct?

Judge KAVANAUGH. Yes.

Senator FEINSTEIN. All three of these women have asked the FBI to investigate their claims. I listened carefully to what you said. Your concern is evident and clear, and if you're very confident of your position, and you appear to be, why aren't you also asking the FBI to investigate these claims?

Judge KAVANAUGH. Senator, I'll do whatever the Committee wants. I wanted a hearing the day after the allegation came up. I wanted to be here that day. Instead, 10 days passed where all this nonsense is coming out, you know, that I'm in gangs, I'm on boats in Rhode Island, I'm in Colorado. You know, I'm sighted all over the place. And these things are printed and run breathlessly by cable news. You know, I wanted a hearing the next day.

My family has been destroyed by this, Senator, destroyed.

Senator FEINSTEIN. And I—

Judge KAVANAUGH. And whoever wants—you know, whatever the Committee decides, I'm all in, immediately.

Senator FEINSTEIN. The question is—

Judge KAVANAUGH. I'm all in immediately.

Senator FEINSTEIN. And the terrible and hard part of this is when we get an allegation, we're not in a position to prove it or disprove it. Therefore, we have to depend on some outside authority for it. And it would just seem to me, then, when these allegations came forward, that you would want the FBI to investigate those claims and clear it up once and for all.

Judge KAVANAUGH. Senator, the Committee investigates. It's not for me to say how to do it. But just so you know, the FBI doesn't reach a conclusion. They would give you a couple of 302s that just tell you what we said. So, I'm here. I wanted to be here, I wanted to be here the next day. It's an outrage that I was not allowed to come and immediately defend my name and say I didn't do this and give you all this evidence. I'm not even in DC on the weekends in the summer of 1982. This happened on a weekday? I'm not at Blair High School for a summer league game? I'm not at Tobin's house working out? I'm not at a movie with Suzanne? You know, I wanted to be here right away.

Senator FEINSTEIN. Well, the difficult thing is that these hearings are set, and set by the Majority. But I'm talking about getting the evidence and having the evidence looked at, and I don't understand. You know, we hear from the witnesses, but the FBI isn't interviewing them and isn't giving us any facts, so all we have is what they say.

Judge KAVANAUGH. You're interviewing me. You're interviewing me. You're doing it, Senator. I'm sorry to interrupt, but you're doing it. That's the—there's no conclusions reached.

Senator FEINSTEIN. And what you're saying, if I understand it, is that the allegations by Dr. Ford, Ms. Ramirez, and Ms. Swetnick are wrong.

Judge KAVANAUGH. That is emphatically what I'm saying, emphatically. The Swetnick thing is a joke. That is a farce.

Senator FEINSTEIN. Would you like to say more about it?

Judge KAVANAUGH. No.

[Laughter.]

Senator FEINSTEIN. Okay. That's it.

Thank you, Mr. Chairman.

Chairman GRASSLEY. Ms. Mitchell.

[For Senator Hatch.]

Ms. MITCHELL. Dr. Ford has described you as being intoxicated at a party. Did you consume alcohol during your high school years?

Judge KAVANAUGH. Yes, we drank beer, my friends and I, boys and girls. Yes, we drank beer. I liked beer, still like beer. We drank beer.

The drinking age, as I noted, so the seniors were legal. Senior year in high school, people were legal to drink. And we—yes, we drank beer. And I said sometimes—sometimes probably had too many beers, and sometimes other people had too many beers.

We drank beer. We liked beer.

Ms. MITCHELL. What do you consider to be too many beers?

Judge KAVANAUGH. I don't know. You know, whatever the chart says, blood alcohol chart.

Ms. MITCHELL. When you talked to Fox News the other night, you said that there were times in high school when people might have had too many beers on occasion. Does that include you?

Judge KAVANAUGH. Sure.

Ms. MITCHELL. Okay. Have you ever passed out from drinking?

Judge KAVANAUGH. Passed out would be no, but I've gone to sleep. But I've never blacked out. That's the—that's the allegation, and that's wrong.

Ms. MITCHELL. So let us talk about your time in high school. In high school after drinking, did you ever wake up in a different location than you remembered passing out or going to sleep?

Judge KAVANAUGH. No, no.

Ms. MITCHELL. Did you ever wake up with your clothes in a different condition or fewer clothes on than you remembered when you went to sleep or passed out?

Judge KAVANAUGH. No. No.

Ms. MITCHELL. Did you ever tell—did anyone ever tell you about something that happened in your presence that you did not remember during a time that you had been drinking?

Judge KAVANAUGH. No. We drank beer, and you know, so did, I think, the vast majority of people our age at the time. But in any event, we drank beer and—and still do. So whatever—yes.

Ms. MITCHELL. During the time in high school when you would be drinking, did anyone ever tell you about something that you did not remember?

Judge KAVANAUGH. No.

Ms. MITCHELL. Dr. Ford described a small gathering of people at a suburban Maryland home in the summer of 1982. She said that Mark Judge, P.J. Smyth, and Leland Ingham also were present, as well as an unknown male, and that the people were drinking to varying degrees. Were you ever at a gathering that fits that description?

Judge KAVANAUGH. No, as I've said in my opening statements—opening statement.

Ms. MITCHELL. Dr. Ford described an incident where she was alone in a room with you and Mark Judge. Have you ever been alone in a room with Dr. Ford and Mark Judge?

Judge KAVANAUGH. No.

Ms. MITCHELL. Dr. Ford described an incident where you were grinding your genitals on her. Have you ever ground or rubbed your genitals against Dr. Ford?

Judge KAVANAUGH. No.

Ms. MITCHELL. Dr. Ford described an incident where you covered her mouth with your hand. Have you ever covered Dr. Ford's mouth with your hand?

Judge KAVANAUGH. No.

Ms. MITCHELL. Dr. Ford described an incident where you tried to remove her clothes. Have you ever tried to remove her clothes?

Judge KAVANAUGH. No.

Ms. MITCHELL. Referring back to the definition of sexual behavior that I have given you, have you ever at any time engaged in sexual behavior with Dr. Ford?

Judge KAVANAUGH. No.

Ms. MITCHELL. Have you ever engaged in sexual behavior with Dr. Ford, even if it was consensual?

Judge KAVANAUGH. No.

Ms. MITCHELL. I want to talk about your calendars. You submitted to the Committee copies of the handwritten calendars that you have talked about for the months of May, June, July, and August 1982. Do you have them in front of you?

Judge KAVANAUGH. I do.

Ms. MITCHELL. Did you create these calendars in the sense of all the handwriting that is on them?

Judge KAVANAUGH. Yes.

Ms. MITCHELL. Okay. Is it exclusively your handwriting?

Judge KAVANAUGH. Yes.

Ms. MITCHELL. When did you make these entries?

Judge KAVANAUGH. In 1982.

Ms. MITCHELL. Has anything been changed for those since 1982?

Judge KAVANAUGH. No.

Ms. MITCHELL. Do these calendars represent your plans for each day, or do they document—in other words, prospectively, or do they document what actually occurred, more like a diary?

Judge KAVANAUGH. They're both forward-looking and backward-looking, as you can tell by looking at them, because I cross out certain doctor's appointments that didn't happen, or one night where I supposed to lift weights, I crossed that out because I obviously didn't make it that night.

So you can see things that I didn't do crossed out in retrospect. And also when I list the specific people who I was with, that is likely backward-looking.

Ms. MITCHELL. You explained that you kept these calendars because your father started keeping them in 1978, I believe you said.

Judge KAVANAUGH. Mm-hmm.

Ms. MITCHELL. That is why you kept them. In other words, you wrote on them, but why did you keep them up until this time?

Judge KAVANAUGH. Oh, well, he's kept them, too, since 1978. So he's a good role model.

Chairman GRASSLEY. Ms. Mitchell, you will have to stop.

Ms. MITCHELL. Oh, I am sorry.

Chairman GRASSLEY. Judge Kavanaugh has asked for a break. So we will take a 15-minute break.

[Whereupon, at 4:11 p.m., the Committee was recessed.]

[Whereupon, at 4:27 p.m., the Committee reconvened.]

Chairman GRASSLEY. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Judge, you have said before, and again today, that Mark Judge was a close friend of yours in high school. Now Dr. Ford, as you know, has said that he was in the room when she was attacked. She also says you were, too.

Unfortunately, the FBI has never interviewed him. We have not been able to have his attendance here. The Chairman refuses to call him. If she is saying Mark Judge was in the room then, then he should be in the room here today. Would you want him called as a witness?

Judge KAVANAUGH. Senator, this allegation came into the Committee—

Senator LEAHY. No, no. I am just asking the question, would you want him to be here as a witness?

Judge KAVANAUGH. He's already provided sworn testimony to the Committee. This allegation has been hidden by the Committee, by Members of the—Members—

Senator LEAHY. No, it has not been—it has not been investigated by the FBI. The Committee has refused to allow it to be—

Judge KAVANAUGH. It was dropped on us. It was sprung.

Senator LEAHY. It was not investigated by the FBI, and he has not been called. We might be under—

Judge KAVANAUGH. It should have been handled in the due course, Senator, when it came in.

Senator LEAHY. I would—I would disagree with that. I have been on this Committee 44 years, both Republicans and Democrats. I have never seen somebody that critical and not allowed to be here to—called to be testifying or an FBI background.

But let me—

Judge KAVANAUGH. He's provided sworn testimony, and Senator—

Senator LEAHY. He has—

Judge KAVANAUGH. Senator, let me finish. He—the allegation came in weeks ago, and nothing was done with it by the Ranking Member, and then it's sprung on me——

Senator LEAHY. Judge Kavanaugh, I have heard your line, and you stated it over and over again. And I have that well in mind, but let me ask you this.

He authored a book titled, "Wasted: Tales of a GenX Drunk." He references a Bart O'Kavanaugh vomiting in someone's car during Beach Week and then passing out. Is that you that he is talking about?

Judge KAVANAUGH. Senator, Mark Judge was——

Senator LEAHY. To your knowledge, is that you that he is talking about?

Judge KAVANAUGH. I'll explain if you let me.

Chairman GRASSLEY. Proceed, please.

Judge KAVANAUGH. Mark Judge was a friend of ours in high school who developed a very serious drinking problem and addiction problem that lasted decades and was very difficult for him to escape from. And he nearly died. And then he developed—then he had leukemia as well on top of it.

Now, as part of his therapy or part of his coming to grips with sobriety, he wrote a book that is a fictionalized book and an account. I think he picked out names of friends of ours to throw them in as kind of close to what—for characters in the book. So, you know, we can sit here——

Senator LEAHY. So we do not know—we do not know whether that is you or not?

Judge KAVANAUGH. We can sit here and——

Senator LEAHY. Is that what you are saying?

Judge KAVANAUGH [continuing]. You know, like make fun of some guy who has an addiction.

Senator LEAHY. I am not making fun of anybody, Judge Kavanaugh.

Judge KAVANAUGH. But I don't think that really makes—is really good.

Senator LEAHY. I am trying to get a straight answer from you under oath. Are you the Bart O'Kavanaugh that he is referring to, "yes" or "no"? That is——

Judge KAVANAUGH. You'd have to ask him.

Senator LEAHY. Well, I agree with you there, and that is why I wish that the Chairman had him here under oath.

Now you talked about your yearbook. In your yearbook, you talked about drinking and sexual exploits, did you not?

Judge KAVANAUGH. Senator, let me—let me take a step back and explain high school. I was number one in the class——

Senator LEAHY. And I thought only——

Judge KAVANAUGH. No, no.

Senator LEAHY. I thought only the Senate could filibuster.

Judge KAVANAUGH. No, no, no, no. You got this up. I'm going to talk about my high school——

Senator LEAHY. I thought only the Senate could filibuster.

Judge KAVANAUGH. No, no. I'm going to——

Senator HATCH. Let him answer.

Judge KAVANAUGH. I'm going to talk about my high school record, if you're going to sit here and mock me.

Chairman GRASSLEY. We were—I think we were all very fair to Dr. Ford. Should we not be just as fair to Judge Kavanaugh?

Senator HATCH. Just saying.

Judge KAVANAUGH. I busted my butt in academics. I always tried to do the best I could. As I recall, I finished one in the class, first in freshman and junior year, right up at the top with Steve Clark and Eddie Ayala. We were always kind of in the mix.

I played sports. I was captain of the varsity basketball team. I was wide receiver and defensive back on the football team. I ran track in the spring of '82 to try to get faster.

I did my service projects at the school, which involved going to the soup kitchen downtown—let me finish—and going to tutor intellectually disabled kids at the Rockville library. I went to church. And yes, we got together with our friends.

Senator LEAHY. Does this reflect what you are? Does this yearbook reflect your focus on academics and your respect for women? That is easy, “yes” or “no.” You do not have to filibuster the answer. Does it reflect your focus on—

Judge KAVANAUGH. I already said the yearbook—in my opening statement, the yearbook obviously—

Chairman GRASSLEY. Judge? Just wait a minute. He has asked the question. I will give you time to answer it.

Judge KAVANAUGH. The yearbook, as I said in my opening statement, was something where the students and editors made a decision to treat some of it as farce and some of it as exaggeration, some of it celebrating things that don't reflect the things that were really the central part of our school.

Yes, we went to parties, though. Yes, of course, we went to parties, and the yearbook page describes that and kind of makes fun of it. And you know, if we want to sit here and talk about whether a Supreme Court nomination should be based on a high school yearbook page, I think that's taking us to a new level of absurdity.

Chairman GRASSLEY. Ms. Mitchell.

Senator LEAHY. Well, we got a filibuster, but not a single answer.

Chairman GRASSLEY. Ms. Mitchell.

[For Senator Graham.]

Ms. MITCHELL. Judge, do you still have your calendars there?

Judge KAVANAUGH. I do.

Ms. MITCHELL. I would like you to look at the July 1st entry.

Judge KAVANAUGH. Yes.

Ms. MITCHELL. The entry says, and I quote, “Go to Timmy's for skis with Judge, Tom, P.J., Bernie, and—Squi?”

Judge KAVANAUGH. “Squi.” It's a nickname.

Ms. MITCHELL. Okay. To what does this refer and to whom?

Judge KAVANAUGH. So it first says, “Tobin's house workout.” So that's one of the football workouts that we would have that Dr. Finizio would run for guys on the football team during the summer. So we would be there. That's usually 6 p.m. to 8 p.m. or so, kind of until near dark.

Then it looks like we went over to Timmy's. Do you want to know their last names, too? I'm happy to do it.

Ms. MITCHELL. If you could just identify, is “Judge” Mark Judge?

Judge KAVANAUGH. It is.

Ms. MITCHELL. And is "P.J." P.J. Smyth?

Judge KAVANAUGH. It is. So it's Tim Gaudette, Mark Judge, Tom Kane, P.J. Smyth, Bernie McCarthy, Chris Garrett.

Ms. MITCHELL. Chris Garrett is "Squi"?

Judge KAVANAUGH. He is.

Ms. MITCHELL. Did you in your calendar routinely document social gatherings like house parties or gatherings of friends in your calendar?

Judge KAVANAUGH. Yes. It certainly appears that way. That's what I was doing in the summer of 1982, and you can see that reflected on several of the—several of the entries.

Ms. MITCHELL. If a gathering like Dr. Ford has described had occurred, would you have documented that?

Judge KAVANAUGH. Yes, because I documented everything of those kinds of events, even small get-togethers. August 7th is another good example where I documented a small get-together that summer. So, yes.

Ms. MITCHELL. August 7th. Could you read that?

Judge KAVANAUGH. I think that's "Go to Becky's. Matt, Denise, Laurie, Jenny."

Ms. MITCHELL. Have you reviewed every entry that is in these calendars of May, June, July, and August 1982?

Judge KAVANAUGH. I have.

Ms. MITCHELL. Is there anything that could even remotely fit what we are talking about in terms of Dr. Ford's allegations?

Judge KAVANAUGH. No.

Ms. MITCHELL. As a lawyer and a judge, are you—we have talked about the FBI. Are you aware that this type of offense would actually be investigated by local police?

Judge KAVANAUGH. Yes, I mentioned Montgomery County Police earlier. Yes.

Ms. MITCHELL. Are you aware that in Maryland, there is no statute of limitations that would prohibit you being charged, even if this happened in 1982?

Judge KAVANAUGH. That's my understanding.

Ms. MITCHELL. Have you at any time been contacted by any members of local police agencies regarding this matter?

Judge KAVANAUGH. No, ma'am.

Ms. MITCHELL. Prior to your nomination for Supreme Court, you have talked about all of the female clerks you have had and the women that you have worked with, I am not just talking about them. I am talking about globally. Have you ever been accused, either formally or informally, of unwanted sexual behavior?

Judge KAVANAUGH. No.

Ms. MITCHELL. And when I say informally, I mean just a female complains. It does not have to be to anybody else, but you.

Judge KAVANAUGH. No.

Ms. MITCHELL. Since Dr. Ford's allegation was made public, how many times have you been interviewed by the Committee?

Judge KAVANAUGH. It's been three or four. I'm—I'm trying to remember now. It's been several times. Each of these new things, absurd as they are, we'd get on the phone and kind of go through them.

Ms. MITCHELL. So have you submitted to interviews specifically about Dr. Ford's allegation?

Judge KAVANAUGH. Yes.

Ms. MITCHELL. And what about Deborah Ramirez's allegation—

Judge KAVANAUGH. Yes.

Ms. MITCHELL [continuing]. That you waved your penis in front of her?

Judge KAVANAUGH. Yes.

Ms. MITCHELL. What about Julie Swetnick's allegation that you repeatedly engaged in drugging and gang raping or allowing women to be gang raped?

Judge KAVANAUGH. Yes. Yes, I've been interviewed about it.

Ms. MITCHELL. Okay. Were your answers to my questions today consistent with the answers that you gave to the Committee in these various interviews?

Judge KAVANAUGH. Yes, ma'am.

Ms. MITCHELL. Okay. I see I am out of time.

Chairman GRASSLEY. Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Judge Kavanaugh, earlier today, Dr. Christine Ford sat in that same chair, and under oath, she said clearly and unequivocally that she was the victim of sexual assault at your hands. She answered our questions directly, and she did not flinch at the prospect of submitting herself to an FBI investigation of these charges. We know, and I am sure she has been advised by her attorneys, that a person lying to the FBI can face criminal prosecution.

You have clearly and unequivocally denied that you assaulted Dr. Ford. With that statement, you must believe that there is no credible evidence or any credible witness that could prove otherwise.

You started off with an impassioned statement at the beginning, and I can imagine—try to imagine what you have been through or your family has been through, and I am sure I would not get close to it. But it was an impassioned—

Judge KAVANAUGH. No, you wouldn't.

Senator DURBIN. I am sure I would not. It was an impassioned statement. And in the course of it, you said, "I welcome any kind of investigation." I quote you, "I welcome any kind of investigation."

I have got a suggestion for you. Right now, turn to your left in the front row to Don McGahn, counsel to President Donald Trump. Ask him to suspend this hearing and nomination process until the FBI completes its investigation of the charges made by Dr. Ford and others and goes to bring the witnesses forward and provides that information to this hearing.

I am sure that the Chairman at that point will understand that that is a reasonable request to finally put to rest these charges if they are false or to prove them if they are not. You spent 2 years in the White House office that approved judicial nominees. You turned to the FBI over and over and over again for their work.

Let us bring them in, here and now. Turn to Don McGahn and tell him it is time to get this done. An FBI investigation is the only way to answer some of these questions.

Judge KAVANAUGH. Senator—

Chairman GRASSLEY. Stop the clock. This Committee is running this hearing. Not the White House, not Don McGahn, not even you as a nominee.

We are here today because Dr. Ford asked for an opportunity to hear her. I know you did, too, as well. In fact, maybe even before she did. We are here because people wanted to be heard from charges that they all thought were unfair or activities, like sexual assault, was unfair.

So I want to assure Senator Durbin, regardless of what you say to Senator—Don McGahn, we are not suspending this hearing.

Proceed to answer the question or whatever—if the gentleman—

Senator DURBIN. I would just say this. If you, Judge Kavanaugh, turn to Don McGahn and to this Committee and say for the sake of my reputation, my family name, and to get to the bottom of the truth of this, I am not going to be an obstacle to an FBI investigation, I would hope that all the Members of the Committee would join me in saying we are going to abide by your wishes, and we will have that investigation.

Judge KAVANAUGH. I welcome whatever the Committee wants to do because I'm telling the truth.

Senator DURBIN. I want to know what you want to do.

Judge KAVANAUGH. I'm telling the truth.

Senator DURBIN. I want to know what you want to do, Judge.

Judge KAVANAUGH. I'm innocent. I'm innocent of this charge.

Senator DURBIN. Then you are prepared for an FBI investigation?

Judge KAVANAUGH. They don't reach conclusions. You reach the conclusion, Senator.

Senator DURBIN. No, but they do investigate questions.

Judge KAVANAUGH. I mean, this is—

Senator DURBIN. And you cannot have it both ways, Judge. You cannot say here at the beginning—

Judge KAVANAUGH. I wanted a hearing—

Senator DURBIN [continuing]. In an impassioned moment, "I welcome any kind of investigation"—

Judge KAVANAUGH. Look, this thing was sprung on me.

Senator DURBIN [continuing]. And then walk away from this.

Judge KAVANAUGH. This thing was sprung at the last minute after being held by staff, you know? And I called for—

Senator DURBIN. Judge, if there is no truth—

Judge KAVANAUGH. I called for a hearing immediately.

Senator DURBIN. If there is no truth to her charges, the FBI investigation will show that. Are you afraid that they might not? Come on. Gee whiz.

Judge KAVANAUGH. The FBI does not reach—you know, you know this is—you know that's a phony question because the FBI doesn't reach conclusions. They just provide the 302s. The 302, so I can explain to people who don't know what that is, they just go and do what you're doing, ask questions and then type up a report. They don't reach the bottom-line conclusion.

Senator DURBIN. This morning—this morning, I asked Dr. Ford. I asked her about this incident where she ran into Mark Judge at

a Safeway. And she said, sure, I remember. It was 6 or 8 weeks after this occurrence.

Well, someone at The Washington Post went in and took a look at Mr. Judge's book and has been able to—the one that he wrote about his addiction and his alcoholism. And they have narrowed it down to what they think was a period of time 6 or 8 weeks after the event, and he would have been working at the Safeway at that point.

So the point I am getting to is, we at least can connect some dots here and get some information. Why would you resist that kind of investigation?

Judge KAVANAUGH. There's the dots.

Senator DURBIN. Why would you resist that kind of investigation?

Judge KAVANAUGH. Senator, I welcome—I wanted the hearing last week.

Senator DURBIN. I am asking about the FBI investigation.

Judge KAVANAUGH. The Committee figures out how to ask the questions. I'll do whatever. I've been on the phone multiple times with Committee Counsel. I'll talk to—

Senator DURBIN. Judge Kavanaugh, will you support an FBI investigation right now?

Judge KAVANAUGH. I will do whatever the Committee wants—

Senator DURBIN. Personally, do you think that is the best thing for us to do? You will not answer?

Judge KAVANAUGH. Look, Senator, I've said I wanted a hearing, and I said I would welcome anything. I'm innocent. This thing was held, held when it could have been presented in the ordinary way. It could have been held and handled confidentially at first, which was what Dr. Ford's wishes were, as I understand it, and wouldn't have caused this, like destroyed my family like this effort has.

Senator DURBIN. I think an FBI investigation will help all of us on both sides of the issue.

Chairman GRASSLEY. Senator Graham asked for the floor. But before he does, it seems to me that if you want to know something, you have got the witness right here to ask him. And second, if you want an FBI report, you can ask for it yourself. I have asked for FBI reports in the past, in the 38 years I have been in the Senate.

Senator Graham.

Senator GRAHAM. Are you aware that at 9:23 on the night of July the 9th, the day you were nominated to the Supreme Court by President Trump, Senator Schumer said, 23 minutes after your nomination, "I will oppose Judge Kavanaugh's nomination with everything I have." I have a bipartisan—"and I hope a bipartisan majority will do the same. The stakes are simply too high for anything less."

Well, if you were not aware of it, you are now. Did you meet with Senator Dianne Feinstein on August 20th?

Judge KAVANAUGH. I did meet with Senator Feinstein.

Senator GRAHAM. Did you know that her staff had already recommended a lawyer to Dr. Ford?

Judge KAVANAUGH. I did not know that.

Senator GRAHAM. Did you know that her and her staff had these allegations for over 20 days?

Judge KAVANAUGH. I did not know that at the time.

Senator GRAHAM. If you wanted an FBI investigation, you could have come to us. What you want to do is destroy this guy's life, hold this seat open, and hope you win in 2020. You have said that, not me.

You have got nothing to apologize for.

When you see Sotomayor and Kagan, tell them that Lindsey said hello because I voted for them. I would never do to them what you have done to this guy. This is the most unethical sham since I have been in politics. And if you really wanted to know the truth, you sure as hell would not have done what you have done to this guy.

Are you a gang rapist?

Judge KAVANAUGH. No.

Senator GRAHAM. I cannot imagine what you and your family have gone through.

Boy, you all want power. God, I hope you never get it. I hope the American people can see through this sham that you knew about it and you held it. You had no intention of protecting Dr. Ford, none. She is as much of a victim as you are.

God, I hate to say it because these have been my friends. But let me tell you, when it comes to this, you are looking for a fair process, you came to the wrong town at the wrong time, my friend.

Do you consider this a job interview?

Judge KAVANAUGH. The Advice and Consent role is like a job interview.

Senator GRAHAM. Do you consider that you have been through a job interview?

Judge KAVANAUGH. I've been through a process of advice and consent under the Constitution, which—

Senator GRAHAM. Would you say you have been through hell?

Judge KAVANAUGH. I have been through hell and then some.

Senator GRAHAM. This is not a job interview. This is hell.

Judge KAVANAUGH. This is—

Senator GRAHAM. This is going to destroy the ability of good people to come forward because of this crap. Your high school yearbook. You have interacted with professional women all your life, not one accusation.

You are supposed to be Bill Cosby when you are a junior and senior in high school, and all of a sudden, you got over it. It has been my understanding that if you drugged women and raped them for 2 years in high school, you probably do not stop.

Here is my understanding. If you lived a good life, people will recognize it, like the American Bar Association has the gold standard: "His integrity is absolutely unquestioned. He is the very circumspect in his personal conduct. Harbors no biases or prejudices. He is entirely ethical. Is a really decent person. He is warm, friendly, unassuming. He is the nicest person." The ABA.

The one thing I can tell you, you should be proud of is—Ashley, you should be proud of this. That you raised a daughter who had the good character to pray for Dr. Ford.

To my Republican colleagues, if you vote no, you are legitimizing the most despicable thing I have seen in my time in politics. You want this seat? I hope you never get it.

I hope you are on the Supreme Court. That is exactly where you should be. And I hope that the American people will see through this charade, and I wish you well. And I intend to vote for you, and I hope everybody who is fair-minded will.

Chairman GRASSLEY. Senator Whitehouse.

Senator WHITEHOUSE. Should we let things settle a little bit after that?

Chairman GRASSLEY. Do you want a—we will take a 60-second break?

Senator WHITEHOUSE. No, I am good. I am good.

Chairman GRASSLEY. Okay. Go ahead.

Senator WHITEHOUSE. One of the reasons, Mr. Kavanaugh, that we are looking at the yearbook is that it is relatively consistent in time with the events at issue here and because it appears to be your words. Is it, in fact, your words on your yearbook page?

Judge KAVANAUGH. We submitted things to the editors, and I believe they took them. I don't know if they changed things or not, but—

Senator WHITEHOUSE. You are not aware of any changes?

Judge KAVANAUGH. I don't know. I'm not aware one way—

Senator WHITEHOUSE. As far as you know, these are your words?

Judge KAVANAUGH. I'm not aware one way or the other, but I'm not going to sit here and contest that. Have at it, if you want to go through my yearbook.

Senator WHITEHOUSE. Yes, I am actually interested. You know, lawyers should be working off of common terms and understand the words that we are using. I think that is a pretty basic principle among lawyers. Would you not agree?

Judge KAVANAUGH. It is. If you're worried about my yearbook, have at it, Senator.

Senator WHITEHOUSE. So let us look at "Beach Week Ralph Club Biggest Contributor." What does the word "ralph" mean in that instance?

Judge KAVANAUGH. That probably refers to throwing up. I'm known to have a weak stomach and always have. In fact, the last time I was here, you asked me about having ketchup on spaghetti. I always have had a weak stomach.

Senator WHITEHOUSE. I do not know that I asked about ketchup on spaghetti, but—

Judge KAVANAUGH. You didn't. Someone did.

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. And this is well known. Anyone who's known me, like a lot of these people behind me have known me my whole life, know, you know, I got a weak stomach, whether it's with beer or with spicy food or anything.

Senator WHITEHOUSE. So the vomiting that you reference in the "Ralph Club" reference related to the consumption of alcohol?

Judge KAVANAUGH. Senator, I was at the top of my class academically, busted my butt in school, captain of the varsity basketball team, got into Yale College. When I got into Yale College, got into Yale Law School. Worked my tail off.

Senator WHITEHOUSE. And, did the word "ralph" you used in your yearbook relate to alcohol?

Judge KAVANAUGH. I already said—I already answered the question. If you're—

Senator WHITEHOUSE. Did it relate to alcohol?

Judge KAVANAUGH. I like beer.

Senator WHITEHOUSE. You have not answered that.

Judge KAVANAUGH. I like beer. I don't know if you do. Do you like beer, Senator, or not?

Senator WHITEHOUSE. Okay.

Judge KAVANAUGH. What do you like to drink?

Senator WHITEHOUSE. The next one is—

Judge KAVANAUGH. Senator, what do you like to drink?

Senator WHITEHOUSE [continuing]. Judge, have you—I do not know if it is “boofed” or “bufed”—how do you pronounce that?

Judge KAVANAUGH. That refers to flatulence. We were 16.

[Laughter.]

Senator WHITEHOUSE. Okay. And so, when your friend Mark Judge said the same—put the same thing in his yearbook page back to you, he had the same meaning, it was flatulence?

Judge KAVANAUGH. I don't know what he did, but that's my recollection. We want to talk about flatulence at age 16 on a yearbook page, I'm game.

Senator WHITEHOUSE. You mentioned, I think, the “Renaté” or “Renate,” “Renata”—I do not know how you pronounce that. That is the proper name of an individual you know?

Judge KAVANAUGH. “Renate.”

Senator WHITEHOUSE. “Renate.” It is spelled with an “e” at the end, R-e-n-a-t-e. Is that—

Judge KAVANAUGH. Correct.

Senator WHITEHOUSE. Okay. And then after that is the word “alumnius.” What does the word “alumnius” mean in that context?

Judge KAVANAUGH. I explained that in my opening statement. We—she was a great friend of ours. A bunch of us went to dances with her. She hung out with us as a group. The media circus that has been generated by this thought and reported that it referred to sex. It did not.

Never had any—as she herself said on the record, any kind of sexual interaction with her. And I'm sorry how that's been misinterpreted and I'm sorry about that, as I explained in my opening statement. Because she's a good person, and to have her name dragged through this hearing is a joke and really an embarrassment.

Senator WHITEHOUSE. “Devil's triangle”?

Judge KAVANAUGH. Drinking game.

Senator WHITEHOUSE. How is it played?

Judge KAVANAUGH. Three glasses in a triangle.

Senator WHITEHOUSE. And?

Judge KAVANAUGH. You ever played quarters?

Senator WHITEHOUSE. No.

Judge KAVANAUGH. Okay. It's a quarters game.

Senator WHITEHOUSE. “Anne Dougherty's.”

Judge KAVANAUGH. As you can tell from my calendar, she had a party on the Fourth of July in—the beach in Delaware.

Senator WHITEHOUSE. And there are like one, two, three, four, five, six, seven “Fs” in front of the Fourth of July, what does that signify, if anything?

Judge KAVANAUGH. One of our friends, Squi, when he said the “F” word, starting at a young age, had kind of a wind-up to the “F” word, kind of a “f-f-f” and then the word would come out. And when we were 15, we thought that was funny, and it became an inside joke for that, how he would say—and I won’t repeat it here—for the “F” word.

Senator WHITEHOUSE. Referring to “Georgetown versus Louisville” and—

Judge KAVANAUGH. Do you want any more on the “Fs”?

Senator WHITEHOUSE. No. And the “Orioles versus Red Sox,” in both, you respond, “Who won anyway?” Or, “Who won that game anyway?” Should we draw any conclusion that a loss of recollection associated with alcohol was involved in you not knowing who won the games that you attended?

Judge KAVANAUGH. No. First of all, the Georgetown–Louisville was watching it on TV, a party, and the—

Senator WHITEHOUSE. That is not inconsistent with drinking and not remembering what happened.

Judge KAVANAUGH. I’m aware. And the point of both was, we, in essence, were having a party and didn’t pay attention to the game, even though the game was the excuse we had for getting together. I think that’s very common.

I don’t know if you’ve been to a Super Bowl party, for example, Senator, and not paid attention to the game and just hung out with your friends. I don’t know if you’ve done that or not. But that’s what we were referring to in those—those two occasions.

Chairman GRASSLEY. Senator Cornyn.

Senator CORNYN. Judge, I cannot think of a more embarrassing scandal for the United States Senate since the McCarthy hearings when the comment was about the cruelty of the process toward the people involved, and the question was asked, “Have you no sense of decency?” And, I am afraid we have lost that, at least for the time being.

Do you understand you have been accused of multiple crimes?

Judge KAVANAUGH. I’m painfully aware, for my family and me to read about this—

Senator CORNYN. And—

Judge KAVANAUGH [continuing]. Breathless reporting.

Senator CORNYN [continuing]. Of course, the sexual assault that Dr. Ford claims that you have denied, then the claims of Ms. Ramirez that not even The New York Times would report because it could not corroborate it. And then Stormy Daniels’ lawyer released a bombshell accusing you of gang rape. All of those are crimes, are they not?

Judge KAVANAUGH. They are, and I’m—I’m never going to get my reputation back. My life is totally and permanently altered.

Senator CORNYN. Well, Judge, do not give up.

Judge KAVANAUGH. I’m not giving up. I will—

Senator CORNYN. The American people—

Judge KAVANAUGH. I will—

Senator CORNYN. The American people are listening to this, and they will make their decision, and I think you will come out on the right side of that decision.

Judge KAVANAUGH. Well, I always be a good person and try to be a good judge, whatever happens. But—

Senator CORNYN. So this is not a job interview. You have been accused of a crime. If you have lied to the Committee and the investigators, that is a crime, in and of itself. Correct?

Judge KAVANAUGH. That is correct.

Senator CORNYN. So in order to vote against your nomination, we would have to conclude that you are a serial liar, and you have exposed yourself to legal jeopardy in the way in your interaction with this Committee and the investigators. Is that not correct?

Judge KAVANAUGH. That's my understanding.

Senator CORNYN. You talked in your interview on—with Martha MacCallum the other night about a fair process. Some of my colleagues across the aisle say, well, the burden is not on the accuser because this is a job interview. The burden is on you.

But you said you were not there, and it did not happen. It is impossible for you to prove a negative. So I would just suggest that you have been accused of a crime and that a fair process under the United States Constitution, under our notion of fair play, means that the people who make an accusation against you have to come forward with some evidence. Is that not part of a fair process?

Judge KAVANAUGH. Yes, sir, Senator.

Senator CORNYN. And part of that means that if you are going to make an allegation, there needs to be corroboration. In other words, you are not guilty because somebody makes an accusation against you in this country. We are not a police state. We do not give the Government that kind of power. We insist that those charges be proven by competent evidence.

And I know we are not in a court. I have told my colleagues if we were in court, half of them would be in contempt of court. But you have been accused of a crime, and I believe fundamental notions of fair play and justice in our constitutional system require that if somebody is going to make that accusation against you, then they need to come forward with some corroboration, not just allegations.

And you are right to be angry about the delays in your ability to come here and protect your good name because, in the interim, it just keeps getting worse. If it is not Dr. Ford, it is this story that not even The New York Times would report, the allegation of Ms. Ramirez. And then Stormy Daniels' lawyer comes up with this incredible story accusing you of the most sordid and salacious conduct.

It is outrageous, and you are right to be angry. But this is your chance to tell your story, and I hope you have a chance to tell us everything you want to tell us. But the burden is not on you to disprove the allegations made. The burden under our system, when you accuse somebody of criminal conduct, is on the person making the accusation.

Now I understand we are not—this is not a trial, like I said. But I just wanted to make sure that we understood. It is hard to reconstruct what happened 36 years ago, and I appreciate what you said

about Dr. Ford, that perhaps she has had an incident at some point in her life, and you are sympathetic to that.

And—but your reputation is on the line, and I hope people understand the gravity of the charges made against you and what a fair process looks like.

Chairman GRASSLEY. Senator Klobuchar.

Senator KLOBUCHAR. Thank you, Mr. Chairman.

Judge, we are talking here about decency, and you understand we have this constitutional duty to advise and consent. And for me, when this evidence came forward, I decided that I needed to look at this, and I needed to find out about it, and I needed to ask you questions about it, as well as others that were involved.

So, again, I am not going to take quite the same approach as my colleagues here and talk about Don McGahn or any of this. Why do you not just ask the President? Mrs.—Dr. Ford cannot do this. We clearly have not be able to do this. But just ask the President to re-open the FBI investigation.

Judge KAVANAUGH. I think the Committee is doing—you're doing the investigation. I'm here to answer your questions. And I should say one thing, Senator Klobuchar, which is I appreciate our meeting together, and I appreciate how you handled the prior hearing, and I have a lot of respect for you.

Senator KLOBUCHAR. Well, thank you.

All of that aside, here is the thing. You could actually just get this open so that we can talk to these witnesses, and the FBI can do it instead of us. And you have come before us, but we have people like Mark Judge, who Dr. Ford says was a witness to this. We have this polygraph expert that my colleagues were raising issues about the polygraph. We would like to have that person come before us.

And I just think if we could open this up—

Judge KAVANAUGH. I don't mean—I don't mean to interrupt, but I guess I am, but Mark Judge has provided sworn statement saying this didn't happen and that I never did or would do—

Senator KLOBUCHAR. But we would like the FBI to be able to follow up and ask him questions. You know, we talked about past nomination processes, and you talked about those. And I note that President George Bush in the Anita Hill Justice Thomas case, he opened up the FBI investigation and let questions be asked. And I think it was helpful for people. So was his decision reasonable?

Judge KAVANAUGH. I don't know the circumstances of that. What I know, Senator, is I'm—

Senator KLOBUCHAR. That he just—the circumstances are that he opened up the investigation so the FBI could ask some questions. That what he—he opened up the background check.

Judge KAVANAUGH. I'm here to answer questions about my yearbook or about, you know, what I—and my sports or, you know, summer basketball—

Senator KLOBUCHAR. Okay, that is—okay, I am not going to ask—okay. I am not going to ask about the yearbook.

So most people have done some drinking in high school and college, and many people even struggle with alcoholism and binge drinking. My own dad struggled with alcoholism most of his life, and he got in trouble for it, and there were consequences. But he

is still in AA at age 90, and he is sober. And in his words, he was pursued by grace, and that is how he got through this.

So in your case, you have said here and other places that you never drank so much that you did not remember what happened. But yet we have heard, not under oath, but we have heard your college roommate say that you did drink frequently—these are in news reports—that you would sometimes be belligerent.

Another classmate said it is not credible for you to say you did not have memory lapses. So drinking is one thing.

Judge KAVANAUGH. I don't—I actually don't think that's—the second quote is correct. On the first quote, if you wanted, I provided some material that's still redacted about the situation with the freshman year roommate, and I don't really want to repeat that in a public hearing. But just so you know, there were three people in a room—Dave White, Jamie Roche, and me—and it was a contentious situation, where Jamie did not like Dave White at all. And, I mean, this—

Senator KLOBUCHAR. Okay. I just—

Judge KAVANAUGH. So Dave White came back from home one weekend, and Jamie Roche had moved all his furniture out into the—out into the courtyard.

Senator KLOBUCHAR. Okay.

Judge KAVANAUGH. And so he walks in, and so that's your source on that. So there's some old—

Senator KLOBUCHAR. So, drinking is one thing—

Judge KAVANAUGH. And there's much more. Look at the redacted portion of what I said. I don't want to repeat that in a public hearing, but there's—

Senator KLOBUCHAR. I will. I will. Could I just ask one more question?

Judge KAVANAUGH [continuing]. Redacted information about that.

Senator KLOBUCHAR. Okay. Drinking is one thing, but the concern is about truthfulness, and in your written testimony, you said sometimes you had too many drinks. Was there ever a time when you drank so much that you could not remember what happened, or part of what happened, the night before?

Judge KAVANAUGH. No. I remember what happened. And, I think you've probably had beer, Senator, and so—

Senator KLOBUCHAR. So, you are saying there has never been a case where you drank so much that you did not remember what happened the night before, or part of what happened?

Judge KAVANAUGH. It's—you're asking about blackout. I don't know, have you?

Senator KLOBUCHAR. Could you answer the question, Judge? So, you—that has not happened? Is that your answer?

Judge KAVANAUGH. Yes. And, I'm curious if you have.

Senator KLOBUCHAR. I have no drinking problem, Judge.

Judge KAVANAUGH. Yes, nor do I.

Senator KLOBUCHAR. Okay. Thank you.

Chairman GRASSLEY. Before I go to Senator Hatch, since this FBI thing keeps coming up all the time, let us get back to basics. First of all, anybody, including any Senator, that has brought up this issue, could ask for an FBI investigation. What the FBI does

is gather information for the White House, then the file is sent to the Committee for us to make our own evaluations. We are capable of making our own determination about the accuracy of any of those allegations.

The FBI has put out a statement over, now I suppose it is a month ago, clearly stating this matter is closed as far as the letter being sent to them, and there is no Federal crime to investigate. If Senate Democrats hope for the FBI to draw any conclusions on this matter, I am going to remind you what Joe Biden said. Now I said this in my statement, but maybe—maybe people are not listening when I say, and maybe they will not even hear this.

Joe Biden, quote: “The next person who refers to an FBI report as being worth anything obviously does not understand anything. The FBI explicitly does not—does not, in this or any other case, reach a conclusion, period. They say ‘he said, she said, they said,’ period. So when people wave an FBI report before you”—or even bring it up now as something prospectively, that was not in his quote—“understand they do not, they do not, they do not reach conclusions. They do not make recommendations.”

Senator Hatch.

Senator WHITEHOUSE. Mr. Chairman? Mr. Chairman, may I say for the record that actually we have asked. You said that nobody has asked the FBI or we could ask the FBI. I actually have. I think others have, and I think that the issue is that part of what an FBI report does is to investigate and seek either corroborating or exculpatory evidence. It is not so much the conclusion that it draws as the breadth of the evidence that is sought out through the investigation and the difference between what somebody might say to an FBI agent when they are being examined and, for instance, Mr. Judge’s letter signed by his lawyer sent in.

It is just a different thing, and I believe still that this is the first background investigation in the history of background investigations that has not been reopened when new credible derogatory information was raised about the subject, about the nominee.

So, you know, I just did not want to let the point you made stand without referencing what we have tried to do.

Chairman GRASSLEY. Well, pardon me, but I will just add to the point you made. The letter was sent to the FBI. The FBI sent it to the White House with a letter saying the case is closed.

We are taking a break now. Senator, we are taking a break now. A 15-minute break.

[Whereupon, at 5:09 p.m., the Committee was recessed.]

[Whereupon, at 5:28 p.m., the Committee reconvened.]

Chairman GRASSLEY. Judge, are you ready?

Judge KAVANAUGH. I am ready. And can I say one thing?

Chairman GRASSLEY. Yes.

Judge KAVANAUGH. I was just going to say, I started my last colloquy by saying to Senator Klobuchar how much I respect her and respected what she did at the last hearing, and she asked me a question at the end that I responded by asking her a question, and I’m sorry I did that. This is a tough process. I’m sorry about that.

Senator KLOBUCHAR. I appreciate that. I would like to add, when you have a parent that is an alcoholic, you are pretty careful about drinking. And the second thing is, I was truly just trying to get to

the bottom of the facts and the evidence, and I, again, believe we do that by opening up the FBI investigation, and I would call it a "background check" instead of "investigation."

Thank you.

Judge KAVANAUGH. I appreciate that.

Chairman GRASSLEY. Senator Hatch.

Senator HATCH. Well, thank you. Judge, welcome. We are happy to have you here. I would just like to say a few words.

My friend from Arizona emphasized yesterday that we have before us today two human beings: Dr. Ford and Judge Kavanaugh. They deserve, each of you deserves, to be treated fairly and respectfully. We tried to do that with Dr. Ford earlier, and I think we succeeded. It is important that we treat Judge Kavanaugh fairly now, and it remains to be seen how that is going to work out.

Judge Kavanaugh has been a Federal judge for 12 years, and he has been a great Federal judge on the second highest court in the Nation. He has earned a reputation for fairness and decency. His clerks love him. His students he teaches in law school as well, his students love him. His colleagues love him. This man is not a monster, nor is he what has been represented here in these hearings. We are talking today about Judge Kavanaugh's conduct in high school, and even then, and as a freshman in college, I guess as well.

Serious allegations have been raised that if Judge Kavanaugh committed sexual assault, he should not serve on the Supreme Court. I think we would all agree with that. But the circus atmosphere that has been created since my Democratic colleagues first leaked Dr. Ford's allegations to the media 2 weeks ago, after sitting on them for 6 weeks, I might add, has brought us the worst in our politics. It certainly has brought us no closer to the truth. Anonymous letters with no name and no return address are now being treated as national news. Porn star lawyers with facially implausible claims are driving the news cycle.

I hate to say this, but this is worse than Robert Bork, and I did not think it could get any worse than that. This is worse than Clarence Thomas. I did not think it could get any worse than that. This is a national disgrace the way you are being treated.

And in the middle of it all, we have Judge Kavanaugh, a man who until 2 weeks ago was a pillar of the legal community, and there has been no whisper of misconduct by him in the time he has been a judge. What we have are uncorroborated, unsubstantiated claims from his teenage years, claims that every alleged eyewitness has either denied or failed to corroborate.

I do not mean to minimize the seriousness of the claims. Yes, they have been serious claims. But the search for truth has to involve more than bare assertions. Like Dr. Ford, Judge Kavanaugh deserves fair treatment. He was an immature high schooler. So were we all. That he wrote or said stupid things sometimes does not make him a sexual predator.

I understand the desire of my colleagues to tear down this man at any cost. I do understand it. But let us at least be fair and look at the facts, or the absence thereof. Guilt by association is wrong. Immaturity does not equal criminality. That Judge Kavanaugh drank in high school or college does not make him guilty of every

terrible thing that he has recently been accused of. A lifetime of respect and equal treatment ought to mean something when assessing allegations that are flatly inconsistent with the course of a person's entire adult life.

With those comments, Judge, I would just like to ask you a few questions, if I can, about how—and if you can be short in your answers, it would help me get through a bunch of them—about how this process has unfolded. When did you first learn of Dr. Ford's allegations against you?

Judge KAVANAUGH. It was a week ago Sunday when—The Washington Post story.

Senator HATCH. Isn't that amazing? Did the Ranking Member raise these allegations in your one-on-one meeting with her last month?

Judge KAVANAUGH. She did not.

Senator HATCH. Did the Ranking Member raise them at your public hearing earlier this month?

Judge KAVANAUGH. No.

Senator HATCH. Did the Ranking Member raise them at the closed session that followed the public hearing?

Judge KAVANAUGH. She was not there.

Senator HATCH. Did the Ranking Member or any of her colleagues raise them in the 1,300 written questions that were submitted to you following the hearing?

Judge KAVANAUGH. No.

Senator HATCH. When was the first time that the Ranking Member or her staff asked you about these allegations?

Judge KAVANAUGH. Today.

Senator HATCH. When did you first hear of Ms. Ramirez's allegations against you?

Judge KAVANAUGH. In the last—in the period since then, the New Yorker story.

Senator HATCH. Did the Ranking Member or any of her colleagues or any of their staffs ask you about Ms. Ramirez's allegations before they were leaked to the press?

Judge KAVANAUGH. No.

Senator HATCH. When was the first time that the Ranking Member or any of her colleagues or any of their staff asked you about Ms. Ramirez's allegations?

Judge KAVANAUGH. Today.

Senator HATCH. I think it is a disgrace between—

Chairman GRASSLEY. Senator Coons.

Senator COONS. Thank you, Mr. Chairman.

Judge Kavanaugh, today's hearing is about Dr. Ford's serious allegations about sexual assault. You have unequivocally denied those claims, but we are here today to assess her credibility and yours. And in our previous vigorous exchanges in the previous confirmation hearing rounds, I have found that your answers at times vigorously defended, but at other times have struck me as evasive or not credible on key issues. And it is against that backdrop that I am seeking to assess your credibility today.

You said in your opening that rule of law means taking allegations seriously, and I agree with that. It brings me no joy to ques-

tion you on these topics today, but I do think they are serious, and I think they are worthy of our attention.

So let me, if I can, return to a line of questioning that my colleague was on before, which was about whether you have ever gotten aggressive while drinking or forgotten an evening after drinking.

Judge KAVANAUGH. Those are two different questions. I've already answered the second one. As to the first, I think the answer to that is basically no. I don't know really what you mean by that. Like, what are you talking about?

Senator COONS. Well, the reason I—

Judge KAVANAUGH. I don't mean it that way, but no is the basic answer unless you're talking about something where—that I'm not aware of that you're going to ask about.

Senator COONS. The reason I am asking, we have had a very brief period of time to weigh outside evidence, and I will join my colleagues in saying I wish we had more evidence in front of us today to weigh.

Do you remember Liz Swisher, a college classmate of yours from Yale?

Judge KAVANAUGH. First, on your point about the outside evidence, all four witnesses said—

Senator COONS. Well, let me focus—I am trying to get this question—

Judge KAVANAUGH. I know, but you made a point, and I just want to emphasize, all four witnesses who were allegedly at the event have said it didn't happen, including Dr. Ford's long-time friend, Ms. Keyser, who said she—

Senator COONS. That is right. And if Mark Judge were in front of us today to question, we would be able to assess his credibility.

Judge KAVANAUGH. But he's—

Senator COONS. Let me just get this through, if I can, Your Honor. Liz Swisher is a college classmate. She is now a medical doctor. And I am quoting from a recent interview she gave. She said, "Brett Kavanaugh drank more than a lot of people. He'd end up slurring his words, stumbling. It's not credible for him to say he's had no memory lapses in the nights he drank to excess. I know because I drank with him."

How should we assess that?

Judge KAVANAUGH. She then goes on, if you kept reading, and says she actually can't point to any specific instance like that.

Senator COONS. The quote that jumped out at me was, "Brett was a sloppy drunk, and I know because I drank with him." There is also—

Judge KAVANAUGH. I do not think that's a fair characterization, and Chris Dudley's quoted in that article, and I would refer you to what Chris Dudley said. I spent more time with Chris Dudley in college than just about anyone. And I'd refer you to what he said.

Senator COONS. In other reporting, as I am sure you know, a college classmate described you as relatively shy, but said that when you drank you could be aggressive or even belligerent. And your roommate, as I think you discussed with Senator Klobuchar, said you were frequently drunk.

Judge KAVANAUGH. And that roommate, that was freshman year roommate.

Senator COONS. Yes.

Judge KAVANAUGH. And there was contention between him and the third person. There were three of us in a small room, and you should look at what I said in the redacted portion of the transcript about him. And you should assess his credibility with that in mind.

Senator COONS. Put yourself in our shoes for a moment, if you would, Judge, and I know that is asking a lot of you in this setting. But suppose you had gone through a process to select someone for an incredibly important job and a position you had a lot of qualified candidates, and as you are finishing the hiring process, you learn of a credible allegation that, if true, would be disqualifying. Wouldn't you either take a step back and conduct a thorough investigation or move to a different candidate? And why not agree to a 1-week pause to allow the FBI to investigate all these allegations and allow you an opportunity a week from now to have the folks present in front of us for us to assess their credibility and for us to either clear your name or resolve these allegations by moving to a different nominee?

Judge KAVANAUGH. All four witnesses who were alleged to be at the event said it didn't happen, including Dr. Ford's long-time friend, Ms. Keyser, who said that she didn't know me and that she does not recall ever being at a party with me with or without Dr. Ford.

Senator COONS. What I struggle with, Judge Kavanaugh, is the absence of a fair, Federal law enforcement-driven, nonpartisan process to question the various people who I think are critical to this. My concern, should you move forward, is what it will do to the credibility of the Court and how that may well hang over your service. I understand your concern about this—

Judge KAVANAUGH. Look, Senator, my—

Senator COONS. But I wish you would join us—

Judge KAVANAUGH [continuing]. Reputation has been—

Senator COONS [continuing]. In calling for an FBI investigation for 1 week to clear or confirm some of these allegations.

Chairman GRASSLEY. I will give you time to answer.

Judge KAVANAUGH. When you say a week delay, do you know how long the last 10 days have been for us?

Senator COONS. They were probably an eternity. But in the Judge Thomas confirmation—

Judge KAVANAUGH. For us, every day—

Senator COONS [continuing]. It was a 4-day delay.

Judge KAVANAUGH [continuing]. Has been a lifetime, and, you know, yes—and it's been investigated, and all four witnesses say it didn't happen, and they've said it under penalty of felony. And I've produced my calendars which show, you know, a lot that's important evidence. And you act like—I mean, the last 10 days, I asked for a hearing the day after the allegation.

Chairman GRASSLEY. Before I call on Senator Lee, I want to emphasize something here. Talking about doing something without enough time, we had 45 days between July 30th and September the 13th, I believe it is, when we could have been investigating this. And in regard to this candidate, if you take the average of 65

to 70 days between the time that a person is announced by the President and the Senate votes on it, it is about 65 to 70 days. And here we are at about 85 to 90 days. So there is plenty of time put in on this nomination.

Senator Lee—oh, no, wait a minute. I have got one other thing I want to do. Everybody else has been putting letters in the record. I have a letter here from 65 women who knew Judge Kavanaugh between the years 1979 and 1983, the years he attended Georgetown Prep High School. These women wrote to the Committee because they know Judge Kavanaugh and they know that the allegations raised by Dr. Ford are completely, totally inconsistent with his character. These 65 women know him through social events and church. Many have remained close friends with him. Here is what they say, partly quoting the letter: “Through the more than 35 years we have known him, Brett has stood out for his friendship, character, and integrity. He has always treated women with decency and respect. That was true in high school, and it remains true to this day.”

“In closing,” they wrote, Judge Kavanaugh “has always been a good person.”

So, without objection, I will put it in the record.

[The information appears as a submission for the record.]

Chairman GRASSLEY. Senator Lee.

Senator LEE. Judge Kavanaugh, you have been cooperative at every stage of this investigation, both your background investigation and the investigation conducted by this Committee. Is that correct?

Judge KAVANAUGH. That’s correct, Senator.

Senator LEE. It is also correct that you yourself do not control the FBI or when it conducts an investigation. You are a nominee. You are not tasked with the job of deciding who, when, whether, or how conducts an investigation.

Judge KAVANAUGH. That’s correct.

Senator LEE. But at every moment when he either we or, prior to taking the jurisdiction over it, the FBI has asked you questions, you have been attentive and you have been responsive. Isn’t that right?

Judge KAVANAUGH. That’s correct, throughout my career.

Senator LEE. I have colleagues today who have repeatedly asked for an FBI investigation, and there are some ironies in this, ironies that ascend at least two levels.

In the first place, at least one of my colleagues, at least one of them, had access to this information many, many weeks before anyone else did, had the ability and I believe the moral duty and obligation to report those facts to the FBI, at which point they could have and would have been investigated by the FBI. And that could have been handled in such a way that did not turn this into a circus, one that has turned your life upside down and that of your family and the life of Dr. Ford and her family upside down. I consider this most unfortunate given that this was entirely within the control of at least one of my Democratic colleagues to do this.

The second level of irony here is that while calling repeatedly for an investigation by the FBI, an investigation over which you have no ability to control, by the way, an investigation you have no au-

thority to call for, while calling for an investigation, we are in the middle of a conversation that involves questions to you. And so I ask my Democratic colleagues, if you have questions for Judge Kavanaugh, ask him. He is right here. If that is really what you want is the truth, ask him questions right now. If you have questions of other witnesses, then for the love of all that is sacred and holy, participate in the Committee investigations that have been going on, as you have not been participating, with the Committee staff investigating the outside witnesses.

If someone really were interested in the truth, this is what they would do. They would participate in the investigation, and when we have a Committee investigation, a Committee hearing with live witnesses, they would talk about that rather than something else they wish they were having in front of them. If what they want is a search for the truth, then now is their choice. If, on the other hand, what they want to do is delay this until after the election, which at least one of my colleagues on the Democratic side has acknowledged, then that might be what they would do.

Finally, I want to point out that there is significant precedent from our former Chairman of this Committee, Chairman Joe Biden. During the Clarence Thomas hearings, nearly three decades ago, Chairman Biden made some interesting observations about FBI reports and their role in this process. Here is what he said: "The next person who refers to an FBI report as being worth anything obviously doesn't understand anything. The FBI explicitly does not, in this or any other case, reach a conclusion. Period. Period." Those are his dual "periods," not mine.

I continue the quote: "The reason why we cannot rely on the FBI report, you would not like it if we did because it is inconclusive. So when people wave an FBI report before you, understand they do not—they do not—they do not reach conclusions. They do not make—as my friend points out more accurately, they do not make recommendations. In other words, the role of the FBI is to flag issues. Those issues have been flagged." Sadly, in this case they were flagged not as they should have been, not in the timing in which they should have been. And, therefore, they couldn't have been addressed in the manner that would have preserved a lot more dignity for you, for your family, and for Dr. Ford and her family. They were instead held out until the final moment. I consider that most unfortunate. And for that, on behalf of this Committee, I extend to you my most profound sympathies, and my most profound sympathies to Dr. Ford and her family as well.

Chairman GRASSLEY. Senator—

Senator SASSE. Mr. Chairman, since we do not have enough slots for everyone, can I have the last minute of Senator Lee so that Senator Kennedy can be recognized?

Judge, we did 38 hours in public with you. Did we have any private hearings with you?

Judge KAVANAUGH. Yes.

Senator SASSE. Was that a fun time for you when people, when Senators could ask questions that are awkward or uncomfortable about potential alcoholism, potential gambling addiction, credit card debt, if your buddies floated you money to buy baseball tickets? Did you enjoy that time we spent in here late one night?

Judge KAVANAUGH. I am always happy to cooperate with the Committee.

Senator SASSE. That is charitable. Were you ever asked about any sexual allegations when we had that time in here with you alone?

Judge KAVANAUGH. No.

Senator SASSE. Did the Ranking Member already have these allegations for—I guess this would have been September 6 or 7, and the letter was written on July 30th. A recommendation was made by the Ranking Member or her staff to Dr. Ford—and, by the way, I think Dr. Ford is a victim, and I think she has been through hell, and I am very sympathetic to her. But did the Ranking Member's staff, did we hear today, make a recommendation to hire a lawyer and she knew all that, and yet we had a hearing here with you and none of these things were asked? But then once the process was closed, once the FBI investigation was closed, once we were done meeting in public and in private, then this was sprung on you? I just want to make sure I have the dates correct. Right? Because we have got 35-plus days from all the time that this evidence was in the hands, recommendations were made to an outside lawyer, you could have handled all this, we could have had this conversation in private in a way that did not, not only do crap to his family but do—

Chairman GRASSLEY. Senator—

Senator SASSE. I yield my time. I am just trying to see if he could do math about 35 days. That was a little bit of a question.

Chairman GRASSLEY. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Good afternoon, Judge Kavanaugh.

As a Federal judge, you are aware of the jury instruction, "Falsus in uno, falsus in omnibus," are you not? You are aware of that jury instruction?

Judge KAVANAUGH. Yes, I am.

Senator BLUMENTHAL. You know what it means.

Judge KAVANAUGH. You can translate it for me, Senator. You can do it better than I can.

Senator BLUMENTHAL. "False in one thing, false in everything," meaning, in jury instructions that we—some of us as prosecutors have heard many times, has told a jury that they can disbelieve a witness if they find him to be false in one thing. So the core of why we are here today really is credibility. Let me talk—

Judge KAVANAUGH. The core of why we are here is an allegation for which the four witnesses present have all said it didn't happen.

Senator BLUMENTHAL. Let me ask you about Renata Dolphin, who lives in Connecticut. She thought these yearbook statements were, quote, "horrible, hurtful, and simply untrue," end quote, because "Renata alumni" clearly implied some boast of sexual conquest, and that is the reason that you apologized to her. Correct?

Judge KAVANAUGH. That's false, speaking about the yearbook, and she said she and I never had any sexual interaction. So your question—your question is false, and I've addressed that in the opening statement, and so your question is based on a false premise and really does great harm to her. I don't know why you're

bringing this up, frankly. Doing great harm to her by even bringing her name up here is really unfortunate.

Senator BLUMENTHAL. Well, calling someone an alumnus in that way—

Judge KAVANAUGH. Well, implying what you're implying about—

Senator BLUMENTHAL [continuing]. Especially interpreted by a number of your football friends at the time as boasting of sexual—that is the reason that I am bringing it up.

Judge KAVANAUGH. Yes. No, it's false. You're implying that—look what you're bringing up right now about her. Look what you're doing.

Senator BLUMENTHAL. Mr. Chairman, I ask that—

Judge KAVANAUGH. Don't bring her name up.

Senator BLUMENTHAL [continuing]. These interruptions not be subtracted from my time.

Chairman GRASSLEY. Ask your question, and then—

Judge KAVANAUGH. She's a great person. She's always been a great person. We never had any sexual interaction. By bringing this up, you're just dragging her through the mud. It's just unnecessary.

Chairman GRASSLEY. Proceed, Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Mr. Chairman.

You have made reference, Judge, to a sworn statement, I believe, by Mark Judge to the Committee. Is that correct?

Judge KAVANAUGH. I've made reference to what Mark Judge's lawyer sent to the Committee.

Senator BLUMENTHAL. Yes. It is not a sworn statement, is it?

Judge KAVANAUGH. Under penalty of felony.

Senator BLUMENTHAL. Well, it is a statement signed by his lawyer, Barbara VanGelder. It is six cursory and conclusory sentences. Are you saying that that is a substitute for an investigation by the FBI or some interview by the FBI under oath?

Judge KAVANAUGH. Under penalty of felony, he said that this kind of event didn't happen and that I never did or would have done something like that.

Senator BLUMENTHAL. As a Federal judge, you always want the best evidence, don't you?

Judge KAVANAUGH. Senator, he has said and all the witnesses present—look at Ms. Keyser's statement. She's—she's—

Senator BLUMENTHAL. Let me move on to another topic. You have testified to this Committee this morning—this afternoon: "This whole 2-week effort has been a calculated and orchestrated political hit, fueled with apparent pent-up anger about President Trump and the 2016 election, fear that has been unfairly stoked about my judicial record, revenge on behalf of the Clintons, and millions of dollars in money from outside left-wing opposition groups."

Is it your testimony that the motivation of the courageous woman who sat where you did just a short time ago was revenge on behalf of a left-wing conspiracy or the Clintons?

Judge KAVANAUGH. Senator, I said in my opening statement that she preferred confidentiality, and her confidentiality was destroyed by the actions of this Committee.

Senator BLUMENTHAL. Let me ask you this: In a speech that you gave at Yale, you described “falling out of the bus onto the front steps of the Yale Law School at 4:45 a.m.” and then—

Judge KAVANAUGH. I wasn’t—I wasn’t describing me. I organized—

Senator BLUMENTHAL [continuing]. And trying to—

Judge KAVANAUGH. Senator, Senator, let me finish here, please. I organized a third-year, end-of-school party for 30 of my classmates to rent a bus to go to Fenway Park in Boston, which was about a 3-hour trip. I bought all the tickets. You and I have discussed that before. I bought all the baseball tickets. I rented the bus. I organized the whole trip. We went to Fenway Park. Roger Clemens was pitching for the Red Sox. We had a great time. George Brett was playing third base for the Royals—actually, he was playing left field that night, and he—and we went to the game and got back, and then we went out. It was a great night of friendship—

Senator BLUMENTHAL. I apologize for interrupting, Judge, but I need to finish the quote before I ask you the question. The quote ends—

Judge KAVANAUGH. I wasn’t talking about me.

Chairman GRASSLEY. Okay. We will—

Senator BLUMENTHAL. The quote ends that you tried to, quote, “piece things back together, ” end quote, to recall what happened that night, meaning—

Judge KAVANAUGH. I know what happened.

Senator BLUMENTHAL. Well, you—

Chairman GRASSLEY. Judge, let him—will you quickly answer your question, then I am going to let him answer—

Judge KAVANAUGH. I know what happened that night.

Senator BLUMENTHAL. I will finish asking my question.

Chairman GRASSLEY. Please, go ahead, but do it quickly.

Senator BLUMENTHAL. Doesn’t that imply to you that you had to piece things back together, you had to ask others what happened that night?

Judge KAVANAUGH. No, it—

Chairman GRASSLEY. Okay. You take your time now and answer the question. Then, Senator Crapo.

Judge KAVANAUGH. Definitely not. I know exactly what happened that night. It was a great night of fun. I was so happy that—there was great camaraderie. Everyone looks back fondly on the trip to Fenway Park. And then we went out together, a group of classmates, and I know exactly what happened the whole night, and I’m happy—

Senator BLUMENTHAL. Judge, do you believe Anita Hill?

Chairman GRASSLEY. Senator Crapo.

[Voice off microphone.] Your time is up. Your time is up.

Chairman GRASSLEY. Senator Crapo.

Senator CRAPO. Thank you, Mr. Chairman.

And, Judge Kavanaugh, first I want to get into this whole question that has been bandied back and forth here almost endlessly today about the FBI investigation process, because I think it—I want to follow up a little bit on what Senator Lee and Senator Sasse have referenced. There has been a lot of talk here about we

need an FBI investigation. In these processes, which you have been through a number of times now when the FBI does a background check with regard to a nomination, could you quickly describe that for us? What does the FBI do?

Judge KAVANAUGH. The FBI gathers statements from people who have information. They don't resolve credibility. They gather the information, and the credibility determination is made by the ultimate factfinder, which in this case is the United States Senate. The Committee, of course, hears gathered evidence.

Senator CRAPO. And the FBI then gives that report to the White House, if I understand it, and the White House then transfers it to the Senate. Is that the chain of control?

Judge KAVANAUGH. That's my understanding, yes.

Senator CRAPO. And as you indicated, it does not do—and it has been said many times here today; the FBI does not make judgments. It gives the Senate Committee information.

At that point in time, if I understand the process correctly, the Senate, the United States Senate Judiciary Committee, has legal authorities—if it receives information in an FBI report that it wants to further investigate, the Senate has legal authority to conduct further investigation. Is that correct?

Judge KAVANAUGH. That's my understanding.

Senator CRAPO. And that is what has been referenced here many times about how some of these witnesses that were identified in the very late information that we received have made statements that are under penalty of felony. That is a felony for lying to the Senate Judiciary Committee. And as I understand it, what happens is the Senate Judiciary Committee, which has authority under law to conduct those kinds of investigations, follows up on the FBI reports to finish out the investigation that it wants with regard to any information that it receives that needs further investigation. Is that your understanding of the process?

Judge KAVANAUGH. That is my understanding, Senator.

Senator CRAPO. Now, in this case, there has been a lot of talk here today—and if I have time, I will get into it. It looks like I will run out of time. But in this case, there is a lot of concern by many that there was not so much an interest in an FBI investigation as there was in delay. I am not going to get to that unless I have time. I want to talk about what happened in the Senate Committee's investigation, because as I understand it—and this may be more of a question to the Chairman—as soon as we received information, which was about 45 days after others on the Committee received it, we conducted an investigation. Is that correct, Mr. Chairman? I am sorry to turn the questioning to you, but we began that legal Senate Judiciary Committee investigation.

Chairman GRASSLEY. Yes.

Senator CRAPO. And that investigation involved our fully, lawfully enabled investigators to conduct an investigation. And if I understand it correctly, the Democratic Members of the Committee refused to participate in that investigation.

Chairman GRASSLEY. Yes.

Senator CRAPO. And so we have conducted the investigation. The very kinds of things that my colleagues on the other side are asking that we tell the FBI to do, this Committee has the authority

to do it, and this Committee does it, and this Committee has done it.

Now, there may be more demands for more interviews and more investigation. But when you, Judge Kavanaugh, have referenced the testimony that has come from those who were supposed—who were identified as being at this event, the testimony that has been received from them is information that has been received pursuant to a Senate Committee investigation. And I just think it should be made clear. I think there has been a lot of back and forth here about, oh, we are not getting information, we are not looking at this, you do not want to look into the investigation, you do not want to see what happened. The reality is that this Committee immediately and thoroughly investigated every witness that has been identified to us, and we have statements under penalty of felony from them. So I just want to conclude with that. I have got 45 seconds left, so I am going to just ask you one quick question, again, on timing. You had a meeting with Senator Feinstein on August 20th?

Judge KAVANAUGH. It's my understanding—yes, well, I had a meeting, and that's my understanding of the date.

Senator CRAPO. Of the date, yes. What was established earlier in testimony here today was that the Ranking Member's staff helped Dr. Ford to retain the Katz law firm on—sometime between July 30th and August 7th. So I just wanted you to clarify one more time. In the meeting that you had 2 weeks or more later, this issue was not raised with you.

Judge KAVANAUGH. The issue was not raised.

Senator CRAPO. All right. Thank you. My time is up.

Chairman GRASSLEY. We will take a 5-minute break now.

[Whereupon the Committee was recessed and reconvened.]

[Voice off microphone.]

Judge KAVANAUGH. I'm good.

Chairman GRASSLEY. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. Judge Kavanaugh, my colleagues on the other side are accusing the Democrats of some sort of political conspiracy, but that's because they want us to distract—they want to distract us from what happened here this morning. And what happened here this morning was that we heard from Dr. Christine Ford, who spoke to us with quiet, raw emotional power about what happened to her.

She said she was 100 percent certain that it was you who attacked her, and she explained how she came forward, how she struggled with her decision, how she wanted the President to know so that he could make a better choice. So, when you and my colleagues on the other side accuse us of ambushing you with false charges, I think we all have to remember Dr. Ford's testimony and her courage.

Let me go back to something you just said in your opening. You said you thought at your first hearing “the Democrats were an embarrassment.” We asked you a lot of questions in those days, and which of our questions do you think were an embarrassment? I asked you about dissents you had written as a judge, an amicus brief you wrote as a lawyer, and your knowledge of sexual harassment and abuse by your close friend and mentor, Alex Kozinski, all

valid questions in this setting. They are valid because this is a job interview for the one of the most important positions of trust in this country. And earlier, you agreed that this process of advice and consent is really a job interview, certainly not a criminal trial. There's certainly no entitlement for you to be confirmed to the Supreme Court. Are credibility, character, and candor of a nominee things for us to consider in your job interview?

Judge KAVANAUGH. I think my whole life is subject to consideration.

Senator HIRONO. Is that "yes"? Credibility, character, and candor?

Judge KAVANAUGH. My whole life—

Senator HIRONO. Are those specific traits that would be of interest to us as we consider putting you for life on the highest court in the country? Credibility, character, and candor.

Judge KAVANAUGH. Of course, and as part of my whole life.

Senator HIRONO. Thank you. Is temperament also an important trait for us to consider?

Judge KAVANAUGH. For 12 years, everyone who has appeared before me on the D.C. Circuit has praised my judicial temperament. That's why I have the unanimous well-qualified rating from the American Bar Association. And all the people who have appeared before me—

Senator HIRONO. So, you would agree that temperament is also an important factor for—

Judge KAVANAUGH. Yes, and the Federal Public Defender, who testified to the Committee, talked about how I was always open-minded and how I had ruled in favor of unpopular defendants, how I was fair-minded. I think universally, lawyers who have appeared before the D.C. Circuit—

Senator HIRONO. So, the answer is yes. I am running out of time. You know, we only have 5 minutes, so let me get to something else. In your Fox News interview, you said that you "always treated women with dignity and respect," and that in high school you never "drank so much that you couldn't remember what happened the night before." Would you say the same thing about your college life?

Judge KAVANAUGH. Yes.

Senator HIRONO. So, I'd like to read you statements from people who knew you in college.

Judge KAVANAUGH. Can I say one thing?

Senator HIRONO. And it was noted that James Roche said, your roommate, "Although Brett was normally reserved, he was a notably heavy drinker even by the standards of the time, and he became aggressive and belligerent when he was drunk." So, is your former college roommate lying?

Judge KAVANAUGH. I would refer you to what I said in the sealed or redacted portion about his relationship with the other two roommates, and I'm going to leave it at that. I will say, Senator, you're asking about college. I got into Yale Law School. That's the number one law school in the country. I have no connections there. I got there by busting my tail in college.

Senator HIRONO. I feel insulted as a Georgetown graduate.

[Laughter.]

Judge KAVANAUGH. Excuse me?

Senator HIRONO. But go on.

Judge KAVANAUGH. I'm sorry. It's ranked number one. That doesn't mean it's number one.

[Laughter.]

Judge KAVANAUGH. And, you know, in college, two things: (a) I studied, I was in Cross Campus Library every night, and (b) I played basketball for the junior varsity. I tried out for the varsity. The first day I arrived on campus, we had captains workouts. I played basketball every day all through, and then as soon as the season was over in late February, captains workouts started out again. I was obsessed with being the best basketball player.

Senator HIRONO. So, you were not—I only have 23 seconds. So, you were not a sloppy drunk, and so your roommate was lying.

Judge KAVANAUGH. I refer you—I will refer you again to the redacted portion. I'll say look at my academic record. And I don't usually like to talk about myself this way, but in response to you, you know, I worked very hard in college in my studies, and I also played basketball, did sports, and I also did socialize.

Senator HIRONO. Excuse me. I know that the Chairman is going to stop me, but I do have some other references from other people who knew you, who say that you were not the basic choirboy, but—

Chairman GRASSLEY. Your time is up.

Senator HIRONO. Hold on. I'm sorry. Mr. Chairman—

Chairman GRASSLEY. Senator Tillis.

Senator HIRONO. I would like—Mr. Chairman—okay, I'll wait until we finish because I just want to enter some letters into the record.

Chairman GRASSLEY. Oh, yes.

Senator HIRONO. Could I do that? It's not a question.

Chairman GRASSLEY. It wasn't clear that's what you were doing.

Senator HIRONO. I could go on, but, Mr. Chairman, I'd like to enter into the record four letters. One is dated September 18th, 2018 to you from all of the Democrats on this Committee. Another is a letter dated September 18th to Christopher Wray, the director of the FBI, and Don McGahn, counsel to the President, signed by all the Democrats on this Committee. A September 21st letter signed by Chuck Schumer and Dianne Feinstein to the President, and a September 26th letter signed by all the Democrats on this Committee, all requesting an FBI investigation because you did say all we have to do is ask, and the implication being that if we asked, an investigation will happen, and it certainly has not happened. Thank you, Mr. Chairman.

Chairman GRASSLEY. Without objection, that will be included.

[The information appears as submissions for the record.]

Chairman GRASSLEY. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chairman. Judge Kavanaugh, thank you again for being here, and I apologize for what you're going through right now. I can't imagine. I've gone through a campaign and had a lot of smears, but it pales in comparison to what you've had to deal with.

I think one thing—one point that I'd like to make from the onset, if we go back and review how this Committee processes work, we've

got a lot of work to do. We've had Members take it on themselves to release Committee confidential documents instead of respecting the process. We've had an allegation held for nearly 7 weeks that would've given us plenty of time to investigate. And then when we finally got the information, I invite everybody, particularly the American public—there is an investigation going on, and a lot of it has been documented. There's a chronology on the website that says that each and every time an allegation was made, the staff followed up on it.

And sadly, in several different instances, the Democrats declined to participate. They listened in on at least one interview with you and didn't ask a single question. If they wanted to find other leads and other things to do, why not ask if you're really trying to get to the facts, if you're really trying to do your job to investigate. We're investigating. It's our job.

I think in response to the Ranking Member's question that Judge Kavanaugh said, "I'm here, you're asking me questions." But you know what? When the Committee staff, I assume directed by the Ranking Member, says, no, we're not going to ask questions of Judge Kavanaugh, when he wanted to come in and clear his good name, what are you really after? You may not be after the truth. Maybe you are. Maybe you're after executing some sort of a political agenda. Maybe it's a mix of both. But I think you've been treated unfairly, and I'm amazed that after 32 hours of testimony, one-and-a-half hours I sat in this room, that none of these questions came up when it was all fully known. Lawyered up, as a matter of fact.

I also want to go back to the comments this morning. I think I heard, and we can go back to the record if someone disagrees with me. I think I heard Dr. Ford say that she wasn't aware of the fact that we said we'd come to California, we'd make it confidential, we'll completely depose and ask any questions you want to. I think I heard her say she wasn't aware of that. I don't know whether that came with counsel or not or whether counsel just neglected to tell her, her counsel, but the fact of the matter is, that offer was out there.

We were moving heaven and earth and even moving the schedule to get to the truth. We're doing an investigation. We're doing our level best. I hope that the American people who are watching this will go out to the Senate Judiciary website and take a look at this chronology. Take a look at the lack of investigation on the part of the people who want the investigation. It doesn't make a lot of sense. Every opportunity you had to go and question a witness, every opportunity that we've had to find more truth, to find more facts, we've done it. It's documented. We've got sworn statements. We're doing our job. We're doing the Committee work.

Judge Kavanaugh, I also have to say I believe that you're a part of—you're the first major target of a new strategy that's developed here, and I think you're right. I think it's just basically attack, attack, attack. It's not advise and consent. It's search and destroy. And maybe one of the best evidence of this is one of the websites—one of the groups that are out there attacking you and trying to create fodder and all of these red herrings has already acquired a URL for the next judge that they're going to attack. The URL is

right here. They've already purchased it. They're ready to go. This is the playbook. This is the way we're going to run this Committee from this point forward? Take a look at it. I'll make sure we get it out on our website.

We've already got a "stop another judge who hasn't been nominated" URL from the same people that are trying to mobilize people to attack you. There are some people here who may sincerely have concerns. I would tell you to pound the table with your Ranking Member and the leadership on your side to say, "Why didn't we ask questions?", "Why did we listen in and defer?", "Why didn't we do our part of the investigation while this leader did everything he could to accommodate Dr. Ford and to run every single lead that's been presented to us weeks after it was known to the Minority?"

I look forward to supporting your confirmation. I believe that you're going to be on the Bench. You know—as Senator Cornyn said, these are allegations that can be pursued through the courts if they actually rise to a level to where they could be prosecuted. And everybody on the other side of this dais knows that that's not going to happen.

Chairman GRASSLEY. Senator Booker.

Senator BOOKER. Judge Kavanaugh, you drank on weekdays as well in high school, not just weekends.

Judge KAVANAUGH. Weekdays?

Senator BOOKER. Yes, sir.

Judge KAVANAUGH. I would say that's rare. You're talking about during the school year?

Senator BOOKER. I'm talking about the calendars that you provided during these dates in that summer.

Judge KAVANAUGH. Oh, that's in the summer after a football workout when we went over to—

Senator BOOKER. You drank on weekdays, "yes" or "no," sir.

Judge KAVANAUGH. In the summer when we went over to Timmy's house on July 1st. That would indicate yes.

Senator BOOKER. Yes. In other words, that July 1st reference to "skis"—went over for "skis," that's brewskies, correct?

Judge KAVANAUGH. And after Tobin—

Senator BOOKER. Sir. Sir, I just need a "yes" or "no." That's "brewskies," right?

Judge KAVANAUGH. Well, I need to explain in context.

Senator BOOKER. You just said, sir, that you drank on weekdays. That's all I was looking for.

Judge KAVANAUGH. Well, no, that's not—you're—

Senator BOOKER. If I may—if I may ask the next question, sir. You said clearly on the record—I just want you to restate it—that you never in your life after drinking heavily to the point of throwing up, and, again, you said you had a weak stomach, you never had gaps in memory, never had any losses whatsoever, never had foggy recollection about what happened. Is that correct, sir? "Yes" or "no"?

Judge KAVANAUGH. That's what I said.

Senator BOOKER. Okay. Sir, you also said that this past 2—this past 2 weeks has been a 2-week effort "calculated and orchestrated as a political hit." Are you saying that Dr. Ford's efforts to come forward to prepare for the very difficult testimony she gave today,

to travel to Washington, DC, and tell us about her experience, have all been part of an orchestrated political hit? And are you basically calling her some kind of political operative?

Judge KAVANAUGH. I've said my family has no ill will toward Dr. Ford. She wanted confidentiality. Her confidentiality was blown by the actions of this Committee, and it's caused—it's turned this into a circus.

Senator BOOKER. So, sir, let's just be clear. In other words, you have problems with the Senators up here and how we conducted it, but you're not saying in any way that she is a political pawn, political operative. You have sympathy for her. She is talking about a sexual assault. Is that correct?

Judge KAVANAUGH. I said all allegations should be taken seriously. You should listen to both sides. My family has no ill will toward her.

Senator BOOKER. Thank you, sir. Do you wish that she never came forward?

Judge KAVANAUGH. Senator, I did not do this. The witness—

Senator BOOKER. That's not my question, sir. Could you try to answer my question, sir? Do you wish she never came forward?

Judge KAVANAUGH. The witnesses who were there say it didn't happen.

Senator BOOKER. Okay, sir. Do you wish she had just remained silent then?

Judge KAVANAUGH. I wish—the witnesses who were there say it didn't happen. All allegations should be taken seriously.

Senator BOOKER. So, even if it's in the final days, days before a vote, if someone has a credible allegation of experience that they held for a long time, that person should be allowed to come forward, and, in fact, as she said, it was her civic duty. You're not questioning her sense of civic duty, are you?

Judge KAVANAUGH. She did come forward, and then the—then it—

Senator BOOKER. I know you have a lot of political animus, you stated it very clearly, toward my colleagues and I on this panel. What I—what I'm trying to get to the bottom of is you do not see her specifically as part of an orchestrated—she is not a political pawn.

Judge KAVANAUGH. I don't know her, but I've also said that we bear no ill will toward her. She wanted confidentiality. This could've been handled—

Senator BOOKER. And I understand, but she came forward. She took a great extent.

Judge KAVANAUGH. Yes.

Senator BOOKER. Your family has gone through hell. Her family has gone through hell. She sat here, she told her truth, and you made the allegation that she was coordinating it. I do not think that she was coordinating with the therapist—

Judge KAVANAUGH. I did not say that. That's a—

Senator BOOKER. You said—I'm sorry. You said that others were making a coordinated—

Judge KAVANAUGH. A coordinated—

Senator BOOKER. Forgive me. You were talking about us, not her.

Judge KAVANAUGH. People in this room.

Senator BOOKER. So, she was not—

Judge KAVANAUGH. People in this room coordinated.

Senator BOOKER. She was not doing this for political efforts in 2012 when she talked to her therapist about this attack. She was not coordinating about this painful—when she made revela—painful experience when she made revelations to her husband. She did not coordinate in 2013, '16, 2017, before you were even nominated, when she revealed that it was you—with three different people—that had sexually assaulted her. That wasn't coordination.

Judge KAVANAUGH. All the witnesses who were there say it didn't happen. Ms. Keyser is her long-time friend, said she never saw me at a party with or without Dr. Ford.

Senator BOOKER. And Ms. Keyser has said clearly, and I'll quote what she said, she said she does not remember, and I didn't question that. That supports what you said. But she also says that she believes Dr. Ford. And so, my colleague, Lindsey Graham, who I respect and have admiration to and has been a partner of mine, he said voting no would be legitimizing the most despicable thing in American politics. Do you think that people who believe Dr. Ford are legitimizing despicable things? Those of us who think she's a credible witness, the allegations against her are credible, do you think that somehow we're engaging in something that's despicable?

Judge KAVANAUGH. Senator, I say listen to both sides before you make a bottom-line conclusion, and look at the—

Senator BOOKER. That is fair. I have 10 seconds left, sir.

Judge KAVANAUGH. You have my calendars.

Senator BOOKER. You can answer after I finish. You have 10 seconds left. That is fair. Listen to both sides. This is not about somebody—one side being despicable, the other side not. Listen to both sides. She was a credible—I'm going to finish my question and you can answer. She gave credible, meaningful testimony, a woman who had the courage to come forward and tell her truth, sir, and that's what I'm just asking you to say. She is not a political pawn. She is not orchestrating. She is not part of the Clintons' efforts to get some kind of revenge. She is a woman who came here with corroborating evidence to tell her truth.

Chairman GRASSLEY. Is that a question?

Senator BOOKER. No, sir, it was a final statement.

Chairman GRASSLEY. Senator Cruz.

Judge KAVANAUGH. Just that one thing, Mr. Chairman.

Chairman GRASSLEY. Yes.

Judge KAVANAUGH. The evidence is not corroborated at the time. The witnesses who were there say it didn't happen.

Senator FEINSTEIN. No, that's not what they said.

Chairman GRASSLEY. Okay. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Judge Kavanaugh, you and your family have been treated incredibly poorly by Senate Democrats and by the media. And let me say also I think Dr. Ford and her family have been treated incredibly poorly by Senate Democrats and the media. You have both seen your good names dragged through the mud, and this has been, sadly, one of the most shameful chapters in the history of the United States Senate.

Let me say to you and your family, thank you for a lifetime of public service. I will say watching your mother's pained face has

been heart-wrenching as she's seen her son's character dragged through the mud after not only your lifetime of public service, but her lifetime of public service as well. And I know as a father, there's been nothing more painful to you than talking to your daughters and explaining these attacks that the media is airing. I also believe, though, that the American people are fair-minded people, that the American people can set aside the partisan warfare of Washington and look to substance and facts, and that is the charge of this Committee.

Now, there have been three different sets of allegations that have dominated the media. I think it's important to note that two of those sets of allegations had so little corroboration that even The New York Times, which is no conservative outlet, refused to report on them because they could find no basis for them. And it was striking in this entire hearing that not a single Democrat in this Committee asked about two sets of those allegations, Ms. Ramirez's allegations and the allegations of the client of Mr. Avenatti. Not a single Democrat. I don't know if they were just too embarrassed. Mr. Avenatti's allegations were so scandalous that the Ranking Member omitted his client's most scandalous accusations of you as a criminal mastermind essentially, omitted those scandalous accusations from her statement.

This hearing has focused, rightly so, on the allegations Dr. Ford presented. And let me say I think the Committee did the right thing in giving Dr. Ford a full and fair opportunity to tell her story. That's what we needed to do when these allegations became public, and the Committee treated her with respect as we should. I do not believe Senate Democrats have treated you with respect.

What do we know? We know that her testimony and your testimony are in conflict. A fair-minded assessor of facts would then look to what else do we know when you have conflicting testimony. Well, we know that Dr. Ford identified three fact witnesses who she said observed what occurred. All three of those fact witnesses have stated on the record under penalty of perjury that they do not recall what she is alleging happening. They have not only not corroborated her charges, they have explicitly refuted her charges. That's significant to a fair-minded fact finder.

In addition, you've walked through before this Committee your calendars from the time. Now, I will say you were a much more organized teenager than I was and that many of us were. But it was a compelling recitation of night by night by night where you were in the summer of 1982. That is yet another contemporaneous piece of fact to assess what happened.

And we also know that the Democrats on this Committee engaged in a profoundly unfair process. The Ranking Member had these allegations on July 30th, and for 60 days—that was 60 days ago. The Ranking Member did not refer it to the FBI for an investigation. The Ranking Member did not refer it to the full Committee for an investigation. The Ranking Member—this Committee could've investigated those claims in a confidential way that respected Dr. Ford's privacy. And some of the most significant testimony we heard this morning is Dr. Ford told this Committee that the only people to whom she gave her letter were her attorneys, the Ranking Member, and her Member of Congress.

And she stated that she and her attorneys did not release the letter, which means the only people that could've released that letter were either the Ranking Member and her staff or the Democratic Member of Congress because Dr. Ford told this Committee those are the only people who had it. That is not a fair process, and we should look to the facts, not anonymous innuendo and slander.

Senator FEINSTEIN. Mr. Chairman, I ask for a point of personal privilege to respond.

Chairman GRASSLEY. Proceed.

Senator FEINSTEIN. Mr. Chairman, let me be clear. I did not hide Dr. Ford's allegations. I did not leak her story. She asked me to hold it confidential, and I kept it confidential as she asked. She apparently was stalked by the press, felt that—what happened, she was forced to come forward, and her greatest fear were realized—was realized. She's been harassed, she's had death threats, and she's had to flee her home. In addition, the investigation that the Republican Majority is heralding is really nothing that I know about other than a partisan practice. Normally, all the witnesses would be interviewed. However, that's not happened. While the Majority has reached out to several people, they did not notify me or my staff that they were doing this. And so, to argue that we would not participate, but not tell us what they were up to, is somewhat disingenuous.

I was given some information by a woman who was very much afraid, who asked that it be held confidential, and I held it confidential until she decided that she would come forward.

Senator CORNYN. Mr. Chairman, would the Ranking Member answer a question, please?

Senator FEINSTEIN. If I can.

Senator CORNYN. I have great respect for Senator Feinstein. We've worked together on many topics, and I believe what you just said. Can you tell us that your staff did not leak it?

Senator FEINSTEIN. I don't believe my staff would leak it. I have not asked that question directly, but I do not believe they would do it.

Senator CORNYN. Do you know that? I mean, how in the world did that get in the hands of the press unless—

Senator FEINSTEIN. The answer is "no." The staff said they did not.

Senator CORNYN. Have you asked—have you asked your staff—

Senator FEINSTEIN. I just did.

Senator CORNYN [continuing]. Or other staff members of the Judiciary Committee?

Senator FEINSTEIN. Pardon me? Jennifer reminds me I've asked her before about it, and that's true.

Senator CORNYN. Well, somebody leaked it, if it wasn't you.

Senator FEINSTEIN. Well, it—I'm telling you it was not—I did not. I mean, I was asked to keep it confidential, and I'm criticized for that, too.

Senator CRUZ. Mr. Chairman, could I ask the Chairman a question, which is, does the Committee have a process if there is an allegation against any nominee—

Chairman GRASSLEY. No.

Senator CRUZ [continuing]. To assess that allegation in a confidential forum rather than in the public? Since Dr. Ford requested that it be kept confidential, is there a process for the Committee for considering confidential allegations?

Chairman GRASSLEY. And the answer is “yes,” and Senator Tillis pointed out the document that I put out to show all of the things that we’ve done along the lines of your question.

Senator CRUZ. And, Mr. Chairman, what would you have done if on July 30th the Ranking Member had raised this allegation with you? As the Chairman of this Committee, how would you have handled it?

Chairman GRASSLEY. We would’ve done like we have done with every background or, let’s say, FBI report that comes from the White House for a nominee. And then subsequent to that, because maybe the FBI got done with it 3 months ago, we go through the FBI or information comes to us. Then we have our investigators in a bipartisan way, both Republicans and Democrats, follow up on whatever those questions are or those problems that have to be worked out.

Senator CRUZ. So, bipartisan investigators could’ve investigated this 2 months ago, and it could’ve been heard in a confidential setting without Dr. Ford’s name or Judge Kavanaugh’s name being dragged through the mud. Is that correct?

Chairman GRASSLEY. And except for one or two conversations that we had with the Judge through our investigators, Democrats didn’t participate except in those two. But in those two, one or two, they didn’t ask any questions.

Senator CRUZ. Thank you, Mr. Chairman.

Chairman GRASSLEY. I want to—

Senator FEINSTEIN. Mr. Chairman?

Chairman GRASSLEY. Yes, go ahead.

Senator FEINSTEIN. May I—may I respond? It’s my understanding that her story was leaked before the letter became public. And she testified that she had spoken to her friends about it, and it’s most likely that that’s how the story leaked and that she had been asked by press. But, it did not leak from us. I assure you of that.

Senator CORNYN. Well, Mr. Chairman, I’m a little confused. I thought only the Member of the House, and Senator Feinstein, and her lawyers had the letter. So, her friends she might’ve talked to about it couldn’t leak the letter if they just had a verbal conversation, unless she gave them a copy of the letter.

Senator FEINSTEIN. Senator, I don’t think the letter was ever leaked.

Senator CORNYN. Well, how did the press know to contact her about her complaint?

Senator FEINSTEIN. She apparently—she testified here this morning that she had talked to friends about it, and that press had talked to her.

Chairman GRASSLEY. Senator or Judge, since there was a reference to the problems—the legitimate problems and the—and the change of lifestyle that Dr. Ford had, if you want some time to say the impact on your family, I’d be glad to hear you. If you don’t want to talk about it, that’s okay.

Judge KAVANAUGH. I've talked about that, Mr. Chairman.

Chairman GRASSLEY. Okay. Then Senator Harris.

Senator HARRIS. Thank you. Judge Kavanaugh, have you taken a professionally administered polygraph test as it relates to this issue?

Judge KAVANAUGH. No, the—I'll do whatever the Committee wants. Of course, those are not admissible in Federal court, but I'll do whatever the Committee wants. They're not admissible in Federal court because they're not reliable.

Senator HARRIS. Thank you.

Judge KAVANAUGH. As you know.

Senator HARRIS. So, you have not taken one.

Judge KAVANAUGH. Right.

Senator HARRIS. All three of the women who have made sworn allegations against you have called for an independent FBI investigation into the claims. You've been asked during the course of this hearing by four different Members, by my count, at least 8 times today and also earlier this week on national television, whether you would call for the White House to authorize an FBI investigation. Each time you have declined to do so.

Now, you know—I know you do—that the FBI is an agency of men and women who are sworn and trained law enforcement, who in the course of conducting background investigations on nominees for the Supreme Court of the United States and others, are charged with conducting those background investigations because they are sworn law enforcement, and they have the expertise and the ability and the history of doing that. So, I'm going to ask you one last time. Are you willing to ask the White House to authorize the FBI to investigate the claims that have been made against you?

Judge KAVANAUGH. Well, I'll do whatever the Committee wants. Of course—

Senator HARRIS. And I've heard you say that—

Judge KAVANAUGH. The witness statements—

Senator HARRIS [continuing]. But I've not heard you answer a very specific question that's been asked, which is, Are you willing to ask the White House to conduct an investigation by the FBI to get to whatever you believe is the bottom of the allegations that have been levied against you.

Judge KAVANAUGH. The FBI would gather witness statements. You have the witness statements.

Senator HARRIS. Sir, it's—I'm not—

Judge KAVANAUGH. They don't—

Senator HARRIS. I don't want to debate with you how they do their business. I'm just asking, are you willing to ask the White House to conduct such an investigation because as you are aware, the FBI did conduct a background investigation into you before we were aware of these most recent allegations. So, are you willing to ask the White House to do that. It is a "yes" or "no," and then we can move on.

Judge KAVANAUGH. I've had six background investigations over 26 years.

Senator HARRIS. Sir, as it relates to the recent allegations, are you willing to have them do it?

Judge KAVANAUGH. The witness testimony is before you. No witness who was there supports that I was there.

Senator HARRIS. Okay. I'm going to take that as a "no," and we can move on. You have said—in your opening statement you characterized these allegations as a conspiracy directed against you. I'll point out to you that Judge—Justice now—Neil Gorsuch was nominated by this President. He was considered by this body just last year. I did a rough kind of analysis of similarities. You both attended Georgetown Prep. You both attended very prestigious law schools. You both clerked for Justice Kennedy. You were both circuit judges. You were both nominated to the Supreme Court. You were both questioned about your record. The only difference is that you have been accused of sexual assault. How do you reconcile your statement about a conspiracy against you with the treatment of someone who was before this body not very long ago?

Judge KAVANAUGH. I explained that in my opening statement, Senator. Look at the evidence here, the calendars. Look at the witness statements. Look at Ms. Keyser's statement.

Senator HARRIS. Okay. And then do you agree that it is possible for men to both be friends with some women and treat other women badly?

Judge KAVANAUGH. Of course, but the point I've been emphasizing, and that is, if you go back to age 14 for me, you will find people, and not just people, lots of people who I've been friends with, some of whom are in this room today starting at age 14, women, and who talked about my friendships with them through my whole life. And it's a consistent pattern all the way through.

Sixty-five women who knew me more than 35 years ago signed a letter to support me after the allegation was made because they know, and they were with me, and we grew up together. We talked on the phone together, and we went to events together. That is who I am, what they've said, what the people who worked with me in the Bush White House, the women there. Look at what Sarah Day said in CentralMaine.com. Look at the—what the law clerks. I have sent more women law clerks to the Supreme Court than any other Federal judge in the country.

Senator HARRIS. I only have a few seconds left, and I'll just ask a direct question. Did you watch Dr. Ford's testimony?

Judge KAVANAUGH. I did not. I planned to.

Senator HARRIS. Thank you. Thanks. Thank you.

Judge KAVANAUGH. I planned to, but I did not. I was preparing mine.

Chairman GRASSLEY. Our last 5 minutes will be Senator Flake, 1 minute, and Senator Kennedy, 4 minutes.

Senator FLAKE. Thank you, Mr. Chairman. When Dr. Ford came forward with her account, I immediately said that she should be heard and asked the Chairman to delay the vote that we had scheduled, and the Chairman did, and I appreciate that. She came at great difficulty for her and offered compelling testimony. You have come and done the same.

I am sorry for what's happened to you and your family as I'm sorry for what has happened to hers. This is not a good process, but it's all we've got. And I would urge my colleagues to recognize that in the end we are 21 very imperfect Senators trying to do our

best to provide advice and consent, and in the end there's likely to be as much doubt as certainty going out of this room today. And as we make decisions going forward, I hope that people will recognize that. And the rhetoric that we use and the language that we use going forward, that we'll recognize that, that there is doubt. We'll never move beyond that, and just have a little humility on that front. So, thank you.

Chairman GRASSLEY. Thank you, Senator Flake. Now Senator Kennedy.

Senator KENNEDY. Yes, sir. I'm sorry, Judge, for what you and your family have been through, and I'm sorry for what Dr. Ford and her family have been through. It could've been avoided. Do you believe in God?

Judge KAVANAUGH. I do.

Senator KENNEDY. I'm going to a last opportunity, right here, right in front of God and country. I want you to look me in the eye. Are Dr. Ford's allegations true?

Judge KAVANAUGH. They're not accurate as to me. I have not questioned that she might have been sexually assaulted at some point in her life by someone some place, but as to me, I've never done this. Never done this to her or to anyone else. And I've talked to you about what I was doing that summer of 1982, but I'm telling you I've never done this to anyone, including her.

Senator KENNEDY. Are Ms. Ramirez's allegations about you true?

Judge KAVANAUGH. Those are not. None of the witnesses in the room support that. If that had happened, that would've been the talk of campus, in our freshman dorm. The New York Times reported that as recently as last week she was calling other classmates seeking to—well, I'm not going to characterize it, but calling classmates last week, and it just seemed very—I'll just stop there, but it's not true. It's not true.

Senator KENNEDY. Are Ms. Swetnick's allegations, made by Mr. Avenatti, about you true?

Judge KAVANAUGH. Those are not true. Never met her. Don't know who she is. There was a letter released within 2 hours of that breaking yesterday from, I think, 60 people who knew me in high school, men and women, who said it was, their words, nonsense, totally—you know, the whole thing, totally ridiculous.

Senator KENNEDY. None of these allegations are true.

Judge KAVANAUGH. Correct.

Senator KENNEDY. No doubt in your mind.

Judge KAVANAUGH. Zero. I'm a hundred percent certain.

Senator KENNEDY. Not even a scintilla.

Judge KAVANAUGH. Not a scintilla. Hundred percent certain, Senator.

Senator KENNEDY. You swear to God.

Judge KAVANAUGH. I swear to God.

Senator KENNEDY. That's all I have, Judge.

Chairman GRASSLEY. Judge Kavanaugh, thank you very much. Hearing adjourned.

[Whereupon, at 6:44 p.m., the Committee was adjourned.]

[Additional material submitted for the record for Day 1, Day 2, Day 3, Day 4, and Day 5 follows.]

A P P E N D I X

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

[Some submissions contain redactions.]

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Witness List
Hearing before the
Senate Committee on the Judiciary
on
The Nomination of Brett M. Kavanaugh to be an Associate Justice
of the Supreme Court of the United States

Tuesday, September 4, 2018
Hart Senate Office Building, Room 216
9:30 a.m.

Introducers

The Honorable Condoleezza Rice
Former Secretary of State
Senior Fellow at Hoover Institution
Professor at Stanford University
Stanford, CA

The Honorable Rob Portman
United States Senator
State of Ohio

Ms. Lisa S. Blatt
Partner
Arnold & Porter
Washington, DC

Panel I

The Honorable Brett M. Kavanaugh
Nominee to Serve as an Associate Justice of the Supreme Court of the United States
Chevy Chase, MD

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Panel II

Mr. Paul T. Moxley
Chair
American Bar Association
Standing Committee on the Federal Judiciary
Salt Lake City, UT

Mr. John R. Tarpley
Principal Evaluator
American Bar Association
Standing Committee on the Federal Judiciary
Nashville, TN

Panel III

Majority

Mr. Luke McCloud
Former Law Clerk
Associate
Williams & Connolly LLP
Washington, DC

Ms. Louisa Garry
Teacher
Friends Academy
Locust Valley, NY

The Honorable Theodore B. Olson
Partner
Gibson Dunn & Crutcher
Former Solicitor General
United States Department of Justice
Washington, DC

Ms. Colleen E. Roh Sinzdak
Former Student
Senior Associate
Hogan Lovells LLP
Washington DC

Professor Akhil Amar
Sterling Professor of Law and Political Science
Yale Law School
New Haven, CT

Minority

The Honorable Cedric Richmond
U.S. Representative, Louisiana, 2nd District
Chairman, Congressional Black Caucus

Ms. Rochelle Garza
Managing Attorney
Garza & Garza Law
Brownsville, TX

Ms. Elizabeth Weintraub
Advocacy Specialist
Association of University Centers on Disabilities
Silver Spring, MD

Ms. Alicia Baker
Indianapolis, IN

Professor Melissa Murray
Professor of Law
New York University School of Law
New York, NY

Panel IV

Majority

Mr. A.J. Kramer
Federal Public Defender
Office of the Federal Public Defender for the District of Columbia
Washington, DC

Ms. Rebecca Taibleson
Former Law Clerk
Eastern District of Wisconsin
Foxpoint, WI

Ms. Maureen E. Mahoney
Former Deputy Solicitor General of the United States
Washington, DC

Mr. Kenneth Christmas
Executive Vice President, Business & Legal Affairs
Marvista Entertainment
Los Angeles, CA

Minority

Ms. Aalayah Eastmond
Parkland, FL

Mr. Jackson Corbin
Hanover, PA

Mr. Hunter Lachance
Kennebunk, ME

Ms. Melissa Smith
Social Studies Teacher
U.S. Grant Public High School
Oklahoma City, OK

Panel V

Majority

Ms. Monica Mastal
Real Estate Agent
Washington, DC

The Honorable Paul Clement
Partner
Kirkland & Ellis LLP
Former Solicitor General
United States Department of Justice
Washington, DC

Professor Adam White
Executive Director
The C. Boyden Gray Center for the Study of the Administrative State
Antonin Scalia Law School
George Mason University
Arlington, VA

Professor Jennifer Mascott
Former Law Clerk
Assistant Professor of Law
Antonin Scalia Law School
George Mason University
Arlington, VA

Minority

Mr. John Dean
Former Counsel to the President
President Richard M. Nixon
Beverly Hills, CA

Professor Rebecca Ingber
Associate Professor of Law
Boston University School of Law
Boston, MA

Professor Lisa Heinzerling
Justice William J. Brennan Jr. Professor of Law
Georgetown University Law Center
Washington, DC

Professor Peter Shane
Jacob E. Davis and Jacob E. Davis II Chair in Law
Moritz College of Law
Ohio State University
Columbus, OH

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Panel VI

Professor Christine Blasey Ford, Ph.D.
Palo Alto University
Palo Alto, CA

Panel VII

The Honorable Brett M. Kavanaugh
Nominee to Serve as an Associate Justice of the Supreme Court of the United States
Chevy Chase, MD

**Prepared Written Testimony of Judge Brett M. Kavanaugh
Nomination Hearing to Serve as an Associate Justice of the Supreme Court
September 27, 2018 (submitted September 26, 2018)**

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee: Eleven days ago, Dr. Ford publicly accused me of committing a serious wrong more than 36 years ago when we were both in high school. I denied the allegation immediately, unequivocally, and categorically. The next day, I told this Committee that I wanted to testify as soon as possible, under oath, to clear my name.

Over the past few days, other false and uncorroborated accusations have been aired. There has been a frenzy to come up with something—anything, no matter how far-fetched or odious—that will block a vote on my nomination. These are last-minute smears, pure and simple. They debase our public discourse. And the consequences extend beyond any one nomination. Such grotesque and obvious character assassination—if allowed to succeed—will dissuade competent and good people of all political persuasions from serving our country.

As I told this Committee the last time I appeared before you, a federal judge must be independent, not swayed by public or political pressure. That is the kind of judge I am and will always be. I will not be intimidated into withdrawing from this process. This effort to destroy my good name will not drive me out. The vile threats of violence against my family will not drive me out. I am here this morning to answer these allegations and to tell the truth. And the truth is that I have never sexually assaulted anyone—not in high school, not in college, not ever.

Sexual assault is horrific. It is morally wrong. It is illegal. It is contrary to my religious faith. And it contradicts the core promise of this Nation that all people are created equal and entitled to be treated with dignity and respect. Allegations of sexual assault must be taken seriously. Those who make allegations deserve to be heard. The subject of allegations also deserves to be heard. Due process is a foundation of the American rule of law.

Dr. Ford's allegation dates back more than 36 years, to a party that she says occurred during our time in high school. I spent most of my time in high school focused on academics, sports, church, and service. But I was not perfect in those days, just as I am not perfect today. I drank beer with my friends, usually on weekends. Sometimes I had too many. In retrospect, I said and did things in high school that make me cringe now. But that's not why we are here today. What I've

been accused of is far more serious than juvenile misbehavior. I never did anything remotely resembling what Dr. Ford describes.

The allegation of misconduct is completely inconsistent with the rest of my life. The record of my life, from my days in grade school through the present day, shows that I have always promoted the equality and dignity of women.

I categorically and unequivocally deny the allegation against me by Dr. Ford. I never had any sexual or physical encounter of any kind with Dr. Ford. I am not questioning that Dr. Ford may have been sexually assaulted by some person in some place at some time. But I have never done that to her or to anyone. I am innocent of this charge.

[Additional Testimony To Follow]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT

PUBLIC

1. **Name:** State full name (include any former names used).

Brett Michael Kavanaugh

2. **Position:** State the position for which you have been nominated.

Associate Justice, Supreme Court of the United States

3. **Address:** List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

E. Barrett Prettyman United States Courthouse and William B. Bryant Annex
333 Constitution Avenue, N.W.
Washington, D.C. 20001

Residence:
Chevy Chase, Maryland

4. **Birthplace:** State year and place of birth.

1965; Washington, D.C.

5. **Education:** List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

1987 – 1990: Yale Law School; J.D., 1990

1983 – 1987: Yale University; B.A. (*cum laude*), 1987

6. **Employment Record:** List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

2006 – present
United States Court of Appeals for the District of Columbia Circuit

E. Barrett Prettyman United States Courthouse and William B. Bryant Annex
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Circuit Judge

2008 – present
Harvard Law School
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138
Lecturer on Law

2011
Yale Law School
127 Wall Street
New Haven, Connecticut 06511
Lecturer on Law

2007
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Adjunct Professor

2001 – 2006
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500
Assistant to the President and Staff Secretary (2003 – 2006)
Senior Associate Counsel to the President (2003)
Associate Counsel to the President (2001 – 2003)

1997 – 1998; 1999 – 2001
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20005
Partner

1994 – 1997; 1998
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-N
Washington, D.C. 20004
Associate Counsel

1993 – 1994
Honorable Anthony M. Kennedy
Supreme Court of the United States

One First Street, N.E.
Washington, D.C. 20543
Law Clerk

1992 – 1993
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorney

1992
Munger Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071
Summer Associate

1991 – 1992
Honorable Alex Kozinski
United States Court of Appeals for the Ninth Circuit
Richard H. Chambers Courthouse
125 South Grand Avenue
Pasadena, California 91105
Law Clerk

1990 – 1991
Honorable Walter K. Stapleton
United States Court of Appeals for the Third Circuit
J. Caleb Boggs Federal Building
844 North King Street, Unit 18
Wilmington, Delaware 19801
Law Clerk

1990
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005
Summer Associate

1989
Covington & Burling LLP
850 10th Street, N.W.
Washington, D.C. 20001
Summer Associate

1989

Miller Cassidy Larocca & Lewin
Later acquired by Baker Botts LLP
The Warner
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Summer Associate

1988
Pillsbury Winthrop Shaw Pittman LLP
Formerly Pillsbury Madison & Sutro
1200 17th Street, N.W.
Washington, D.C. 20036
Summer Associate

Other Affiliations

2017 – present
Washington Jesuit Academy
900 Varnum Street, N.E.
Washington, D.C. 20017
Director

2010 – 2016
The Historical Society of the District of Columbia Circuit
E. Barrett Prettyman United States Courthouse and William B. Bryant Annex
333 Constitution Avenue, N.W.
Washington, D.C. 20001
Director

7. **Military Service and Draft Status:** Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number) and type of discharge received, and whether you have registered for selective service.

I have not served in the military. I timely registered for Selective Service.

8. **Honors and Awards:** List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

Honorary Degree and Commencement Speaker, The Catholic University of America Columbus School of Law (2018)

Defender of the Constitution Award, The Heritage Foundation (2017)

Green Bag “Exemplary Legal Writing” Honoree (2013)

Commencement Speaker, George Mason University School of Law (2011)

Samuel Williston Lecturer on Law, Harvard Law School (2009 – present)

Outstanding White House Service on September 11, 2001 (2001)

Adat Shalom Synagogue Award for Pro Bono Representation (2000)

40 Lawyers Under 40, Washingtonian Magazine (1998)

Graduation Speaker, Mater Dei School (1993)

Notes Editor, Yale Law Journal (1989 – 1990)

Degree from Yale University conferred *cum laude* (1987)

9. **Bar Associations:** List all bar associations or legal or judicial-related committees, selection panels or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Administrative Conference of the United States (2010 – present)

Liaison Representative, Judicial Review Committee (2011 – present)

American Bar Association (1990s (approximate); 2008 – 2012)

Section of Administrative Law and Regulatory Practice, *Ex Officio* Member (2008 – 2012)

American Law Institute (2009 – present)

Adviser, Principles of the Law, Election Administration (2011 – present)

Member, Regional Advisory Group (2013)

Bar Association of the District of Columbia, Honorary Member (2006 – present)

Commission on the Future of Maryland Courts (1996)

Research Associate to the Chairman

District of Columbia Bar Association (1992 – present)

Dwight D. Opperman Foundation Devitt Award Selection Committee (2016 – 2017)

The Edward Coke Appellate Inn of Court (2000 – 2017)

President (2011 – 2012)

Vice President (2010)

President-Elect (2010 – 2011)

The Edward Bennett Williams Inn of Court (2015 – present)

Federalist Society for Law and Public Policy Studies (1988 – present)
 Co-Chair of School Choice Subcommittee, Religious Liberties Practice Group (1999 – 2001)

Judicial Conference of the United States (2009 – present)
 Advisory Committee on Rules of Appellate Procedure (2015 – present)
 Judicial Branch Committee (2009 – present)

Maryland State Bar Association (1990 – 2006)

Montgomery County Bar Association (1990s – 2000s) (The Montgomery County Bar Association does not have membership records pre-dating 2014.)

United States Court of Appeals for the District of Columbia Circuit (2006 – present)
 Circuit Judicial Council (2017 – present)
 Procedures Committee, Liaison Judge (2008 – present)
 Judicial Wellness Committee (2018)
 Criminal Justice Act Panel, Chair (2013 – 2018)
 Criminal Justice Act Voucher Review Committee (2013 – 2018)

10. **Bar and Court Admission:**

a. List the date(s) you were admitted to the bar of any state and any lapses in membership. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission. Please explain the reason for any lapse in membership.

Maryland (1990 – 2006)
 District of Columbia (1992 – present)

Upon joining the federal bench, I resigned from the Maryland Bar and took judicial status in the District of Columbia.

My membership in the District of Columbia Bar lapsed for a brief period in 2002 when my renewal form was delivered to an incorrect home address. There have been no other lapses in membership.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Please explain the reason for any lapse in membership. Give the same information for administrative bodies that require special admission to practice.

Supreme Court of the United States (1994)
 United States Court of Appeals for the Third Circuit (1991)
 United States Court of Appeals for the Fourth Circuit (1997)

United States Court of Appeals for the Fifth Circuit (1993)
 United States Court of Appeals for the Sixth Circuit (1999)
 United States Court of Appeals for the Seventh Circuit (1999)
 United States Court of Appeals for the Eighth Circuit (1996)
 United States Court of Appeals for the Ninth Circuit (1999)
 United States Court of Appeals for the Tenth Circuit (1999)
 United States Court of Appeals for the Eleventh Circuit (2000)
 United States Court of Appeals for the District of Columbia Circuit (1993)
 United States Court of Appeals for the Federal Circuit (1998)
 United States District Court for the District of Columbia (2000)
 United States District Court for the District of Maryland (2000)

I chose not to renew my membership in the bar of the United States Court of Appeals for the Fifth Circuit in 2000 because I did not actively litigate in that court. I also chose not to renew my membership in the bars of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the District of Maryland in 2006, as I joined the bench and no longer litigate.

I also have been admitted *pro hac vice* at various times to several lower federal courts, including the United States District Court for the Eastern District of Virginia and the United States District Court for the Eastern District of Arkansas.

11. **Memberships:**

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, or in which you have participated, from the beginning of law school. Provide dates of membership or participation, and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an office or other person from whom more detailed information may be obtained.

Blessed Sacrament School (1996 – 1997; 2014 – 2018)

Coach

I have coached 4th grade girls basketball teams and 5th – 6th grade girls basketball teams. I also have coached a 6th grade boys basketball team. For more information, contact Marilyn Campbell, Athletic Director, at mcampbell@blessedsacramentdc.org.

Catholic Charities, Archdiocese of Washington (2015 – present)

Volunteer

Catholic Charities is the social ministry outreach of the Archdiocese of Washington. As a volunteer, I have regularly served meals as part of the St. Maria's Meals program in Washington, D.C. For more information, contact Monsignor John Enzler or the D.C.

office at communications@cc-dc.org.

Chevy Chase Club (2016 – present)

Member

The Chevy Chase Club is a recreational club. We joined because the club has an outdoor hockey rink and a girls ice hockey program, and because of its gym and sports facilities. For more information, contact the Club at (301) 652-4100.

Classics AAU (2015 – present)

Coach

Classics AAU is an organization that provides opportunities for young athletes to play basketball at highly competitive levels. I have coached 2nd, 3rd, and 4th grade girls basketball teams. For more information, email info@classicbasketball.com.

Congressional Country Club (1986 – 2017)

Junior Non-Voting Member (1986 – 2000)

Member (2000 – 2017)

The Congressional Country Club is a recreational club. My family and I used the club's gym and sports facilities. For more information, contact the Club at (301) 469-2000.

Georgetown Prep Alumni Association (1990s – present)

Member

The Georgetown Prep Alumni Association is an organization made up of Georgetown Prep School alumni of all generations. For more information, contact Georgetown Preparatory School at (301) 493-5000.

The Historical Society of the District of Columbia Circuit (2010 – 2016)

Director

The Historical Society preserves the history of the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia. As Director, I have been active in developing ideas for events, including an annual reception for all former clerks of the D.C. Circuit and the D.C. District Court. For more information, contact Linda J. Ferren, Executive Director, at (202) 216-7346.

The John Carroll Society (2006 – present)

Member

The John Carroll Society is a service organization of Catholic professionals. As a member, I have spoken at and attended some of the organization's events, including the annual Red Mass in Washington, D.C., and an event with young lawyers. For more information, contact the John Carroll Society at (301) 654-4399 or johncarrollsociety1951@gmail.com.

Lawyers Club of Washington, D.C. (2007 – present)

Member

The Lawyers Club of Washington, D.C., is an organization of lawyers and judges who meet periodically. As a member, I attend lunches and annual dinners. For more

information, contact Secretary and Treasurer Philip L. O'Donoghue at (301) 652-6880.

Montgomery County Recreation (2015 – present)

Coach

I have coached a variety of girls basketball teams when my daughters were on the teams. For more information, contact Montgomery County Recreation at (240) 777-6840.

Washington Jesuit Academy (2017 – present)

Director

The Washington Jesuit Academy's mission is to provide a tuition-free, high-quality, and comprehensive education to boys of all religions from low-income communities. The students are almost all minorities from Washington, D.C., and Prince George's County, Maryland. As a Board Member, I participate in meetings where the Board deals with various issues, including educational decisions. For more information, contact the D.C. office at (202) 832-7679.

Yale Law School Class of 1990

Class Secretary (2000 – 2001)

This organization is made up of Yale Law School alumni from the Class of 1990. As Class Secretary, I collected and organized the class notes for the Yale Law Report. For more information, contact (203) 432-1690 or alumni.law@yale.edu.

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminate or formerly discriminated on the basis of race, sex, religion or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

Years before I became a member of the Congressional Country Club and the Chevy Chase Club, it is my understanding that those clubs, like most similar clubs around the country, may have excluded members on discriminatory bases that should not have been acceptable to people then and would not be acceptable now.

Except as set forth above, to the best of my knowledge, none of the above organizations currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies.

c. List all conferences, symposia, panels, and continuing legal education events you have attended since you joined the United States Court of Appeals for the District of Columbia Circuit. For each event, provide the dates, a description of the subject matters addressed, the sponsors, and whether any funding, gifts or travel reimbursements were provided to you by the sponsors or other organizations.

Please see the attached Appendix 11.c.

12. **Published Writings and Public Statements:**

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet, regardless of whether it was published in your name, another name, or anonymously. Supply four (4) copies of all published material to the Committee.

Congress and the President in Wartime, Lawfare (Nov. 28, 2017, 3:00 PM), <https://www.lawfareblog.com/congress-and-president-wartime> (book review). Copy supplied.

From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist (American Enterprise Institute 2017). This is a published version of my September 18, 2017, speech at the American Enterprise Institute noted in response to Question 12.d. Copy supplied.

Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907 (2017). This is a published version of my February 23, 2017, speech at Notre Dame Law School noted in response to Question 12.d. Copy supplied.

One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama, Marquette Lawyer Magazine, Fall 2016, at 8. This is a published version of my March 3, 2015, speech at Marquette University Law School noted in response to Question 12.d. Copy supplied.

With Bryan A. Garner et al., *The Law of Judicial Precedent* (2016). Copy supplied.

Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118 (2016) (book review). Copy supplied.

The Judge as Umpire: Ten Principles, 65 Cath. U. L. Rev. 683 (2016). This is a published version of my March 30, 2015, speech at the Catholic University Columbus School of Law noted in response to Question 12.d. Copy supplied.

Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution, 89 Notre Dame L. Rev. 1907 (2014). This is a published version of my November 1, 2013, speech at Notre Dame Law School noted in response to Question 12.d. Copy supplied.

The Courts and the Administrative State, 64 Case W. Res. L. Rev. 711 (2014). This is a published version of my October 1, 2013, speech at Case Western Reserve Law School noted in response to Question 12.d. Copy supplied.

Remarks at the Opening Session of the American Law Institute 90th Annual Meeting (2013). This is a published version of my May 20, 2013, speech delivered to the American Law Institute noted in response to Question 12.d. Copy supplied.

Separation of Powers During the 44th Presidency and Beyond, 93 Minn. L. Rev. 1454 (2009). This is a published version of my October 17, 2008, speech at the University of Minnesota Law School noted in response to Question 12.d. Copy supplied.

With Robert J. Bittman & Solomon J. Wisenberg, *To Us, Starr Is an American Hero*, Wash. Post, Nov. 15, 1999. Copy supplied.

Opinion, *Are Hawaiians Indians? The Justice Department Thinks So*, Wall St. J., Sept. 27, 1999, at A35. Copy supplied.

Letter to the Editor, *Indictment of an Ex-President?*, Wash. Post, Aug. 31, 1999, at A12. Copy supplied.

Letter to the Editor, *Starr Report*, N.Y. Times, Aug. 1, 1999, § 7, at 2. Copy supplied.

Letter to the Editor, *We All Supported Kenneth Starr*, Wash. Post, July 1, 1999, at A28. Copy supplied.

What a Difference a Year Makes; Experts Draw Lessons, for Our Politics and Our Culture, from the Impeachment and Acquittal of William Jefferson Clinton, American Spectator, Apr. 1999. Copy supplied.

First Let Congress Do Its Job; A Deep Structural Flaw in the Independent Counsel Statute, Wash. Post, Feb. 26, 1999. Copy supplied.

The President and the Independent Counsel, 86 Geo. L.J. 2133 (1998). Copy supplied.

Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky Hearings, 99 Yale L.J. 187 (1989). Copy supplied.

While an undergraduate at Yale University, I regularly wrote news stories on the sports beat for the Yale Daily News. I prepared the below list based on my records and searches of publicly available records conducted by others on my behalf.

Search Still on to Replace Yale Head Hoop Man, Yale Daily News, May 6, 1986. Copy supplied.

Ivy Title Hopes Snuffed in Penn Loss, Yale Daily News, Feb. 24, 1986. Copy supplied.

Ailing Elis Hope to Get Well in Penn, Tigers Weekend Games, Yale Daily News, Feb. 21, 1986. Copy supplied.

Elis Tame Lions, Lose to Big Red, Yale Daily News, Feb. 17, 1986. Copy supplied.

Lions, Big Red, Fear Eli Repeat Performance, Yale Daily News, Feb. 14, 1986. Copy supplied.

Yale Erases 23 Years of Tiger Frustration, Yale Daily News, Feb. 10, 1986. Copy supplied.

Bulldogs Head South to Home of Ivy Crown, Yale Daily News, Feb. 7, 1986. Copy supplied.

Dartmouth Rally Upends Streak, Yale Daily News, Feb. 3, 1986. Copy supplied.

Yale Looks To Continue Streak, Yale Daily News, Jan. 31, 1986. Copy supplied.

Elis Trounce Jaspers, Yale Daily News, Jan. 30, 1986. Copy supplied.

Elis Hang on, Beat Army, 54-51, Yale Daily News, Jan. 24, 1986. Copy supplied.

Dudley Leads Bulldogs in Split, Yale Daily News, Jan. 20, 1986. Copy supplied.

Lackluster Yale Needs a Boost, Yale Daily News, Jan. 15, 1986. Copy supplied.

Brown Triumphs, 68-65, Yale Daily News, Jan. 14, 1986. Copy supplied.

Clark Upsets Elis, 78-70, Yale Daily News, Dec. 16, 1985. Copy supplied.

Eli Cagers Drop Two in California Tourney, Yale Daily News, Dec. 11, 1985. Copy supplied.

Hoopsters Head West, Yale Daily News, Dec. 6, 1985. Copy supplied.

Yale Nets Two of Three, Yale Daily News, Dec. 3, 1985. Copy supplied.

Men's Basketball Shoots for Ivy Championship, Yale Daily News, Nov. 21, 1985. Copy supplied.

Ivy Basketball Predictions, Yale Daily News, Nov. 21, 1985. Copy supplied.

PBS Brings 'Carmen,' Cozza to Living Room, Yale Daily News, Oct. 30, 1985. Copy supplied.

Ivy League Roundup, Yale Daily News, Oct. 28, 1985. Copy supplied.

TV Moves Game to 1 p.m., Yale Daily News, Oct. 25, 1985. Copy supplied.

TenBrink Vital to Elis' Success, Yale Daily News, Sept. 18, 1985. Copy supplied.

Crimson Defeats Eli Freshmen 14-7, Yale Daily News, Nov. 19, 1983. Copy supplied.

Unbeaten Freshman Team Is a Good Sign for Cozza, Yale Daily News, Oct. 25, 1983. Copy supplied.

I provided assistance in the preparation of the following book:

Ken Starr, *First Among Equals* (2002). Copy supplied.

b. Supply four (4) copies of any reports, memoranda, policy statements, minutes, agendas, legal filings, or other materials you prepared or contributed in the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member or in which you have participated as defined in 11(a). Include reports, memoranda, policy statements, or legal filings of any advisory board on which you served or working group of any bar association, committee, or conference which produced a report, memorandum, policy statement, or legal filing even where you did not contribute to it. If you do not have a copy of a report, memorandum, policy statement, or legal filing, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

To my recollection and through searches of my records and publicly available databases by persons acting on my behalf, I have found the following responsive materials.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, May 22, 2018. Copy supplied.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, Dec. 6, 2017. Copy supplied.

United States Court of Appeals for the District of Columbia Circuit, Advisory Committee on Procedures, *Minutes of December 2017 Meeting* (Dec. 5 – 6, 2017) (statements made as member of Committee). Copy supplied.

Advisory Committee on Appellate Rules, *Draft Minutes of Fall 2017 Meeting* (Nov. 8, 2017) (statements made as member of Committee). Copy supplied.

Advisory Committee on Appellate Rules, *Addendum to the Report of Advisory Committee on Appellate Rules*, June 11, 2017. Copy supplied.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, May 22, 2017. Copy supplied.

Advisory Committee on Appellate Rules, *Minutes of Spring 2017 Meeting* (May 2, 2017)

(statements made as member of Committee). Copy supplied.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, Dec. 7, 2016. Copy supplied.

Advisory Committee on Appellate Rules, *Minutes of Fall 2016 Meeting* (Oct. 18, 2016) (statements made as member of Committee). Copy supplied.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, May 18, 2016. Copy supplied.

Advisory Committee on Appellate Rules, *Minutes of Spring 2016 Meeting* (Apr. 5, 2016) (statements made as member of Committee). Copy supplied.

American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes (Tentative Draft No. 1)*, Apr. 15, 2016. Copy supplied. I did not contribute to, or participate in the drafting of, this document.

American Law Institute, *Principles of the Law, Election Administration: Non-Precinct Voting and Resolution of Ballot-Counting Disputes (Council Draft No. 2)*, Dec. 16, 2015. Copy supplied. I did not contribute to, or participate in the drafting of, this document.

Advisory Committee on Appellate Rules, *Report of Advisory Committee on Appellate Rules*, Dec. 14, 2015. Copy supplied.

c. Supply four (4) copies of any testimony, official statements or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials, including during your time in the Office of the Independent Counsel.

To my recollection and through searches of my records and publicly available databases by persons acting on my behalf, I have found the following responsive materials.

On July 9, 2009, I participated in a public hearing of the United States Sentencing Commission on a panel entitled, "View from the Appellate Bench." Transcript supplied.

On April 27, 2004, and May 9, 2006, I testified before the Senate Judiciary Committee in confirmation hearings to be a circuit judge. I also received Questions for the Record and provided responses. Copies of my Questionnaire for Judicial Nominees, testimony, and responses to Questions for the Record are supplied. A video of the 2006 hearing is available at: <https://www.c-span.org/video/?192420-1/brett-kavanaugh-testifies-dc-circuit-confirmation-hearing-2006>. A video of the 2004 hearing is available at: <https://www.c-span.org/video/?181538-1/judicial-nominations>.

Statement of Independent Counsel Kenneth W. Starr Before the Committee on the Judiciary, U.S. House of Representatives, Nov. 19, 1998. Copy supplied. I, along with others, assisted in the preparation of the Independent Counsel's prepared statement to the House Judiciary Committee in its impeachment proceedings.

Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c) (Sept. 11, 1998). Copy supplied. I, along with others, assisted in the preparation of the grounds section of the Independent Counsel's report setting forth possible grounds for impeachment.

Report on the Death of Vincent W. Foster, Jr. by the Office of Independent Counsel, *In re Madison Guar. Sav. & Loan Ass'n* (D.C. Cir.) (filed July 15, 1997; leave to publish granted Oct. 10, 1997). Copy supplied.

On July 14, 1995, I participated in a deposition as counsel to Independent Counsel Kenneth Starr. A transcript of this deposition was later published by the Senate Committee on Banking, Housing, and Urban Affairs' Special Committee to Investigate Whitewater Development Corporation and Related Matters. Copy supplied.

d. Supply four (4) copies, transcripts or event-sponsored recordings of all speeches or talks delivered by you including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, symposia, panels, continuing legal education events, and question-and-answer sessions. Include the date and place where they were delivered, and readily available non-duplicative press reports about the speech or talk. If you do not have a copy of the speech or a transcript, or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

To my recollection and through a review of my calendars and searches of publicly available databases by persons acting on my behalf, I have found the following responsive materials.

July 9, 2018: Speaker, Introduction as Nominee to the United States Supreme Court, The White House, Washington, D.C. Video available at:
<https://www.youtube.com/watch?v=a4-4vRixwIo>.

May 25, 2018: Speaker, "Commencement Address," Catholic University of America, Columbus School of Law, Washington, D.C. Video available at:
<https://www.youtube.com/watch?v=sggWPce-Ugk>. Press reports supplied.

May 11, 2018: Speaker, Georgetown Prep Alumni Breakfast. I reflected on my education and how it has affected me. I have no notes, transcript, or recording. The address of Georgetown Preparatory School is 10900 Rockville Pike, North Bethesda, Maryland 20852.

April 26, 2018: Moot Court Judge, Sixth Annual National Virtual Supreme Court Competition for high school students, the Constitutional Sources Project and the Harlan Institute, Georgetown University Law Center, Washington, D.C. I have no notes, transcript, or recording. The address of the Constitutional Sources Project and the Harlan Institute is 9100 Westheimer Road, Apartment 226, Houston, Texas 77063. Press report supplied.

April 20, 2018: Speaker, Yale Law School Black Law Students Association, Yale Law School, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

April 19, 2018: Speaker, "Welcome Dinner with Judge Kavanaugh," Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

April 12, 2018: Speaker, "Swearing-In Ceremony for U.S. Attorney John Bash," Austin, Texas. Notes and press report supplied.

April 11, 2018: Speaker, University of Texas School of Law, Austin, Texas. I spoke together with Professors Chesney and Vladeck about issues of national security law. I have no notes, transcript, or recording. The address of the University of Texas School of Law is 727 East Dean Keeton Street, Austin, Texas 78705.

March 27, 2018: Speaker, Harvard Law School Black Law Students Association, Cambridge, Massachusetts. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of the Harvard Law School Black Law Students Association is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

March 27, 2018: Panelist, "The Craft of Judicial Opinion Writing: A Conversation with Judge Kavanaugh, Judge Watford, and Chief Judge Saris," Harvard Law Review, Cambridge, Massachusetts. I have no notes, transcript, or recording. The address of Harvard Law Review is 1511 Massachusetts Avenue, Cambridge, Massachusetts 02138.

February 23, 2018: Speaker, "A Judge's Role: A Conversation with Judge Brett Kavanaugh and Professor William Kelley," Notre Dame Law School Federalist Society Student Chapter, South Bend, Indiana. Notes supplied.

December 7, 2017: I spoke to high school students from Hawken School in the U.S. Courthouse, Washington, D.C., as part of their course, "Pursuing Justice." I discussed my role as a judge. I have no notes, transcript, or recording. The address of the Hawken School is 5000 Clubside Road, Lyndhurst, Ohio 44124.

November 16, 2017: Speaker, Yale Law School Alumni Luncheon, Federalist Society

2017 National Lawyers Convention, Washington, D.C. I reflected on my time at Yale and discussed my service as a judge. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

November 16, 2017: Moderator, "The Future of Antitrust: Is the Consumer Welfare Standard Still Up to the Task or Is It Time for a 'Better Deal'?", Federalist Society 2017 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=DLqzv6-xx2Y>.

November 6, 2017: Speaker, "The Judge as Umpire," William & Mary Law School Supreme Court Seminar, Washington, D.C. I spoke on judging and answered questions from students. I have no notes, transcript, or recording. The address of the William & Mary Law School is 613 South Henry Street, Williamsburg, Virginia 23185. Press report supplied.

November 2, 2017: Panelist, "The Judicial Perspective," the Georgetown Law Journal, Symposium: The Law of Nations and the United States Constitution, Washington, D.C. I participated in a panel discussion of Anthony Bellia and Bradford Clark's book, *The Law of Nations and the United States Constitution*. I have no notes, transcript, or recording. The address of the Georgetown University Law Center is 600 New Jersey Avenue, N.W., Washington, D.C. 20001. Press report supplied.

October 27, 2017: Panelist, "A Conversation with Federal Judges about Federal Courts," Harvard Law School Bicentennial, Cambridge, Massachusetts. Video available at: <https://www.youtube.com/watch?v=xkT9NeT6s3A>.

October 25, 2017: Speaker, "The Judiciary's Role in Maintaining the Separation of Powers," Joseph Story Distinguished Lecture, Heritage Foundation, Washington, D.C. Video available at: https://www.youtube.com/watch?v=s_rR6518w3I. Press report supplied.

October 13, 2017: Guest Lecturer, Judicial Decisionmaking Class, New York University School of Law, New York, New York. I spoke about the process of preparing judicial opinions. I have no notes, transcript, or recording. The address of New York University School of Law is 40 Washington Square South, New York, New York 10012.

September 18, 2017: Speaker, "The Constitutional Statesmanship of Chief Justice William Rehnquist," Walter Berns Constitution Day Lecture, American Enterprise Institute, Washington, D.C. Video available at: <http://www.aei.org/events/2017-walter-berns-annual-constitution-day-lecture/>. A published version of this speech is provided in response to Question 12.a.

September 15, 2017: Panelist, "Lessons Learned from the FISC and the Guantanamo Habeas Litigation," University of Texas School of Law Courts at War Conference. I have no notes, transcript, or recording. The address of the University of Texas School of

Law is 727 East Dean Keeton Street, Austin, Texas 78705.

September 13, 2017: Speaker, "A Conversation with Dean Jennifer Collins," Southern Methodist University Dedman School of Law. I answered questions about a wide range of issues related to my service as a judge. I have no notes, transcript, or recording. The address of the Southern Methodist University Dedman School of Law is 3315 Daniel Avenue, Dallas, Texas 75205.

July 6 – 12, 2017: Moderator, "Justice & Society Program Summer Seminar," the Aspen Institute. I have no notes, transcript, or recording. Together with Professor Robert Post, I served as a moderator for a week-long series of discussions where participants debated a variety of topics related to legal issues and philosophy. The address of the Aspen Institute is 2300 N Street, N.W., Suite 700, Washington, D.C. 20037.

June 26, 2017: I spoke to students in my chambers about the U.S. Constitution and the role of judges. The event was organized by the U.S.–Asia Institute. I have no notes, transcript, or recording. The address of the U.S.–Asia Institute is 232 East Capitol Street, N.E., Washington D.C. 20003. Press report supplied.

May 27, 2017: Panelist, "The First Amendment," Yale College Alumni Weekend, New Haven, Connecticut. I have no notes, transcript, or recording. The address of Yale College is 344 College Street, New Haven, Connecticut 06511.

April 21, 2017: Speaker, Yale Law School Black Law Students Association, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of the Yale Law School Black Law Students Association is 127 Wall Street, New Haven, Connecticut 06511.

April 20, 2017: Speaker, Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I reflected on my time at Yale and discussed my service as a judge. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511. Press report supplied.

April 3, 2017: Speaker, "A Conversation with Judge Brett Kavanaugh on the Separation of Powers and the Role of the Article III Judge," Harvard Law School Federalist Society Student Chapter. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

February 3, 2017: Speaker, Notre Dame Law Review Federal Courts Symposium, Notre Dame Law School. A published version of this speech is provided in response to Question 12.a.

December 12, 2016: Participant, "Romeo and Juliet Wrongful Death Mock Trial," Shakespeare Theatre Company, Washington, D.C. Video available at: <https://www.c->

span.org/video/?419930-1/federal-judges-discuss-romeo-juliet. Press report supplied.

December 7, 2016: Speaker, Swearing-In of Justice Britt Grant, Georgia Supreme Court, Atlanta, Georgia. Notes supplied.

December 4, 2016: Speaker, Georgetown Visitation School Father-Daughter Mass and Brunch, Washington, D.C. Notes supplied.

November 14, 2016: Panelist, "National Security and Government Service: Perspectives from the D.C. Circuit, the Executive Branch, and the Academy – A Conversation with Judge Brett Kavanaugh (D.C. Cir.), Caroline Krass (General Counsel of the CIA), and Prof. Jack Goldsmith," Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

November 3, 2016: Speaker, Former Law Clerks Reception, Historical Society of the District of Columbia Circuit, Washington, D.C. Notes and press report supplied.

October 4, 2016, Speaker, "Constitutional Exceptions," Eighth Annual Justice Anthony Kennedy Lecture Series, Lewis & Clark Law School, Portland, Oregon. My remarks were substantially similar to my speech at Notre Dame Law School on February 3, 2017, for which a published version is supplied.

September 20, 2016: Panelists, "Barbarians at the Gate, Part 2: The Attack on Professionalism," International Bar Association Annual Conference. I have no notes, transcript, or recording. The address of the International Bar Association's North American office address is 1667 K Street, N.W., Suite 1230, Washington, D.C. 20006.

September 14, 2016: Speaker, "Reception at the Top of the Town," John Carroll Society, Arlington, Virginia. I spoke about my faith and my career. I have no notes, transcript, or recording. The address of the John Carroll Society is Post Office Box 454, Glen Echo, Maryland 20812. Press report supplied.

June 2, 2016: Speaker, "Remembering Justice Scalia," George Mason University Antonin Scalia Law School, Arlington, Virginia. Video available at: https://vimeo.com/169758593?utm_source=email&utm_medium=vimeo-cliptranscode-201504&utm_campaign=28749. Press reports supplied.

May 25, 2016: Speaker, Federalist Society D.C. Lawyers Chapter. I spoke about my role as a judge, the D.C. Circuit, and my experiences in the Bush White House. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street N.W., Washington, D.C. 20006.

April 13, 2016: Speaker, "On the Issues with Mike Gousha, Judge Brett Kavanaugh & Ted Ulyot," Marquette University Law School, Milwaukee, Wisconsin. Video available

at: <https://www.youtube.com/watch?v=dJMM1WrRwQw>. Press report supplied.

April 13, 2016: Judge, Moot Court Competition, Marquette University Law School, Milwaukee, Wisconsin. Video available at: <https://law-media.marquette.edu/Mediasite/Play/3845ecbb83c24188bac70238027731e91d>. Press report supplied.

April 1, 2016: Moderator, "Presidential Power in an Era of Polarized Politics," Harvard Law School, Cambridge, Massachusetts. Audio available at: https://www.youtube.com/watch?v=-sAzs_uAi9Q.

March 31, 2016: Participant, "Federal Courts & Public Policy," American Enterprise Institute, Washington, D.C. Video available at: https://www.youtube.com/watch?time_continue=1&v=GCtR0OyHiK8. Press reports supplied.

March 2, 2016: Guest Teacher, Public Law Workshop Class, Harvard Law School, Cambridge, Massachusetts. I spoke about my law review article on statutory interpretation referred to in Question 12.a.

February 23, 2016: Speaker, Georgetown University Law Center, Washington, D.C. I spoke to Viet Dinh and Paul Clement's class about the separation of powers. I have no notes, transcript, or recording. The address of the Georgetown University Law Center is 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

January 21, 2016: Moot Court Judge, 2016 Van Vleck Constitutional Law Moot Court Competition, George Washington University Law School, Washington, D.C. I have no notes, transcript, or recording. A video in which I discuss the competition is available at: <https://www.youtube.com/watch?v=gpgKlogLO8w>. Press report supplied.

November 17, 2015: Speaker, Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. I spoke about my service as a judge. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 16, 2015: Speaker, 2015 Law Clerk Reception, the Historical Society of the District of Columbia Circuit. I spoke about the various activities of the Historical Society. I have no notes, transcript, or recording. The address of the Historical Society of the District of Columbia Circuit is E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Room 4714, Washington, D.C. 20001. Press report supplied.

November 14, 2015: Panelist, "Life on the Bench," Federalist Society 2015 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=rW9V4IIOTX0>.

November 12, 2015: Moderator, "Federalism: Deference Meets Delegation: Which is the Most Dangerous Branch?," Federalist Society 2015 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=Ae3etb8ieKM>.

October 22, 2015: Speaker, "Judge Kavanaugh & Jane Ostrager '16: A Conversation About the D.C. Circuit," Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I discussed a wide range of legal issues related to my service on the D.C. Circuit. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

October 6, 2015: Speaker, "Separation of Powers," Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. I spoke about the division of the legislative, executive, and judicial functions. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

July 16, 2015: Speaker, "A Conversation with Judge Bill Pryor and Judge Brett Kavanaugh," Federalist Society D.C. Young Lawyers Chapter, Washington, D.C. I participated in a discussion of a wide range of issues related to my service as a judge. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Washington, D.C. 20006. Press report supplied.

June 24, 2015: Panelist, "The Constitutional Convention of 1787," D.C. Circuit Judicial Conference, Philadelphia, Pennsylvania. I have no notes, transcript, or recording. The address of the D.C. Circuit is E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

April 7, 2015: Speaker, Yale Law School Black Law Students Association, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

April 7, 2015: Speaker, "Judging on the D.C. Circuit: A Conversation with Judges Kavanaugh and Srinivasan," Yale Law School Federalist Society Student Chapter and the Yale American Constitution Society, New Haven, Connecticut. I participated in a discussion of legal issues related to, and practice before, the D.C. Circuit. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter and the Yale American Constitution Society is 127 Wall Street, New Haven, Connecticut 06511.

April 6, 2015: Moot Court Judge, Orison S. Marden Moot Court Board Competition, New York University School of Law, New York, New York. I have no notes, transcript, or recording. The address of New York University School of Law is 40 Washington Square South, New York, New York 10012. Press report supplied.

March 30, 2015: Speaker, "The Judge as Umpire," Pope John XXIII Lecture Series, the Catholic University of America, Columbus School of Law. Video available at: https://www.youtube.com/watch?list=PL_aRAkHbV7Gv8S87bQgQalwdtLVFFYdbF&v=SXXKX_whwVzs. A published version of this speech is provided in response to Question 12.a. Press report supplied.

March 3, 2015: Speaker, E. Harold Hallows Lecture, "Separation of Powers Controversies in the Bush and Obama Administrations: A View from the Trenches," Marquette University Law School, Milwaukee, Wisconsin. Video available at: <https://law-media.marquette.edu/Mediasite/Play/9a65034002ad4003b9c00cec7dd2e9171d>. Press report supplied. A published version of this speech is provided in response to Question 12.a.

January 20, 2015: Speaker, Harvard Law School, Cambridge, Massachusetts. I spoke to Thomas Goldstein's class about the D.C. Circuit and the Supreme Court. I have no notes, transcript, or recording. The address of Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 24, 2014: Participant, "Trial of Lysistrata," Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is 610 F Street, N.W., Washington, D.C. 20004. Press report supplied.

November 18, 2014: Speaker, Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. I spoke about my service as a judge and the separation of powers. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 6, 2014: Panelist, American Bar Association 24th Annual Review of the Field of National Security Law CLE Conference, Washington, D.C. Audio available at: [http://www.americanbar.org/content/dam/aba/multimedia/law_national_security/24thannualreview/podcasts/Day1/Panel2\(Day1\)-final.mp3](http://www.americanbar.org/content/dam/aba/multimedia/law_national_security/24thannualreview/podcasts/Day1/Panel2(Day1)-final.mp3). Press report supplied.

April 23, 2014: Speaker, Yale Law School Federalist Society Banquet, New Haven, Connecticut. Notes supplied.

April 15, 2014: Speaker, American University Washington College of Law, Washington, D.C. I guest taught Professor Vladeck's class and discussed issues of national security law and the federal courts. I have no notes, transcript, or recording. The address of American University Washington College of Law is 4300 Nebraska Avenue, N.W., Washington, D.C. 20016.

April 10, 2014: Panelist, "The Approach of Courts to Foreign Affairs and National

Security,” American Society of International Law, Washington, D.C. I have no notes, transcript, or recording. The address of the American Society of International Law is 2223 Massachusetts Avenue, N.W., Washington, D.C. 20008. Press report supplied.

March 28, 2014: Panelist, “The Law of Nations as Constitutional Law,” Virginia Law Review Centennial Symposium, Charlottesville, Virginia. Video available at: https://www.youtube.com/watch?v=2gBMb_E05LM.

March 13, 2014: Speaker, “Judging on the D.C. Circuit,” George Washington Federalist Society Student Chapter, Washington, D.C. I have no notes, transcript, or recording. The address of the George Washington University Law School is 2000 H Street, N.W., Washington, D.C. 20052. Press report supplied.

March 7, 2014: Speaker, “Judicial Wisdom,” Sidley Austin Supreme Court Clinic, Northwestern University Pritzker School of Law. I spoke about judging. I have no notes, transcript, or recording. The address of the Northwestern University Pritzker School of Law is 375 East Chicago Avenue, Chicago, Illinois 60611. Press report supplied.

March 5, 2014: Panelist, “Sub-Regulating Elections,” University of Chicago Law School, Visiting Judges Sidebar Series. I have no notes, transcript, or recording. The address of the University of Chicago Law School is 1111 East 60th Street, Chicago, Illinois 60637.

February 24, 2014: Panelist, “Lunch with Judges, Picking/Using Clerks,” Duke University School of Law, Durham, North Carolina. I spoke about how I select and use law clerks. I have no notes, transcript, or recording. The address of the Duke University School of Law is 210 Science Drive, Durham, North Carolina 27708.

February 24, 2014: Judge, “Dean’s Cup Moot Court Competition,” Duke University School of Law, Durham, North Carolina. I have no notes, transcript, or recording. The address of the Duke University School of Law is 210 Science Drive, Durham, North Carolina 27708.

February 7, 2014: Moot Court Judge, Kirkwood Moot Court Competition Finals, Stanford Law School, Stanford, California. I have no notes, transcript, or recording. The address of Stanford Law School is 559 Nathan Abbott Way, Stanford, California 94305.

February 7, 2014: Panelist, “A Conversation with the Kirkwood Moot Court Finals Judges,” Stanford Law School, Stanford, California. I along with other judges discussed our paths to the bench, the judicial nomination and appointments process, and advice to future law clerks. I have no notes, transcript, or recording. The address of Stanford Law School is 559 Nathan Abbott Way, Stanford, California 94305.

January 31, 2014: Panelist, “Life on the D.C. Circuit – A Conversation with Judge Tatel and Judge Kavanaugh,” Harvard Law School Federalist Society Student Chapter and the Harvard Law School American Constitution Society Chapter, Cambridge, Massachusetts. I spoke about judging, offered general career advice, and answered questions. I have no

notes, transcript, or recording. The address of Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138. Press report supplied.

January 30, 2014: Speaker, "A Clerkship Conversation with D.C. Circuit Judge Kavanaugh," Harvard Law School. I spoke about clerking, its value, and the application process. I have no notes, transcript, or recording. The address of Harvard Law School is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

January 30, 2014: Speaker, Yale Law School Black Law Students Association, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

November 19, 2013: Speaker, New York University School of Law. I spoke to a class about issues of national security law. I have no notes, transcript, or recording. The address of New York University School of Law is 40 Washington Square South, New York, New York 10012.

November 18, 2013: Panelist, "The Role of the Courts in Intelligence and National Security," The Center on Law and Security, New York University School of Law, New York, New York. Video available at: https://www.youtube.com/watch?v=xX6T41_r3ss. Press report supplied.

November 14, 2013: Panelist, "The FCC vs. the First Amendment," Federalist Society 2013 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=O10fo9dDS0w>.

November 1, 2013: Speaker, "Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution," 2013 Notre Dame Law Review Symposium, Notre Dame Law School, South Bend, Indiana. A published version of this speech is provided in response to Question 12.a. Press reports supplied.

November 1, 2013: Speaker, Notre Dame Law School Federalist Society Student Chapter, Notre Dame Law School. I spoke about my role as a judge. I have no notes, transcript, or recording. The address of the Notre Dame Law School Federalist Society Student Chapter is 110 Eck Hall of Law, Notre Dame, Indiana 46556.

October 29, 2013: Speaker, Yale Law School, New Haven, Connecticut. I spoke to Professor Cristina Rodriguez's class. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

October 29, 2013: Speaker, Yale Law School Black Law Students Association, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

October 28, 2013: Speaker, Yale Law School, New Haven, Connecticut. I spoke about the intersection of national security and the law. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

October 1, 2013: Speaker, "The Courts and the Administrative State," 2013 Sumner Canary Lecture, Case Western Reserve University School of Law, Cleveland, Ohio. Video available at <https://www.youtube.com/watch?v=mJRwdcRE7fg>. A published version of this speech is provided in response to Question 12.a.

July 25, 2013: Speaker, Summer Reception with Judge Brett Kavanaugh, Federalist Society D.C. Young Lawyers Chapter, Washington, D.C. I offered general career advice and answered questions. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006. Press report supplied.

July 15, 2013: Speaker, "The Decisional Process," New Appellate Judges Seminar, New York University School of Law, New York, New York. I have no notes, transcript, or recording. The address of New York University School of Law is 40 Washington Square South, New York, New York 10012.

May 20, 2013: Speaker, Opening Session of the 90th Annual Meeting of the American Law Institute, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=kR8SXsmeXIU>. A published version of this speech is provided in response to Question 12.a.

May 13, 2013: Participant, "Coriolanus Mock Trial," Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is 610 F Street, N.W., Washington, D.C. 20004. Press report supplied.

April 5, 2013: Speaker, George Washington University Law School, Washington, D.C. I spoke to Professor Bradford Clark's class about the D.C. Circuit. I have no notes, transcript, or recording. The address of George Washington University Law School is 2000 H Street, N.W., Washington, D.C. 20052.

March 20, 2013: Speaker, Appellate Law Panel, Practising Law Institute, New York, New York. I spoke on an appellate law panel to attorneys. I have no notes, transcript, or recording. The address of the Practising Law Institute is 1177 Avenue of the Americas, New York, New York 10036.

November 29, 2012: Panelist, "Role of the Courts in National Security Law: Past, Present and Future," American Bar Association 22nd Annual Review of the Field of National Security Law, Washington, D.C. Audio available at: https://www.americanbar.org/content/dam/aba/multimedia/law_national_security/22ndAnnualReview/panel_1.authcheckdam.mp3.

November 17, 2012: Panelist, "The Administrative State After the Health Care Cases," Federalist Society 2012 National Lawyers Convention, Washington, D.C. Video available at <https://www.youtube.com/watch?v=zRImAlbJOt8>.

October 26, 2012: Panelist, "D.C. Circuit Judge Panel," American Bar Association Administrative Law Conference, Washington, D.C. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

July 10, 2012: I spoke to students in my chambers about the U.S. Constitution and the role of judges. The event was organized by the U.S.–Asia Institute. I have no notes, transcript, or recording. The address of the U.S.–Asia Institute is 232 East Capitol Street, N.E., Washington D.C. 20003. Press report previously supplied for June 26, 2017 event.

June 19, 2012: Speaker, the Edward Coke Appellate Inn of Court, Washington, D.C. As President, I offered end of the year remarks. I have no notes, transcript, or recording. The address of the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

May 26, 2012: Panelist, Yale College Alumni Weekend, New Haven, Connecticut. I spoke about my service as a judge. I have no notes, transcript, or recording. The address of Yale College is 344 College Street, New Haven, Connecticut 06511.

May 10, 2012: Panelist, "Administrative Law & Regulatory Practice, Arguing and Deciding Administrative Law Cases in the D.C. Circuit," American Bar Association, Administrative Law and Regulatory Practice Institute. I have no notes, transcript, or recording. I spoke about administrative law cases, procedures, and outcomes. The American Bar Association's address is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

April 30, 2012: Participant, "Much Ado About Nothing Mock Trial," Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is 610 F Street, N.W., Washington, D.C. 20004. Press reports supplied.

April 24, 2014: Speaker, Yale Law School Black Law Students Association, New Haven, Connecticut. I spoke about clerkships and provided advice for aspiring clerks. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

April 24, 2012: Moot Court Judge, Thurman Arnold Prize Finals, Yale Law School, New Haven, Connecticut. Video available at: <https://vimeo.com/43395106>. Press report supplied.

April 20, 2012: Panelist, "Effective Appellate Advocacy: Views from the Bar and Bench," the Edward Coke Appellate Inn of Court, Dwight D. Opperman Institute of

Judicial Administration at NYU School of Law, and the American Academy of Appellate Lawyers, Washington, D.C. I participated in two panels and discussed effective written and oral advocacy. I have no notes, transcript, or recording. The address of the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

April 17, 2012: Speaker, Medical Group, Chevy Chase, Maryland. I spoke to a dinner group of doctor friends regarding my service as a judge. I have no notes, transcript, or recording. The address of the Chevy Chase Club is 6100 Connecticut Avenue, Chevy Chase, Maryland 20815.

March 28, 2012: Speaker, Georgetown University Law Center, Washington, D.C. I spoke to Paul Clement and Viet Dinh's class about the separation of powers. I have no notes, transcript, or recording. The address of the Georgetown University Law Center is 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

March 2, 2012: Panelist, "The Rule of Law and the Administrative State," Federalist Society 2012 Annual Student Symposium, Stanford, California. Video available at: <https://www.youtube.com/watch?v=t3njQn0ls9c>.

February 29, 2012: Speaker, Federalist Society Berkeley Student Chapter, U.C. Berkeley School of Law, Berkeley, California. I spoke about judging on the D.C. Circuit. I have no notes, transcript, or recording. The address of the Federalist Society Berkeley Student Chapter is University of California, Berkeley School of Law, Boalt Hall, 225 Bancroft Way, Berkeley, California 94720.

February 21, 2012: Moderator, "The Upside-Down Constitution," American Enterprise Institute, Washington, D.C. Video available at: https://www.youtube.com/watch?time_continue=3&v=5YQdjQv5sK8. Press report supplied.

February 1, 2012: Speaker, "Separation of Powers in the Bush & Obama Administrations," Federalist Society Student Chapter, University of Kansas School of Law. Notes supplied.

January 24, 2012: Moderator, "Litigation Issues Arising From the War on Terror 10 Years Since September 11," the Edward Coke Appellate Inn of Court, Washington, D.C. I have no notes, transcript, or recording. The address of the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

January 17, 2012: Speaker, Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. Professor Jack Goldsmith and I spoke about a wide range of legal issues. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

January 7, 2012: Speaker, "War, Terror, and the Federal Courts, Ten Years After 9/11,"

Association of American Law Schools 2012 Annual Meeting, Washington, D.C.
Transcript and press report supplied.

November 18, 2011: Panelist, "Administrative Law Goes to War," American Bar Association Administrative Law Conference, Washington, D.C. Recording supplied.

November 11, 2011: Panelist, "Judicial Decision-Making," American Bar Association Appellate Judges Education Institute 2011 Summit, Washington, D.C. Video available at: <https://www.c-span.org/video/?302639-1/judicial-decision-making>. Press report supplied.

November 11, 2011: Moderator, "Attorneys Fees in Class Actions," Federalist Society 2011 National Lawyers Convention, Washington, D.C. Video available at: https://www.youtube.com/watch?v=Y7mMVDwJ_AE.

November 4, 2011: Panelist, "A Dialogue with Federal Judges on the Role of History in Interpretation," George Washington Law Review Conference Commemorating the 100th Anniversary of Farrand's Records of the Federal Convention, Washington, D.C. Transcript supplied.

September 16, 2011: Speaker, the Mentor Group Conference, Rome, Italy. I discussed United States Supreme Court jurisprudence related to privacy and data protection. I have no notes, transcript, or recording. The address of the Mentor Group is 160 Commonwealth Avenue, Boston, Massachusetts 02116.

September 8, 2011: Panelist, "Competitive Debate and Oral Advocacy, Film Screening of Fast Talk," Georgetown University Law Center, Washington, D.C. Videos available at: <https://vimeo.com/31415911>, <https://vimeo.com/31416044>, <https://vimeo.com/31416174>, <https://vimeo.com/31416229>, and <https://vimeo.com/31416520>.

July 16, 2011: Speaker, Federalist Society Student Leadership Conference, Arlington, Virginia. Notes and press report supplied.

May 21, 2011: Speaker, Commencement Address, George Mason University School of Law, Arlington, Virginia. Notes supplied.

May 19, 2011: Panelist, "A View from the Appellate Bench," United States Sentencing Commission Annual National Seminar on the Federal Sentencing Guidelines, San Diego, California. I have no notes, transcript, or recording. The address of the United States Sentencing Commission is One Columbus Circle, N.E., Suite 2-500, South Lobby, Washington, D.C. 20002.

May 3, 2011: Panelist, "Government Performance Improvement – The First Two Years of the Obama Administration's Initiative and Perspectives from Prior Administrations," American Bar Association 7th Annual Administrative Law and Regulatory Practice

Institute. I have no notes, transcript, or recording. The address of the American Bar Association Administrative Law and Regulatory Practice Institute is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

April 11, 2011: Participant, "Mock Trial: The Robert Chiltern Affair: An Ideal Husband's Dilemma," the Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is Sidney Harman Hall, 610 F Street, N.W., Washington, D.C. 20004. Press report supplied.

March 31, 2011: Speaker, "The Courts in Wartime," Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I spoke about the use of international law in interpreting the Authorization for Use of Military Force. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

March 27, 2011: Moot Court Judge, 36th Annual Irving Kaufman Memorial Securities Law Moot Court Competition, Fordham University Law School, New York, New York. I have no notes, transcript, or recording. The address of Fordham University Law School is 150 West 62nd Street, New York, New York 10023. Press report supplied.

March 19, 2011: Speaker, Eleventh Annual William Matthew Byrne, Jr. Judicial Clerkship Institute, Pepperdine University Law School, Malibu, California. I spoke on career choices and lessons learned. I have no notes, transcript, or recording. The address of Pepperdine University Law School is 24255 Pacific Coast Highway, Malibu, California 90263.

March 10, 2011: Moot Court Judge, Eighth Annual Williams Institute Moot Court Competition, UCLA School of Law, Los Angeles, California. I have no notes, transcript, or recording. The address of UCLA School of Law is 385 Charles E. Young Drive East, 1242 Law Building, Los Angeles, California 90095.

March 5, 2011: Panelist, "A Moot Court: Miranda and Public Safety," Peter Jennings Project for Journalists and the Constitution, Philadelphia, Pennsylvania. Video available at: http://library.fora.tv/2011/03/05/A_Moot_Court_Miranda_and_Public_Safety.

February 26, 2011: Panelist, "The Welfare State and American Exceptionalism," Federalist Society 2011 Annual Student Symposium, Charlottesville, Virginia. Video available at: https://www.youtube.com/watch?v=mztl4_WUNvA.

February 21, 2011: Moot Court Judge, Dean's Cup Final Round, Duke University School of Law, Durham, North Carolina. Video available at: https://www.youtube.com/watch?time_continue=1&v=nHQWuOYeVBQ.

November 19, 2010: Panelist, "Free Speech: Anonymity and the First Amendment," Federalist Society 2010 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=WZkLrVLBdA0>.

November 5, 2010: Panelist, "Can't We All Just Be Reasonable? Simplifying Judicial Review Doctrine," American Bar Association 2010 Administrative Law Conference, Washington, D.C. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

October 28, 2010: Speaker, "Franklin Roosevelt's Legacy and Administrative Law," D.C. Bar Administrative Law and Agency Practice Section, Washington, D.C. I have no notes, transcript, or recording. The address of the D.C. Bar is 901 4th Street, N.W., Washington, D.C. 20001. Press report supplied.

October 8, 2010: Panelist, Yale Law School Reunion Event, Yale Law School, New Haven, Connecticut. I discussed my service as a judge and my experiences in the Bush White House. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

June 10, 2010: Panelist, "The Roberts Court and Administrative Law," D.C. Circuit Judicial Conference, Washington, D.C. I have no notes, transcript, or recording. The address of the D.C. Circuit is E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

June 1, 2010: Panelist, "Rulemaking and the Courts," American Bar Association, Sixth Annual Administrative Law and Regulatory Practice Institute. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036. Press reports supplied.

May 17, 2010: Speaker, Supreme Court Dinner, the Edward Coke Appellate Inn of Court, Washington, D.C. Notes supplied.

April 15, 2010: Speaker, Yale Law Journal Banquet, New Haven, Connecticut. Notes supplied.

April 15, 2010: Speaker, "Roosevelt's Black Monday at 75: The Tangled Legacies of *Humphrey's Executor* and *Schechter Poultry*," Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

April 14, 2010: Guest Lecturer, Columbia Law School, New York, New York. Professor Gerken and I spoke to Professor Huang's class about a paper by Professor Gerken addressing federalism. I have no notes, transcript, or recording. The address of Columbia Law School is 435 West 116th Street, New York, New York 10027.

April 13, 2010: Moot Court Judge, Orison S. Marden Moot Court Competition, New York University School of Law, New York, New York. I have no notes, transcript, or recording. The address of New York University School of Law is 40 Washington Square

South, New York, New York 10012.

March 31, 2010: Panelist, "Review of Agency Rules in the D.C. Circuit: Back to the Future," the Historical Society of the District of Columbia Circuit, Washington, D.C. Video available at: <http://dcchs.org/news/agencyrules.html>.

March 23, 2010: Panelist, "The Judge's Perspective: Is the Court Taking the 'Right' Cases?," Yale Law School Conference, New Haven, Connecticut. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

March 20, 2010: Speaker, Tenth Annual William Matthew Byrne, Jr. Judicial Clerkship Institute, Pepperdine University Law School, Malibu, California. I spoke on career choices and lessons learned. I have no notes, transcript, or recording. The address of Pepperdine University Law School is 24255 Pacific Coast Highway, Malibu, California 90263.

March 16, 2010: Participant, "Judgment at Agincourt," the Shakespeare Theatre Company, Washington, D.C. Video available at: <https://www.c-span.org/video/?292554-1/judgment-agincourt>.

February 27, 2010: Panelist, "A Moot Court: Rationing Health Care," Peter Jennings Project for Journalists and the Constitution, the National Constitution Center, Philadelphia, Pennsylvania. Video available at: <https://www.c-span.org/video/?292300-2/moot-court-rationing-health-care>.

February 12, 2010: Speaker, Evening Honoring Judge Stapleton, Federal Bar Association, Wilmington, Delaware. Notes and press report supplied.

November 13, 2009: Moderator, "Religious Liberties: Religious Liberty and the Limits of Government Power," Federalist Society 2009 National Lawyers Convention, Washington, D.C. Video available at: <https://www.youtube.com/watch?list=PL579DE3ACAF0565EB&v=-kRN.W.YdO3X0>.

October 29, 2009: Speaker, D.C. Bar CLE Appellate Advocacy Program, Washington, D.C. Judge Rogers and I offered our perspectives as judges and provided attendees with advice about appellate advocacy. Notes and press report supplied.

October 22, 2009: Panelist, "Administrative Law," American Bar Association, Washington, D.C. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

October 16, 2009: Panelist, "Environmental Law," Yale Law School Alumni Weekend, New Haven, Connecticut. I have no notes, transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

September 18, 2009: Speaker, the Mentor Group Conference, Berlin, Germany. I discussed significant historical antitrust cases that the D.C. Circuit had decided. I have no notes, transcript, or recording. The address of the Mentor Group is 160 Commonwealth Avenue, Boston, Massachusetts 02116.

June 10, 2009: Panelist, "Effective Appellate Advocacy in Agency Rulemaking and Adjudication Cases: The Judicial Perspective," Fifth Annual Administrative Law and Regulatory Practice Institute. Notes and press reports supplied.

April 6, 2009: Participant, "Mock Trial: Malvolio's Revenge," the Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is Sidney Harman Hall, 610 F Street, N.W., Washington, D.C. 20004. Press reports supplied.

March 4, 2009: Panelist, National Association of Attorneys General Annual Spring Meeting, Washington, D.C. I participated in a panel discussion about legal issues related to cybercrime, Internet safety, and data security. I have no notes, transcript, or recording. The address of the National Association of Attorneys General is 1850 M Street, N.W., 12th floor, Washington, D.C. 20036

February 28, 2009: Moderator, "Separation of Powers in American Constitutionalism, *Medellin v. Texas*," Federalist Society 2009 Annual Student Symposium, New Haven, Connecticut. I have no notes, transcript, or recording. I moderated a panel on separation of powers. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

January 19, 2009: Speaker, Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. I spoke about the role of a judge. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

November 22, 2008: Panelist, "The FCC and the First Amendment," Federalist Society 2008 National Lawyers Convention, Washington, D.C. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006. Press report supplied.

November 21, 2008: Moot Court Judge, George Mason University School of Law Moot Court Competition, Washington, D.C. I have no notes, transcript, or recording. The address of the George Mason University Antonin Scalia Law School is 3301 Fairfax Drive, Arlington, Virginia 22201.

November 14, 2008: Moot Court Judge, University of Georgia School of Law Moot Court Competition, Athens, Georgia. I have no notes, transcript, or recording. The address of the University of Georgia School of Law is 225 Herty Drive, Athens, Georgia 30602.

October 30, 2008: Panelist, "D.C. Circuit Panel," D.C. Bar Association, Washington, D.C. Judge Edwards and I discussed appellate advocacy. I have no notes, transcript, or recording. The address of the D.C. Bar is 901 4th Street, N.W., Washington, D.C. 20001.

October 17, 2008: Speaker, "Separation of Powers During the 44th Presidency and Beyond," University of Minnesota Law Review Symposium, University of Minnesota Law School, Minneapolis, Minnesota. Video available at: <http://www.startribune.com/watch-supreme-court-nominee-brett-kavanaugh-s-2008-speech-at-university-of-minnesota/488057311/>. A published version of this speech is provided in response to Question 12.a.

October 16, 2008: Panelist, "Arbitrary and Capricious Review Revisited: *State Farm v. Vermont Yankee* at Last," American Bar Association 2008 Administrative Law Conference. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

September 23, 2008: Moderator, "Stockholders at the Wheel: Shareholder Access Rule," Federalist Society Corporations, Securities & Antitrust Practice Group, Washington, D.C. Video available at: <https://www.youtube.com/watch?v=WSpRUUzqFNg>.

September 17, 2008: Speaker, "Constitution, Courts, Checks and Balances," Georgetown University Law Center. I have no notes, transcript, or recording. The address of the Georgetown University Law Center is 600 New Jersey Avenue, N.W., Washington, D.C. 20001. Press report supplied.

September 16, 2008: Participant, "The Trial of Socrates," Shakespeare Theatre Company, Washington, D.C. I have no notes, transcript, or recording. The address of the Shakespeare Theatre Company is 610 F Street, N.W., Washington, D.C. 20004. Press reports supplied.

June 5, 2008: Moderator, "The Impact of Legal Blogs," D.C. Circuit Judicial Conference, Farmington, Pennsylvania. I have no notes, transcript, or recording. The address of the D.C. Circuit is E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

May 20, 2008: Panelist, Discussion with Judge J. Frederick Motz and Judge Tim Lewis, the Edward Coke Appellate Inn of Court, Washington, D.C. I spoke about appellate practice in the D.C. Circuit. I have no notes, transcript, or recording. The address of the American Inns of Court is 225 Reinekers Lane, Suite 770, Alexandria, Virginia 22314.

May 16, 2008: Speaker, "May D.C. Luncheon with Brett M. Kavanaugh," Federalist Society Washington D.C. Lawyers Chapter, Washington, D.C. Notes supplied.

May 5, 2008: Moot Court Judge, the Thurman Arnold Prize Finals – Morris Tyler Moot Court of Appeals, Yale Law School, New Haven, Connecticut. I have no notes,

transcript, or recording. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

May 5, 2008: Speaker, Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I reflected on my experience at Yale, my service as a judge, and my time in the Bush White House. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

May 1, 2008: Panelist, "Judicial Review of Guidance," American Bar Association Fourth Annual Administrative and Regulatory Law Institute. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

April 15, 2008: Speaker, Judicial Prayer Breakfast, E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex, Washington, D.C. Notes supplied.

March 27, 2008: Moot Court Judge, Campbell Moot Court Finals, University of Michigan Law School, Ann Arbor, Michigan. I have no notes, transcript, or recording. The address of the University of Michigan Law School is 625 South State Street, Ann Arbor, Michigan 48109. Press report supplied.

March 18, 2008: Moot Court Judge, Fifty-Seventh Annual Beaudry Moot Court Competition, Georgetown University Law Center, Washington, D.C. Video available at: https://www.youtube.com/watch?v=9pp-C_xjSil.

February 21, 2008: Speaker, American Bar Association Appellate Practice Seminar, Washington, D.C. I have no notes, transcript, or recording. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Suite 400, Washington, D.C. 20036.

November 17, 2007: Moderator, "Intellectual Property: American Exceptionalism or International Harmonization?," Federalist Society 2007 National Lawyers Convention, Washington, D.C. Audio available at: <http://www.fed-soc.org/multimedia/detail/intellectual-property-american-exceptionalism-or-international-harmonization-event-audio>.

October 27, 2007: Speaker, "A Critique of the International Legal Academy," Federalist Society New York City Lawyers Chapter, New York, New York. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

October 26, 2007: Panelist, "International Law, the U.S. Constitution and Counterterrorism," International Law Weekend 2007, International Law Association, Washington, D.C. I have no notes, transcript, or recording. The address of the International Law Association, American Branch is Georgetown University Law Center, 600 New Jersey Avenue, N.W., Washington, D.C. 20001.

October 24, 2007: Speaker, Clinton School of Public Service Speaker Series, University of Arkansas, Little Rock, Arkansas. Video available at: <https://www.clintonschoolspeakers.com/lecture/view/us-court-appeals-judge>. Press report supplied.

June 20, 2007: Speaker, "Judging on the D.C. Circuit," Federalist Society Baltimore Lawyers Chapter, Baltimore, Maryland. I spoke about my service as a judge and my time in the Bush White House. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006.

June 2, 2007: Speaker, Yale College Class of 1987 20th Reunion, Association of Yale Alumni, New Haven, Connecticut. I spoke about my career, including my experience at the White House. I have no notes, transcript, or recording. The address of the Association of Yale Alumni is Post Office Box 209010, New Haven, Connecticut 06520.

May 4, 2007: Speaker, Yale Law School Federalist Society Student Chapter, New Haven, Connecticut. I reflected on my experience at Yale, my service as a judge, and my time in the Bush White House. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511.

April 12, 2007: Speaker, Harvard Law School Federalist Society Student Chapter, Cambridge, Massachusetts. I spoke about my career, including my experience at the White House. I have no notes, transcript, or recording. The address of the Harvard Law School Federalist Society Student Chapter is 1563 Massachusetts Avenue, Cambridge, Massachusetts 02138.

April 11, 2007: Moot Court Judge, Harlan Fiske Stone Moot Court Finals, Columbia Law School, New York, New York. Video available at: http://www.law.columbia.edu/media_inquiries/news_events/2007/april07/mootcourt. Press report supplied.

March 31, 2007: Moot Court Judge, William Minor Lile Moot Court Competition, University of Virginia School of Law, Charlottesville, Virginia. I have no notes, transcript, or recording. The address of the University of Virginia School of Law is 580 Massie Road, Charlottesville, Virginia 22903. Press reports supplied.

March 30, 2007: Speaker, "Discussion of Life on the D.C. Circuit Court of Appeals," Federalist Society University of Virginia Student Chapter, Charlottesville, Virginia. I spoke about the importance of oral argument to a court's deliberation and also urged the students to consider careers in public service. I have no notes, transcript, or recording. The address of the Federalist Society University of Virginia Student Chapter is 580 Massie Road, Charlottesville, Virginia 22903. Press report supplied.

March 25, 2007: Speaker, "Judging on the D.C. Circuit," Georgetown University Law

Center Federalist Society Student Chapter, Washington, D.C. I have no notes, transcript, or recording. The address of Georgetown University Law Center Federalist Society Student Chapter is 600 New Jersey Avenue, N.W., Washington, D.C. 20001. Press report supplied.

February 23, 2007: Guest Teacher, Ethics of Lawyering in Government, Washington University of St. Louis School of Law. I have no notes, transcript, or recording. The address of the Washington University of St. Louis School of Law is One Brookings Drive, St. Louis, Missouri 63130

February 23, 2007: Speaker, Exchange with European Judges, United States Judiciary, Washington, D.C. I participated in remarks on administrative law. I have no notes, transcript, or recording. The address of the United States Court of Appeals for the District of Columbia Circuit is E. Barrett Prettyman U.S. Courthouse and William B. Bryant Annex, 333 Constitution Avenue, N.W., Washington, D.C. 20001.

November 17, 2006: Moderator, "Civil Rights in the 21st Century," the Federalist Society 2006 National Lawyers Convention. I have no notes, transcript, or recording. The address of the Federalist Society is 1776 I Street, N.W., Suite 300, Washington, D.C. 20006. Press report supplied.

September 27, 2006: Speaker, Investiture as a Circuit Judge, Washington, D.C. Speech supplied.

June 1, 2006: Speaker, Swearing-In to the United States Court of Appeals for the District of Columbia Circuit, Washington, D.C. Video available at: <https://www.c-span.org/video/?192795-1/judge-kavanaugh-swearing-ceremony>. Press reports supplied (quotations reprinted in multiple outlets).

May 9, 2003: Panelist, Meeting with Log Cabin Republicans, the White House, Washington, D.C. I spoke to a group of gay and lesbian Republicans to discuss Bush Administration policies. I have no notes, transcript, or recording. The address of the Log Cabin Republicans is 1090 Vermont Avenue, N.W., Suite 850, Washington, D.C. 20005. Press report supplied.

March 21, 2003: Speaker, "The Judicial Confirmation Crisis," the Republican National Lawyers Association, Washington, D.C. I have no notes, transcript, or recording. I spoke about judicial confirmations. The address of the Republican National Lawyers Association is Post Office Box 18965, Washington, D.C. 20036.

January 2003 (precise date unknown): Speaker, Yale Law School Association of Washington, D.C. I spoke about judicial appointments. The address of the Yale Law School Association of Washington, D.C., is c/o Yale Law School Office of Alumni Affairs, Post Office Box 208294, New Haven, Connecticut 06520. Press report supplied.

December 13, 2002: Panelist, Federal Practice Seminar, Iowa State Bar Association, Des

Moines, Iowa. I spoke as a part of a panel on federal judicial selection. I have no notes, transcript, or recording. The address of the Iowa State Bar Association is 625 East Court Avenue, Des Moines, Iowa 50309.

May 17, 2002: Speaker, "The Roles and Responsibilities of the Executive and Legislative Branches in the Federal Judicial Selection Process," American Judicature Society, Washington, D.C. Video available at: <https://www.c-span.org/video/?170130-1/role-responsibilities-executive-branch>. Press report supplied.

April 19, 2002: Speaker, "Republican Legal Issues," Republican National Lawyering Society, Washington, D.C. Video available at: <https://www.c-span.org/video/?169679-1/republican-legal-issues>.

April 8, 2002: Speaker, "Welcome on Behalf of President Bush," U.S. Court of Appeals for the Federal Circuit 20th Anniversary Judicial Conference, Washington, D.C. Transcript supplied.

March 2, 2002: Moderator, "Originalism and Historical Truth," Federalist Society 2002 Annual Student Symposium, New Haven, Connecticut. I have no notes, transcript, or recording. The address of the Yale Law School Federalist Society Student Chapter is 127 Wall Street, New Haven, Connecticut 06511. In my 2004 Questionnaire, this event was inadvertently listed as having occurred in 2001.

May 3 – 5, 2000: Speaker, "Ninth Annual Federal Sentencing Guidelines Seminar," Federal Bar Association, Clearwater Beach, Florida. I have no notes, transcript, or recording. The address of the Federal Bar Association is 1220 North Fillmore Street, Suite 400, Arlington, Virginia 22201.

February 18, 2000: Panelist, "The Clinton Impeachment," Duke University School of Law Distinguished Speaker Series, Durham, North Carolina. I have no notes, transcript, or recording. The address of the Duke University School of Law is 210 Science Drive, Durham, North Carolina 27708. Press reports supplied. In my 2004 Questionnaire, this event was inadvertently listed as having occurred in 1999.

November 30, 1999: Speaker, "Kenneth Starr Appreciation Dinner," Washington, D.C. Video available at: <https://www.c-span.org/video/?153930-1/kenneth-starr-appreciation-dinner>.

February 22, 1998: Panelist, "Independent Counsel Act," Georgetown University Law Center, Washington, D.C. Video available at: <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

February 19, 1998: Speaker, "Independent Counsel Structure and Function," Washington, D.C. Video available at: <https://www.c-span.org/video/?101055-1/independent-counsel-structure-function>.

June 1993: Speaker, Mater Dei School Graduation, Bethesda, Maryland. I spoke to the graduating class. I have no notes, transcript, or recording. The address of Mater Dei School is 9600 Seven Locks Road, Bethesda, Maryland 20817.

In addition to remarks noted above, the following events were listed on the Senate Judiciary Questionnaire I submitted in conjunction with my nomination to serve as a circuit judge. I have no further records regarding these events.

2001 – 2003: During this time period, I spoke with groups of historians about presidential recordkeeping practices.

2003: Remarks to the American Forest and Paper Association on a variety of legal issues. The address of the American Forest and Paper Association 1101 K Street, N.W., Suite 700, Washington, D.C. 20005.

2003: Remarks to Federalist Society Southern Leadership Conference. The address of the Federalist Society is 1776 I Street, N.W., Washington, D.C. 20006.

2002: Remarks to National Conference of Women's Bar Associations about judicial appointments. The address of the National Conference of Women's Bar Associations is Post Office Box 82366, Portland, Oregon 97282.

2002: Panel member at Yale Law School about judicial appointments. The address of Yale Law School is 127 Wall Street, New Haven, Connecticut 06511.

2002: Panel member in discussion on judicial appointments sponsored by the New York City Bar Association. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036.

2002: Panel member in discussion on judicial appointments sponsored by the Washington Council of Lawyers. The address of the Washington Council of Lawyers is 601 Massachusetts Avenue, N.W., Suite 5409, Washington, D.C. 20001.

2001: Remarks at Yale Club of Pittsburgh about the independent counsel law and role of White House Counsel's Office. The address of the Yale Club of Pittsburgh is c/o Allegheny HYP Club, 619 William Penn Place, Pittsburgh, Pennsylvania 15219.

2000: Moderator, Federalist Society panel on First Amendment. The address of the Federalist Society is 1776 I Street, N.W., Washington, D.C. 20006.

2000: Remarks at American Bar Association panel on Internet regulation. The address of the American Bar Association is 1050 Connecticut Avenue, N.W., Washington, D.C. 20036.

2000: Participant in symposium sponsored by Georgetown Journal of Legal Ethics. The address of the Georgetown University Law Center is 600 New Jersey Avenue, N.W.,

Washington, D.C. 20001.

2000: Moderator, Federalist Society panel on charitable choice. The address of the Federalist Society is 1776 I Street, N.W., Washington, D.C. 20006.

2000: Participant in Federal Bar Association symposium on federal Sentencing Guidelines. The address of the Federal Bar Association is 1220 North Fillmore Street, Suite 444, Arlington, Virginia 22201.

In addition to the events listed above where I spoke to the Republican National Lawyers Association (RNLA), I believe I may have spoken at other RNLA events during my service for President George W. Bush. I do not have records of these events, and a search of publicly available records on my behalf has not produced further information.

Finally, in addition to the events listed above, during my service for President George W. Bush, I spoke in an official capacity to interested groups, typically at the White House. I do not have dates for these events. I did not have prepared texts for these informal talks, but I occasionally spoke from short written points that I did not retain.

e. List all interviews you have given to newspapers, magazines or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

Through searches of publicly available databases by persons acting on my behalf, we have found the following interviews.

Examining What Anthony Kennedy's Retirement Means (NPR radio broadcast, June 28, 2018). This interview was conducted several years earlier for use when Justice Kennedy left the Court. Transcript provided.

Guillermo Contreras, *District's Top U.S. Attorney Outlines Priorities; Border Security Is No. 1, Bash Says*, San Antonio Express-News, Apr. 13, 2018, at A3. Copy supplied.

Tony Mauro, *Shut Out: SCOTUS Clerks Still Mostly White and Male*, Palm Beach Daily Bus. Rev., Dec. 12, 2017. Copy supplied. This article was reprinted in multiple outlets.

Adam Liptak & Nicholas Fandos, *How Gorsuch the Clerk Met Kennedy the Justice: A Tale of Luck*, N.Y. Times, March 3, 2017. Copy supplied.

Washington Ng {Newcomer's Guide}, Washingtonian, Jan. 2017. Copy supplied.

Mike Scarcella, *Flying Robes*, Nat'l L.J., May 21, 2012. Copy supplied.

Sheldon Goldman et al., *W. Bush's Judicial Legacy: Mission Accomplished*, Judicature, May – June 2009. Copy supplied.

In response to news stories about my confirmation hearings, on June 27, 2007, a spokesperson at the D.C. Circuit issued a statement on my behalf. This statement was reprinted in multiple news stories. I have supplied representative examples of these news stories.

Debra J. Saunders, *Slap Them Silly*, S.F. Chron., Oct. 25, 2005, at B7. Copy supplied.

Todd S. Purdum, *Colleagues Find it Hard to Pinpoint Miers's Influence*, Int'l Herald Trib., Oct. 17, 2005, at 4. Copy supplied. Reprinted in multiple outlets.

Bill Adair, *Miers' Mind a Mystery – Except Toward Bush*, St. Petersburg Times (Fla.), Oct. 16, 2005, at 1A. Copy supplied. Reprinted in multiple outlets.

Todd S. Purdum, *Colleagues Praise Nominee's Work but aren't Specific*, Ventura County Star (Cal.), Oct. 16, 2005, at 11. Copy supplied. Reprinted in multiple outlets.

Miers Fights to Win, Friends Say; the Supreme Court Nominee Is Described As More than Just an Admirer of President Bush, Wilkes-Barre Times Leader (Penn.), Oct. 16, 2005, at A9. Copy supplied.

Donna Cassata, *High Court Nominee Is Tough, Ambitious Lawyer Who Has Been Trusted Adviser to Bush*, Associated Press, Oct. 15, 2005. Copy supplied. Reprinted in multiple outlets.

Amy Goldstein & Peter Baker, *For Miers, Proximity Meant Power; Longtime Bush Confidante Became Gatekeeper of Access to the President*, Wash. Post, Oct. 13, 2005, at A1. Copy supplied.

T.R. Goldman, *Down to the Last Detail*, Legal Times, Dec. 13, 2004. Copy supplied. Reprinted in multiple outlets.

Sheldon Goldman et al., *W. Bush Remaking the Judiciary: Like Father Like Son?*, Judicature, May – June 2003. Copy supplied.

The World Today (CNN television broadcast Dec. 11, 2000). Transcript supplied.

In the weeks before the Supreme Court's decision in *Bush v. Gore*, I was interviewed by MSNBC and perhaps other media outlets in connection with the litigation that concluded with that decision. I do not have more precise records and I, and others acting on my behalf, have been unable to locate recordings or transcripts.

Burden of Proof (CNN television broadcast June 29, 2000). Transcript supplied.

Bill Hatfield, *Lawyers Look Back at Impeachment*, Chronicle (Duke University), Feb. 21, 2000. Copy supplied.

Jeff Shear, *Farewell to All That – The Demise of the Independent Counsel Statute*, Washington Lawyer, November/December 1999, at 24. Copy supplied.

Warren Richey, *New Case May Clarify Court's Stand on Race*, Christian Sci. Monitor, Oct. 6, 1999, at 3. Copy supplied.

Burden of Proof (CNN television broadcast Sept. 9, 1999). Transcript supplied.

Burden of Proof (CNN television broadcast June 30, 1999). Transcript supplied.

Lawyers' Roundtable: Attorney-Client Privilege, Washington Lawyer, Jan.-Feb. 1999, at 34. Copy supplied.

20/20 (ABC television broadcast Nov. 25, 1998). Transcript supplied.

Ruth Marcus, *Probe Bogs Down in Tangle of Privilege; As Starr's Subpoenas Proliferate, So Do Claims of Special Protection*, Wash. Post, Feb. 26, 1998, at A11. Copy supplied.

Books

I provided interviews for the following books:

Jan Crawford, *Supreme Conflict* (2007).

Benjamin Wittes, *Starr: A Reassessment* (2002).

Peter Baker, *The Breach: Inside the Impeachment and Trial of William Jefferson Clinton* (2001).

Susan Schmidt and Michael Weisskopf, *Truth At Any Cost: Ken Starr and the Unmaking of Bill Clinton* (2000).

Bob Woodward, *Shadow: Five Presidents and the Legacy of Watergate* (1999).

Michael Isikoff, *Uncovering Clinton: A Reporter's Story* (1999).

In addition to the interviews listed above, I have also spoken to reporters on background as appropriate or as directed.

f. If, in connection with any public office you have held, there were any reports, memoranda, or policy statements prepared or produced with your participation, supply four (4) copies of these materials. Also provide four (4) copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you

made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group, or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document, the date of the document, a summary of its subject matter, and where it can be found.

As Assistant to the President and Staff Secretary, Senior Associate Counsel to the President, and Associate Counsel to the President, I was involved in the process related to the preparation of various reports, memoranda, and policy statements, as well as the process related to the drafting of some statements made by the President. Those documents are in the custody of the George W. Bush Library.

13. **Judicial Office:** State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed a Circuit Judge for the United States Court of Appeals for the District of Columbia Circuit in 2006. I was nominated by President George W. Bush in 2003 and ultimately confirmed by the United States Senate in 2006.

The United States Court of Appeals for the District of Columbia Circuit has jurisdiction as set forth principally at 28 U.S.C. §§ 1291 & 1292, as well as in various other sections of the United States Code.

- a. Approximately how many cases have you presided over that have gone to verdict or judgment?

Because I have not been a trial judge, I have not presided over any cases as a single trial judge. As a Circuit Judge, I have participated in the disposition of approximately 2,700 cases. I have also sat as a member of a three-judge district panel pursuant to the Voting Rights Act and campaign finance statutes on several occasions.

Of these, approximately what percent were:

- i. jury trials: N/A
bench trials: N/A
- ii. civil proceedings: 92%
criminal proceedings: 8%

- b. Provide citations for all opinions, dispositive orders, and orders affecting injunctive relief you have written, published and unpublished, including concurrences and dissents. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.

A list of citations to opinions I have written, together with copies of opinions not available on Westlaw, is included at Appendix 13.b.

c. Provide citations to all cases in which you were a panel member, but did not write an opinion. If any of the opinions listed are not available on Westlaw, provide copies of the opinions.

A list of all cases in which I was a panel member but did not write an opinion, together with copies of opinions not available on Westlaw, is included at Appendix 13.c.

d. For each of the 10 most significant cases over which you sat, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel of record, designating which counsel was principal counsel; and (4) the citation of the case (if reported) or the docket number and a copy of the opinion or judgment (if not reported and not available on Westlaw).

I have listed the first nine cases below because the position expressed in my opinion (either for the court or in a separate writing) was later adopted by the Supreme Court. I have listed the tenth case because of what it says about anti-discrimination law and American history.

1. *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 537 F.3d 667 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reversed in relevant part*, 561 U.S. 477 (2010).

A non-profit organization and an accounting firm contended that the structure of the Public Company Accounting Oversight Board, an independent agency in the Executive Branch, violated Article II of the Constitution. A D.C. Circuit panel on which I sat rejected that challenge and upheld the Board's structure as lawful. I dissented. In my view, a key feature of the Board's structure—that its members were removable only “for cause” by the Securities and Exchange Commission, whose members were removable only “for cause” by the President—unconstitutionally limited the President's Article II authority to supervise the Executive Branch. I explained that the Board's double for-cause removal structure had no basis in historical practice and was inconsistent with Supreme Court precedent. The Supreme Court reversed the panel decision. The Supreme Court agreed with and cited my dissent.

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2. *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281 (D.D.C. 2011), affirmed, 565 U.S. 1104 (2012).

Foreign citizens working in the United States challenged the federal ban on election contributions and express-advocacy expenditures by foreign nationals, claiming that it violated their First Amendment rights. I wrote an opinion for a unanimous three-judge district court rejecting their constitutional challenge and upholding the statutory ban. My opinion explained that the ban would pass even the strictest level of constitutional scrutiny because it was narrowly tailored to advance a compelling interest in limiting the participation of non-Americans in the activities of democratic self-government. My opinion also relied on Supreme Court precedent upholding restrictions on participation by foreign nationals in other aspects of American self-government. The Supreme Court unanimously agreed with and affirmed my opinion for the court.

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3. *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014) (Kavanaugh, J., dissenting), *reversed in relevant part by Michigan v. EPA*, 135 S. Ct. 2699 (2015).

A broad range of advocacy groups petitioned for review of an EPA rule setting standards for regulation of hazardous air pollutants emitted from electric utility steam generating units. EPA acted pursuant to a statute that allowed it to regulate those units if the Administrator found that the regulation was “appropriate and necessary.” EPA argued that it need not consider costs in determining whether regulation was “appropriate and

necessary” under the statute. A D.C. Circuit panel on which I sat upheld the EPA’s approach. I dissented from that part of the decision. In my view, it was unreasonable—and therefore unlawful under the Administrative Procedure Act—for EPA not to consider the costs imposed by regulations in determining whether such regulations were “appropriate and necessary.” The Supreme Court reversed the panel decision. All nine Justices agreed with my position that the statute requires consideration of costs. The Supreme Court’s majority opinion agreed with and cited my dissent.

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4. *Jones v. United States*, 625 F.3d 766 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel decision affirmed on other grounds*, 565 U.S. 400 (2012).

Antoine Jones appealed his criminal conviction for participation in a drug-trafficking conspiracy. He argued that the district court improperly admitted evidence obtained through the warrantless installation of a GPS tracker on his vehicle. A D.C. Circuit panel concluded that installation of the GPS tracker violated the Fourth Amendment. The court denied rehearing en banc. I wrote a separate opinion suggesting that the court should have considered Jones's alternative argument that the police violated his Fourth Amendment rights by trespassing on his property in order to install the tracker on the vehicle. The Supreme Court agreed with the position espoused in my separate opinion.

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5. *Wesby v. District of Columbia*, 816 F.3d 96 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel decision reversed*, 138 S. Ct. 577 (2018).

D.C. police officers arrested late-night partygoers for trespassing in a vacant house. After prosecutors decided not to pursue charges, the partygoers sued the officers and the District for false arrest, claiming that the police lacked probable cause to arrest them. The district court held that the officers lacked probable cause and that the officers were not entitled to qualified immunity from suit. A jury then awarded the partygoers and their lawyers almost \$1 million in damages and attorney's fees. A D.C. Circuit panel affirmed, and the court denied rehearing en banc. I dissented from the denial of rehearing en banc. I wrote that the panel opinion contravened clear Supreme Court precedent on qualified immunity because it was not clearly established that the police officers' conduct was unconstitutional. In my view, the officers were not subject to damages, and the jury verdict should have been reversed. The Supreme Court unanimously reversed the panel's decision, concluding that the officers were entitled to qualified immunity. The Supreme Court agreed with and cited my dissent.

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6. *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011).

Papagno pled guilty to stealing computer equipment from his employer. The government argued that the Mandatory Victims Restitution Act required him to reimburse his employer for the costs of its internal investigation of the crime. The district court agreed and ordered him to pay about \$160,000 in restitution. I wrote an opinion for a unanimous three-judge panel reversing the district court. My opinion for the court explained that the text of the Act, which authorizes restitution for “necessary” expenses “incurred during participation in the investigation or prosecution of the offense,” does not authorize restitution for the costs of an *internal* investigation, at least when the internal investigation was neither required nor requested by the government. Many other courts of appeals disagreed with my interpretation of the statute. But in a later case presenting the same question, *Lagos v. United States*, 138 S. Ct. 1684 (2018), the Supreme Court cited and agreed with my opinion for the court in *Papagno*.

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7. *Priests for Life v. U.S. Department of Health & Human Services*, 808 F.3d 1 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of rehearing en banc), *panel opinion vacated by Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

The Affordable Care Act requires most employers to provide certain health insurance coverage for their employees. Federal regulations exempted religious non-profit organizations from the mandate to provide contraceptive coverage, but required them to submit information that would facilitate the provision of contraceptive coverage (including contraceptive methods that they believed operated as abortifacients) to their

employees. A religious organization, Priests for Life, challenged that requirement as a violation of the Religious Freedom Restoration Act. Like other religious organizations challenging the requirement, including the Little Sisters of the Poor and the University of Notre Dame, Priests for Life believes that life begins at conception and objected in particular to facilitating what they viewed as the destruction of human life. They did not object, however, to their employees' receiving contraceptive coverage through other means.

A panel of the D.C. Circuit rejected the challenge, and the court declined to rehear the case en banc. I dissented from the denial of rehearing en banc. In my view, the case was largely governed by the text of the Religious Freedom Restoration Act and Supreme Court precedent, namely *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). Under the reasoning of *Hobby Lobby*, the requirement that religious organizations provide a form that facilitates the provision of contraceptive coverage imposed a substantial burden on their religious exercise. Moreover, such a requirement was not the least restrictive means of achieving the government's asserted interest, because the government could facilitate the provision of contraceptive coverage, including abortifacients, for the employees of religious organizations without making those organizations participate in the process. In my view, under that binding Supreme Court precedent, the requirement therefore violated the Religious Freedom Restoration Act. The Supreme Court vacated the D.C. Circuit panel's opinion and remanded for further analysis.

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8. *Republican National Committee v. Federal Election Commission*, 698 F. Supp. 2d 150 (D.D.C. 2010), *affirmed*, 561 U.S. 1040 (2010).

The Republican National Committee and other plaintiffs brought a number of First Amendment challenges to the Bipartisan Campaign Reform Act's restrictions on political-party fundraising. I wrote an opinion for a unanimous three-judge district court rejecting their challenges and upholding the statutory restrictions. My opinion explained that the Supreme Court's decision in *Citizens United v. Federal Election Commission*, 588 U.S. 310 (2010), did not disturb the relevant parts of the Supreme Court's earlier decision in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), which had rejected a challenge to the BCRA's limits on contributions to political parties. We therefore were bound as a lower court to adhere to the *McConnell* precedent. I emphasized that, as a lower court, we could not "clarify" or "refine" *McConnell* in the manner suggested by the plaintiffs. The Supreme Court affirmed my decision without dissent (three Justices would have set the case for full argument).

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9. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

Foreign plaintiffs sued Exxon Mobil under the Alien Tort Statute for alleged torts committed overseas. The district court dismissed the claims. A D.C. Circuit panel on which I sat reversed. I dissented. I would have affirmed the dismissal of the ATS claims for several independent reasons, including: (1) under the presumption against extraterritoriality, the ATS does not apply to conduct that occurred abroad, and (2) the ATS does not apply to claims against corporations. In *Jesner v. Arab Bank, PLC*, 138 S.

Ct. 1386 (2018), the Supreme Court agreed with my dissent as to foreign corporations. In *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), the Supreme Court agreed with and cited my dissent as to extraterritoriality.

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10. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572 (D.C. Cir. 2013).

Placide Ayissi-Etoh, a pro se litigant, worked at Fannie Mae. He was terminated shortly after filing a discrimination complaint with the Equal Employment Opportunity Commission in which he alleged (among other things) that a company executive had created a hostile work environment by calling him the n-word. The district court granted summary judgment to Fannie Mae. A D.C. Circuit panel on which I sat reversed, holding that a reasonable jury could find that Fannie Mae unlawfully discriminated against, harassed, and retaliated against Ayissi-Etoh. I joined the majority opinion and also wrote a separate concurrence to explain that calling someone the n-word, even once, creates a hostile work environment. My opinion explained: "No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans."

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e. For each of the 10 most significant opinions you have written, provide: (1) citations for those decisions that were published; (2) a copy of those decisions that were not published (if not available on Westlaw); and (3) the names and contact information for counsel of record.

Please see my answer to Question 13.d. above, which provides this information.

f. Provide a list of all cases in which you participated, where certiorari to the Supreme Court of the United States or other relief was requested or granted.

A list of all cases in which I participated where certiorari to the Supreme Court of the United States or other relief was requested or granted is included at Appendix 13.f.

g. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions (if not available on Westlaw).

Only one opinion has been reversed in part by the Supreme Court.

EME Homer City Generation, LP v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *reversed in part and remanded*, 134 S. Ct. 1584 (2014).

In *EME Homer City Generation LP v. EPA*, various States, local governments, industry groups, and labor organizations petitioned for review of an EPA rule requiring emissions reductions by certain upwind States. I wrote a majority opinion for the D.C. Circuit granting that petition. In relevant part, we reasoned that the EPA had exceeded its statutory authority under the Clean Air Act by requiring upwind States to reduce emissions by more than their own significant contributions to pollution in downwind States.

The Supreme Court reversed that decision in part and remanded in a 6-2 decision (with Justices Scalia and Thomas in dissent agreeing fully with my majority opinion). The Court “agree[d] with” my opinion that the EPA rule violates the statute when it “requires

an upwind State to reduce emissions by more than the amount necessary to achieve attainment in *every* downwind State to which it is linked.” (Emphasis in original). But the Supreme Court concluded that such potential “over-control” did not “justif[y] wholesale invalidation of the” rule. The Court stated instead that upwind States could bring “particularized, as-applied” challenges to the rule. On remand, several States in fact brought as-applied challenges of that nature, and I wrote an opinion for a unanimous panel invalidating numerous aspects of EPA’s rule.

h. Provide a description of the number and percentage of your decisions in which you issued an unpublished opinion and the manner in which those unpublished opinions are filed and/or stored.

All opinions I have issued are available in the court records maintained by the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit or (for those cases in which I have issued opinions in special Voting Rights Act Panels or campaign-finance related panels of the District Court for the District of Columbia) the Clerk of Court for the United States District Court for the District of Columbia. These opinions are generally available through PACER.

As of July 11, 2018, the records of the Administrative Office for the United States Court list me as the author of 307 opinions (including concurrences and dissents) in my own name. The Westlaw database includes all but one of these opinions (>99%).

i. Provide citations for significant opinions, dispositive orders, and orders affecting injunctive relief you authored and issued on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, provide copies of the opinions.

Beyond the cases described in Question 13.d. above, I have authored the following significant constitutional opinions.

1. *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
2. *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).
3. *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).
4. *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016).
5. *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).
6. *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012).

7. *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (Kavanaugh, J., concurring in the judgment in part and dissenting in part).
8. *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017), *cert. granted, judgment vacated sub nom. Azar v. Garza*, 138 S. Ct. 1790 (2018).
9. *United States Telecom Association v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
10. *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).
11. *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of rehearing en banc), *cert. denied*, 563 U.S. 929 (2011).
12. *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *abrogated by National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).
13. *Carpenters Industrial Council v. Zinke*, 854 F.3d 1 (D.C. Cir. 2017).
14. *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting).
15. *Cablevision v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010) (Kavanaugh, J., dissenting).

j. Provide citations to all cases in which you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

I sat by designation but did not author an opinion in my name or join a dissent in the following cases:

- Vo v. Holder*, 472 F. App'x 425 (9th Cir. 2012).
- Long v. Holder*, 472 F. App'x 652 (9th Cir. 2012).
- United States v. Ruiz-Apolonio*, 657 F.3d 907 (9th Cir. 2011).
- United States v. Parker*, 651 F.3d 1180 (9th Cir. 2011).
- United States v. Rodriguez-Mepfords*, 433 F. App'x 557 (9th Cir. 2011).
- Davidson v. Vasquez*, 431 F. App'x 607 (9th Cir. 2011).
- Zurich Specialties London Ltd. v. Bickerstaff, Whatley, Ryan & Burkhalter, Inc.*, 425 F. App'x 554 (9th Cir. 2011).

14. **Recusal:** Identify the basis by which as a judge you have assessed the necessity or propriety of recusal. (If your court employs an “automatic” recusal system by which you may be recused without your knowledge, please include a general description of that system and a list of cases from which you were recused.) Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself *sua sponte*.

- a. Identify each such case, and for each provide the following information:
 - i. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself *sua sponte*;
 - ii. a brief description of the asserted conflict of interest or other ground for recusal;
 - iii. the procedure you followed in determining whether or not to recuse yourself;
 - iv. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.
- b. Explain whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.

In the D.C. Circuit, judges may have the Clerk’s office automatically recuse them from cases subject to clear recusal, such as where they hold stock in a party or have close friends or relatives who are parties or partners in law firms representing parties. To the best of my knowledge, I have not been automatically recused in any cases without my also separately reviewing the case. I review all cases myself, including those in which the Clerk’s office identifies a potential conflict. I recuse myself in cases as required by law, and I also recuse myself in my discretion consistent with the law from cases that present sufficient appearance issues. Those issues may not be sufficiently apparent to warrant recusal at the beginning of a case, and they may disappear before the end of a case.

The D.C. Circuit does not require judges to list their reasons for *sua sponte* recusals, which are left to each judge’s discretion. As a consequence, and because the court’s data systems often do not contain the reasons for recusals, I am unable to reconstruct with sufficient certainty the reasons for recusals in all cases. Consistent with the practice of prior nominees from this circuit, I have therefore indicated in Appendix 14 the reasons for my recusal in the set of cases from which I have been recused, to the extent that I can best reconstruct the reasons.

Litigants or parties have filed motions to recuse me in the following cases. The motions were resolved as described below.

No. 05-5420, *Mitchell v. Federal Bureau of Prisons*: Mitchell, a pro se prisoner, appealed the district court's orders revoking his in forma pauperis status and dismissing his complaint. Mitchell also moved to disqualify the entire D.C. Circuit on the ground that the court had conspired with the Bureau of Prisons to torture and murder him. A motions panel (Judges Ginsburg, Rogers, and Garland) denied the motion to recuse with respect to its members. The merits panel (Judges Williams, Tatel, and Brown) and the en banc court never voted on the motion to disqualify.

No. 05-5457, *Newby v. Bush*: Newby appealed the district court's dismissal of her pro se complaint seeking to enjoin the confirmation of John G. Roberts, Jr. as Chief Justice. Newby then moved to recuse all judges of the D.C. Circuit because of the judges' association with then-Judge Roberts. A panel (Judges Ginsburg, Randolph, and Tatel) denied the motion to recuse with respect to its members. After Judge Roberts was appointed as Chief Justice, another panel (Judges Ginsburg, Garland, and Rogers) dismissed Newby's appeal as moot. Newby then requested rehearing by the panel and by the en banc court. She also renewed her request that the entire court be recused. I recused myself from the en banc vote, but not for the reasons offered by Newby. I recused myself because Newby's claim focused in part on procedures by which the Executive Branch produced information to the Senate in connection with the Roberts nomination, which was an issue on which I might have had "personal knowledge of disputed evidentiary facts," 28 U.S.C. § 455(b)(1), as a result of my prior Executive Branch work.

No. 05-5185, *Baker Hostetler v. Department of Commerce*: Baker Hostetler sought certain documents related to the Department of Commerce's investigation of Canadian softwood lumber imports under the Freedom of Information Act. The district court granted summary judgment to the Department of Commerce. Baker Hostetler appealed the district court's decision. Baker Hostetler also moved for my recusal if, in my prior work for President George W. Bush, I "personally participated on issues relating to the *Softwood Lumber* dispute between the United States and Canada." I denied the motion because during my service in the Executive Branch, I did not participate in, express an opinion about, or have personal knowledge of the Baker Hostetler litigation. Nor did any rare or extraordinary circumstances arising out of my prior government employment otherwise justify recusal. Recusal therefore was not supported by or appropriate under 28 U.S.C. § 455(a) or (b). See *Baker & Hostetler v. Department of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006).

No. 06-5195, *Karim-Panahi v. Warner*: Karim-Panahi sued the entire D.C. Circuit, alleging a conspiracy to destroy Iranian and Middle Eastern-educated professionals. A panel of which I was a member (with Judges Brown and Griffith) was composed of judges who were not yet on the court when the motion was filed. We recused ourselves, and the case was then referred to another circuit.

No. 06-5282, *Harbury v. Hayden*: Harbury, a pro se litigant, appealed the district court's dismissal of her tort claims against various U.S. Government officials. A panel of which I was a member (along with Judges Randolph and Williams) was assigned Harbury's appeal. Harbury moved that I recuse myself from the case. I denied the motion for the reasons given in *Baker Hostetter v. Department of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006) (opinion of Kavanaugh, J.).

No. 06-7197, *Plotzker v. ABU*: Plotzker, a pro se litigant, sought review of the district court's denial of his third motion for relief under Rule 60(b). A special panel of which I was a member (with Judges Henderson and Griffith) granted the motions for summary affirmance filed by appellees George Washington University and the American Board of Urology. Plotzker then filed a petition for rehearing, arguing, among other things, that I should have recused myself from the case because of apparently unknown prior involvement in the case by my former law firm. I agreed and recused myself. The remaining members of the special panel voted to vacate the original order and to reissue an otherwise identical order reflecting my recusal. The special panel later denied Plotzker's petition for rehearing, which included a request that the panel members and I resign from the bench. The en banc court finally denied Plotzker's motion for reconsideration, in which he argued, among other things, that I acted as an agent of the appellees in voting to grant their motions for summary affirmance and that Judges Henderson and Griffith were tainted by their participation with me and should have recused themselves.

No. 07-5025, *Newby v. Bush*: Newby, a pro se litigant, sought to enjoin the confirmation proceedings of now-Justice Alito and then-CIA Director nominee Michael Hayden. Newby's motions to recuse the district court and for a temporary restraining order to enjoin Hayden's confirmation proceedings were denied. Newby then appealed two more of the district court's interlocutory orders and moved to recuse the entire D.C. Circuit. A special panel (Judges Randolph, Tatel, and Garland) denied the motion with respect to the members of the panel. Newby then filed a motion for reconsideration. Another special panel (Judges Tatel, Garland, and Brown) then denied Newby's motion to recuse with respect to the members of the panel. The motions to recuse were never presented to the full court. The en banc court eventually denied Newby's petition for rehearing en banc.

No. 07-5366, *Johnson v. Department of Veterans Affairs*: Johnson, a pro se prisoner, appealed the district court's dismissal of his complaint. Johnson also filed a motion to recuse the entire D.C. Circuit. Johnson's appeal was eventually dismissed by the Clerk's order for failure to prosecute, so the recusal motion was never presented to the full court.

No. 08-5069, *Rogers v. Schapiro*: Rogers, a pro se prisoner, appealed the district court's dismissal of his action against the chairmen of the SEC, the CFTC, and the U.S. Parole Commission. Rogers moved to recuse me and four other members of the court (Judges Sentelle, Ginsburg, Henderson, and Griffith). A panel of which I was a member (with Judges Ginsburg and Garland) denied the motion to recuse as to its two members who

were the subject of the motion. A later panel of which I was a member (with Judges Garland and Griffith) affirmed the district court's dismissal of Rogers's action. Rogers then sought rehearing of the dispositive order and moved in the alternative to disqualify the members of the panel that had issued that order, on the ground that we had engaged in acts of sedition. A panel of which I was a member (with Judges Garland and Brown) denied the petition for rehearing and the motion to disqualify because it was unwarranted.

No. 08-5523, *In re Henry T. Sanders*: Sanders, a pro se litigant, filed a mandamus petition to overturn a filing injunction that the district court had entered against him. A panel (Judges Sentelle, Ginsburg, and Rogers) denied the mandamus petition. Sanders then requested rehearing and rehearing en banc and also sought disqualification of the en banc court. The same panel denied the petition for rehearing and the motion for disqualification because it was unwarranted.

No. 08-7124, *Wallace v. Hastings*: Wallace, a pro se litigant, appealed the district court's order denying the removal of her case from the Oklahoma Supreme Court to the District Court for the District of Columbia. A panel of which I was a member (with Judges Tatel and Griffith) summarily affirmed the district court's order. Wallace then requested rehearing en banc and recusal of all members of the en banc court. The court denied the petition for rehearing and the motion for recusal because it was unwarranted.

No. 09-5280, *Trescott v. Federal Highway Administration*: Trescott appealed the district court's dismissal of his claim that a Federal Highway Administration rule was arbitrary and capricious. A panel of which I was a member (along with Judges Garland and Brown) granted the Federal Highway Administration's motion for summary affirmance of the district court's decision. Trescott then petitioned for rehearing en banc. He also argued that I should have recused myself from this case because I worked for the President at the same time that the Administrator of the Federal Highway Administration was appointed. The panel denied the petition for rehearing, along with the request for my recusal, because both were meritless.

No. 09-5069, *Sibley v. Samuel Alito, Jr.*: Sibley, a pro se litigant, appealed the district court's dismissal of his complaint against the Justices of the Supreme Court and a deputy clerk of the Supreme Court. A panel of which I was a member (with Judges Ginsburg and Garland) denied Sibley's motion to proceed in forma pauperis after concluding that the district court correctly certified that the appeal was not taken in good faith. Sibley then moved to recuse the members of the panel because of our ruling on his motion, and also moved for reconsideration. We denied both motions because they were unwarranted, and we summarily affirmed the district court's order.

No. 11-5027, *In re Don Benny Anderson*: Anderson, a pro se litigant, filed a petition for a writ of habeas corpus in the D.C. Circuit. A panel dismissed Anderson's petition for lack of jurisdiction, explaining that he had to bring his habeas claims in the district court in the first instance. Anderson then petitioned for rehearing and for rehearing en banc. Those petitions were likewise denied. Anderson moved to recuse the "federal

corporation judges” that had ruled on his petition for rehearing en banc. The en banc court denied the recusal motion because it was unwarranted.

No. 13-1038, *Rodriguez v. Commissioner of Internal Revenue*: Irene and Isidoro Rodriguez, pro se litigants, appealed a U.S. Tax Court decision finding them liable for tax deficiencies and penalties. The appellants also sought to disqualify all judges of the D.C. Circuit, the Second Circuit, the Third Circuit, the Fourth Circuit, the Tenth Circuit, the Federal Circuit, and the U.S. District Court for the District of Columbia, as well as certain Supreme Court justices. A panel of which I was a member (along with Judges Rogers and Brown) denied the recusal motion with respect to the members of the panel because it was unwarranted. The panel also granted the Commissioner’s motion to transfer the appeal to the Fourth Circuit on venue grounds.

No. 14-5071, *Partington v. Houck*: Partington sued various Navy officials, alleging violation of his constitutional rights in an administrative decision that suspended him from practice before naval courts. A panel of which I was a member (with Judges Tatel and Sentelle) affirmed the district court’s order entering summary judgment against Partington as to part of the action and dismissing the rest. Partington later filed a motion in the district court requesting that the district court declare our judgment void for lack of subject matter jurisdiction. The district court denied the motion. Partington appealed. Partington also moved to recuse the original panel of which I was a member. A panel (Judges Tatel, Brown, and Wilkins) denied the motion to recuse because the appeal did not present a circumstance in which the impartiality of the judges could reasonably be questioned. The panel also granted the appellees’ motion for summary affirmance. Partington’s later motions for rehearing and for rehearing en banc were denied.

No. 14-5180, *Smith v. Scalia*: Smith, a pro se litigant, sued the United States and 23 federal judges in a case stemming from the Colorado Supreme Court’s denial of his application for admission to the Colorado Bar. Smith’s complaint named Judges Rogers, Brown, and Sentelle (among others) as defendants. The district court granted the defendants’ motion to dismiss, and Smith appealed. Smith also moved to recuse the entire D.C. Circuit on the ground that the judges could not be impartial because three of their colleagues were named defendants. A panel of which I was a member (with Judges Griffith and Wilkins) denied the recusal motion with respect to the members of the panel because the case did not present a circumstance in which the impartiality of the judges could reasonably be questioned. The panel also granted the appellees’ motions for summary affirmance. Smith’s later petition for rehearing en banc did not seek recusal. The en banc court denied the petition; only the judges named in Smith’s complaint recused themselves.

No. 15-7045, *United States ex rel. Stephen Yelverton v. Federal Insurance Co.*: Yelverton, a pro se litigant, appealed the district court’s dismissals of his bankruptcy appeals. Yelverton also moved to designate a panel of judges from another circuit in order to avoid the appearance of judicial bias in favor of the U.S. Trustee’s Office, which is located within the territory of the D.C. Circuit. A panel (Judges Henderson, Rogers, and Pillard) denied the motion to the extent that it sought recusal of members of the

panel. A merits panel (Judges Srinivasan, Millett, and Wilkins) later affirmed in part and reversed in part the district court's dismissals. Yelverton's later motions for rehearing and for rehearing en banc were denied.

No. 16-5177, *Rochon v. Sessions*: Rochon, a pro se litigant, appealed the district court's order granting summary judgment to the FBI. A panel of which I was a member (with Judges Tatel and Millett) granted the FBI's motion for summary affirmance. Rochon then filed a petition for rehearing, which the same panel denied. Rochon then filed a petition for rehearing en banc, which the en banc court denied. Rochon then filed a "motion to reopen case due to circuit's recusal failure and remove appeal to another jurisdiction," alleging that the panel was biased. The panel denied Rochon's motion because Rochon failed to demonstrate that the panel was biased.

No. 16-5372, *Gorbey v. United States*: Gorbey, a pro se prisoner, appealed the district court's denial of his motion for leave to file without prepayment of fees. A panel ordered the appellant to pay the filing fee. The appellant then submitted a petition for rehearing en banc together with a motion to recuse the members of the panel. We denied the motion to recuse because recusal was not warranted.

15. **Public Office, Political Activities and Affiliations:**

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Appointed by Solicitor General Kenneth W. Starr as an attorney in the Office of the Solicitor General, U.S. Department of Justice, 1992 – 1993.

Appointed by Judge Kenneth W. Starr as Associate Counsel in Office of Independent Counsel, 1994 – 1997, 1998.

Appointed by President George W. Bush as Associate Counsel, 2001 – 2003, and Senior Associate Counsel, 2003.

Appointed by President George W. Bush as Assistant to the President and Staff Secretary, 2003 – 2006.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party, election committee, or President-elect transition team. If you have ever held a position or played a role in a political campaign, including the 2000 presidential campaign and Florida recount, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities. Please supply four (4) copies of any memoranda analyzing issues of law or public policy that you wrote on behalf of or in connection with a President-elect

transition team.

Lawyers for Bush Cheney 2000

Member & Regional Coordinator for Pennsylvania, Maryland, Delaware, and District of Columbia

I participated in legal activities on behalf of the Bush/Cheney 2000 Campaign related to 2000 election recount in DeLand, Florida.

c. List all political events for which you were on the host committee, including the date, location, which candidate or organization it benefitted, and how much was raised at the event.

None.

16. **Legal Career:** Answer each part separately.

a. Describe in reverse chronological order your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court and the dates of the period you were a clerk;

From 1993 to 1994, I served as a law clerk to the Honorable Anthony M. Kennedy, Associate Justice of the United States Supreme Court.

From 1991 to 1992, I served as a law clerk to the Honorable Alex Kozinski, United States Court of Appeals for the Ninth Circuit.

From 1990 to 1991, I served as a law clerk to the Honorable Walter K. Stapleton, United States Court of Appeals for the Third Circuit.

ii. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

iii. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been affiliated, and the nature of your affiliation with each.

2001 – 2006
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500
Assistant to the President and Staff Secretary (2003 – 2006)
Senior Associate Counsel to the President (2003)

Associate Counsel to the President (2001 – 2003)
1997 – 1998; 1999 – 2001
Kirkland & Ellis LLP
655 15th Street, N.W.
Washington, D.C. 20005
Partner

1994 – 1997; 1998
Office of the Independent Counsel
1001 Pennsylvania Avenue, N.W., Suite 490-N
Washington, D.C. 20004
Associate Counsel

1992 – 1993
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Attorney

1992
Munger Tolles & Olson LLP
350 South Grand Avenue, 50th Floor
Los Angeles, California 90071
Summer Associate

1990
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005
Summer Associate

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years.

Office of the Solicitor General:

I served for one year as an attorney in this office from 1992 to 1993. I was

responsible for preparing briefs in opposition to certiorari petitions and appeal recommendations. In addition, I assisted the Solicitor General and his Deputies and Assistants in preparing briefs and in preparing for oral arguments before the Supreme Court. I also handled two court of appeals cases, writing the briefs in both cases and arguing one in the U.S. Court of Appeals for the Fifth Circuit. The government prevailed in both cases.

Office of Independent Counsel:

In the summer of 1994 I joined the Office of Independent Counsel. In that Office, I performed six main functions during the course of my service.

First, I was a line attorney responsible for the Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This assignment required management and coordination with a number of FBI agents and investigators, FBI laboratory officials, and outside experts on forensic and psychological issues. I was responsible for conducting and assisting with interviews of a wide variety of witnesses with respect to both the cause of death and Mr. Foster's state of mind. I was responsible for preparing a draft of the report on his death. The investigation and report resolved questions about the cause and manner of Mr. Foster's death, concluding that he committed suicide in Fort Marcy Park, Virginia.

Second, I was one of two line attorneys responsible for conducting the investigation into possible obstruction of justice in the wake of Mr. Foster's death, including whether documents had been unlawfully removed from his office or otherwise concealed from investigators. This was an extensive grand jury investigation. I conducted numerous interviews and grand jury sessions and, with another attorney, prepared a memorandum of more than 300 pages summarizing the matter. At the time, this matter also was being investigated by the Senate. The Office conducted a thorough investigation of the facts and did not seek criminal charges against any individuals.

Third, I was substantially responsible for writing briefs and conducting oral arguments regarding privilege and other legal matters that arose frequently during the investigation. These included cases about the government attorney-client privilege, Secret Service privilege, executive privilege, and private attorney-client privilege. I argued once before the Supreme Court of the United States and twice before the U.S. Court of Appeals for the D.C. Circuit.

Fourth, I served as a legal adviser on a variety of issues facing the Office. I and several other attorneys sometimes served a function roughly equivalent to that of attorneys in the Office of Legal Counsel in the Justice Department. This required analysis of, for example, statutory reporting requirements, Rule 6(e) obligations, FOIA disclosure rules, and issues related to interaction with Congress.

Fifth, I was part of the team that prepared that part of Judge Starr's 1998 report to Congress, submitted pursuant to statute, that outlined information that "may constitute grounds" for impeachment. Although many volumes of evidence were provided to the House of Representatives under seal, the report as publicly released by the House of Representatives was divided into two parts. The first part was a summary of facts known as the "narrative" section. I did not draft that part of the report. The second part was a description of possible grounds for impeachment that identified areas where the President may have made false statements or otherwise obstructed justice. I drafted portions of that part of the report. This is a matter of some continuing controversy. As I have stated publicly before, I regret that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House's handling of the Special Prosecutor's report in 1974) or, if not, that the report did not further segregate certain sensitive details. The House of Representatives voted to publicly release the report without reviewing it beforehand.

Sixth, I was an attorney primarily responsible for assisting Judge Starr with preparation of his two-hour statement to the House Judiciary Committee, which he submitted in written form and delivered orally on November 19, 1998. The statement identified and discussed the investigation and evidence.

Kirkland & Ellis:

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I represented them in a variety of litigation and administrative matters. I also represented individuals and non-corporate entities in litigation matters. I prepared pro bono briefs in several Supreme Court cases. I also represented pro bono a synagogue that was involved in a zoning dispute with Montgomery County, Maryland. In all of the matters, I was part of a larger litigation team.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims' compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Assistant to the President and Staff Secretary:

I performed the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of speeches and documents for the President, among other responsibilities.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

While serving in the Office of the Solicitor General, my client was the United States.

While serving in the Office of the Independent Counsel, my client was the United States.

While serving in the Office of the Counsel to the President and as Staff Secretary, my client was the United States.

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I also represented individuals and non-corporate entities in litigation matters, including several pro bono matters.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

I appeared in court occasionally. In both public service and private practice, I argued a number of appellate matters and conducted legal arguments in district court.

i. Indicate the percentage of your practice in:

- | | | |
|----|--------------------------|-------------------|
| 1. | federal courts: | 90% (approximate) |
| 2. | state courts of record: | 10% (approximate) |
| 3. | other courts: | 0% |
| 4. | administrative agencies: | 0% |

ii. Indicate the percentage of your practice in:

- | | | |
|----|-----------------------|-------------------|
| 1. | civil proceedings: | 50% (approximate) |
| 2. | criminal proceedings: | 50% (approximate) |

d. List, by case name, all cases in courts of record, including cases before administrative law judges, you tried or litigated to verdict, judgment or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel. For each such case, include the docket number and provide any opinions and filings available to you.

None, as I have not been a trial lawyer. I have worked on legal issues and appeals in both public service and private practice and argued in court, including the Supreme Court of the United States, the U.S. Court of Appeals for the D.C. Circuit, the U.S. Court of Appeals for the Fifth Circuit, federal district courts, and state courts.

i. What percentage of these trials were:

- | | | |
|----|-----------|---|
| 1. | jury: | % |
| 2. | non-jury: | % |

Not applicable.

e. Describe your practice, if any, before the Supreme Court of the United States, the highest court of any state, or any state or federal courts of appeals. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before the Supreme Court in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Also provide the individual names, addresses, and telephone numbers of co-counsel of record and principal counsel of record for each of the other parties.

1. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

I represented an amicus curiae, Sally Campbell, and filed an amicus brief.

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

Principal counsel for Petitioner (Good News Club)

Hon. Thomas Marcelle
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 Cohoes, New York 12047
 (518) 453-5501

Principal counsel for Respondent (Milford Central Schools)

Frank W. Miller
Law Firm of Frank W. Miller
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East Syracuse, New York 13057
(315) 234-9900

2. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

I filed a brief on behalf of amici curiae Congressman Steve Largent and Congressman J.C. Watts in support of the petitioner.

Students and parents alleged that a high school's policy allowing student-led, student-initiated prayer before football games, violated the Establishment Clause. The amicus brief argued that the school's policy was neutral because it neither required nor prevented students from invoking God's name or uttering religious words. Therefore, the policy satisfied the Constitution. The brief also argued that upholding the challenge would require schools to monitor and censor religious words – behavior that would be hostile to religion and would not be permitted under the Religion Clauses of the First Amendment.

The Supreme Court disagreed with the amicus brief and held that the school's policy of permitting student-led invocations before football games was impermissibly coercive. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, dissented and argued that the Court's opinion was not faithful to the meaning of the Establishment Clause.

Principal counsel for Petitioner (Santa Fe Independent School District)

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(202) 546-8890

Principal counsel for Respondent (Jane Doe)

Anthony P. Griffin
Then with the Law Offices of Anthony P. Griffin
Retired

3. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000).

I filed a brief on behalf of amici curiae Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers, Inc.

An injured motorist sued an automobile manufacturer under District of Columbia law. The motorist argued that the manufacturer was negligent because the manufacturer did

not equip the automobile with a driver's side airbag. The question presented in the case was whether the lawsuit was preempted by federal law. The amicus brief argued that two provisions in the National Traffic and Motor Vehicle Safety Act of 1966 expressly preempted state safety standards that would mandate the installation in vehicles when the applicable federal standard made airbags optional. The Supreme Court held that the suit was preempted by a Department of Transportation standard that required manufacturers to place driver's side airbags in some but not all 1987 automobiles.

Co-counsel for Amicus Curiae (Alliance of Automobile Manufacturers and the Association of International Automobile Manufacturers, Inc.)

Richard A. Cordray
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 Columbus, Ohio 43207
 (614) 505-9334

Principal counsel for Petitioners (Geiers)

Arthur H. Bryant
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Principal counsel for Respondents (American Honda Motor Co., Inc.)

Malcolm E. Wheeler
 Wheeler Trigg O'Donnell LLP
 370 17th Street, Suite 4500
 Denver, Colorado 80202
 (303) 244-1870

4. *Rice v. Cayetano*, 528 U.S. 495 (2000).

I filed a brief on behalf of amici curiae Center for Equal Opportunity, New York Civil Rights Coalition, Carl Cohen, and Abigail Thernstrom in support of the petitioner.

A Hawaiian citizen challenged the eligibility requirement for voting for trustees for the Office of Hawaiian Affairs. Only "Hawaiians," as defined by state law, could vote in the elections. The amicus brief argued that Hawaii's racial voting qualification clearly violated the Fifteenth Amendment, which prohibits racial classifications except when those classifications are necessary and narrowly tailored to serve a compelling government interest. The Supreme Court agreed, and held that Hawaii's denial of the petitioner's right to vote in the elections violated the Fifteenth Amendment.

Co-Counsel for Amicus Curiae (Center for Equal Opportunity)

Theodore W. Ullyot
Then with Kirkland and Ellis
 Retired

Principal counsel for Petitioner (Rice)

Hon. Theodore B. Olson
 Gibson, Dunn & Crutcher
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 Washington, D.C. 20036
 (202) 955-8668

Principal counsel for Respondent (Cavetano)

Hon. John G. Roberts, Jr.
Then with Hogan & Hartson
 Supreme Court of the United States
 One First Street, N.E.
 Washington, D.C. 20543
 (202) 479-3000

5. *Gonzalez v. Reno*, 215 F.3d 1243 (11th Cir. 2000) (denying petition for rehearing en banc), *cert. denied*, 530 U.S. 1270 (2000).

I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for stay in the Supreme Court of the United States, and petition for writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, application for stay, and petition for writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in

essence, that the court's original decision granting an injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

Co-counsel for Respondent (Gonzalez)

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Principal counsel for Petitioners (Reno)

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6. *Rubin v. United States*, 525 U.S. 990 (1998).

I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for writ of certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new "protective function" privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the D.C. Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for writ of certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for writ of certiorari (over the dissents of Justices Ginsburg and Breyer).

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7. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), *reversing*, 124 F.3d 230 (D.C. Cir. 1997).

I represented the United States and argued and briefed this case in both the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit. The court of appeals decision was in 1997, and the Supreme Court decision was in 1998.

The case presented the question whether the attorney-client privilege continues to apply in federal criminal proceedings when the client is deceased and therefore no longer available to testify. A federal grand jury issued a subpoena for communications that occurred between Vincent W. Foster, Jr., and his attorney James Hamilton nine days before Mr. Foster's suicide. Mr. Hamilton challenged the subpoena, arguing that the attorney-client privilege continued to apply after the death of the client and that he was not permitted to disclose what Mr. Foster had told him. The United States, represented by the Office of Independent Counsel, sought to enforce the grand jury subpoena, arguing that the attorney-client privilege did not apply with full force in federal criminal proceedings when the client was deceased. Many legal treatises, including the American Law Institute's Restatement of the Law, had agreed with the position advocated by the Office of Independent Counsel. The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge Patricia Wald and Judge Stephen Williams, ruled in favor of the Office of Independent Counsel. Judge Tatel dissented. The Supreme Court then granted certiorari and ruled 6-3 in favor of Mr. Hamilton in an opinion by Chief Justice Rehnquist. The dissent written by Justice O'Connor and joined by Justices Scalia and Thomas agreed with the position of the Office of Independent Counsel.

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8. *United States v. Clinton*, 524 U.S. 912 (1998).

I represented the United States (Office of Independent Counsel) in this case. We argued that the Supreme Court should grant certiorari before judgment even though the President had already withdrawn his claim of executive privilege over certain information because the facts justifying Supreme Court review had not changed. The Supreme Court denied the petition for a writ of certiorari and stated that it assumed the Court of Appeals would proceed expeditiously to decide the case.

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9. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

I represented the United States (Office of Independent Counsel) in this case. I briefed and argued the case in the U.S. Court of Appeals for the D.C. Circuit and worked on the brief in opposition to the petition for writ of certiorari in the Supreme Court of the United States. I also had worked on a petition for writ of certiorari before judgment to the Supreme Court.

This case arose out of a federal grand jury subpoena issued to Bruce R. Lindsey, an attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Office of Independent Counsel sought to have the subpoena enforced. The D.C. Circuit (Judges Randolph and Rogers for the majority; Judge Tatel in dissent) ruled in favor of the Office of Independent Counsel. The Office of the President then filed a petition for writ of certiorari in the Supreme Court. The Supreme Court denied the petition.

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10. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), cert. denied, *Office of the President v. Office of Independent Counsel*, 521 U.S. 1105 (1997).

I represented the United States (Office of Independent Counsel) in this case. I primarily wrote the brief in the U.S. Court of Appeals for the Eighth Circuit and worked on the brief in opposition to the petition for writ of certiorari in the Supreme Court of the United States. I also briefed the case in the United States District Court for the Eastern District of Arkansas.

This case arose out of a federal grand jury subpoena issued to the White House Office of Counsel to the President for documents of a government attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Eighth Circuit (Judges Bowman and Wollman for majority; Judge Kopf in partial dissent) ruled in favor of the United States, represented by the Independent Counsel. The Office of the President then filed a petition for writ of certiorari in the Supreme Court. The Supreme Court denied the petition.

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11. *Lewis v. Brunswick*, No. 97-288 (Supreme Court of the United States) (1997)
(dismissed as moot because of settlement after oral argument).

I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

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12. *United States v. Bonetti*, 277 F.3d 441 (4th Cir. 2002).

In 2000, I briefly represented a pro bono criminal defendant on appeal to the Fourth Circuit. The defendant had been convicted of conspiracy to harbor an alien and harboring an alien. I filed an appearance in the Fourth Circuit on behalf of the defendant but withdrew from the case before any briefs were filed. I withdrew because I had taken a new job at the White House in January 2001.

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13. *MediaOne Group, Inc. v. County of Henrico, Va.*, 257 F.3d 356 (4th Cir. 2001).

I represented several telecommunications entities collectively referred to as Verizon, which had intervened in support of the County of Henrico, Virginia, in a suit brought by a cable television franchisee. The plaintiff challenged the validity of a county ordinance that conditioned the approval of a transfer of a cable television franchise on the franchisee's granting other Internet service providers access to its cable modem platform. The district court found that the county ordinance was preempted by federal law, and the Fourth Circuit agreed, ruling that the ordinance was "inconsistent with the federal Communications Act," and therefore preempted. I assisted with briefing at the Fourth Circuit.

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14. *Communications Telesystems International v. Mercury Communications, Ltd.*, 202 F.3d 277 (9th Cir. 1999) (table decision) (per curiam).

I represented Mercury Communications in the Ninth Circuit. The district court had entered a preliminary injunction enjoining Mercury from proceeding in a suit it had filed in England against Communications Telesystems. I helped draft the opening and reply briefs at the Ninth Circuit, which affirmed the district court's decision in a per curiam memorandum decision.

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15. *GTE South, Inc. v. Morrison*, 199 F.3d 733 (4th Cir. 1999).

I represented the plaintiff GTE South in a challenge to utility rates set by the Virginia State Corporation Commission. We argued that the Commission's pricing decisions did not meet the requirements of the Telecommunications Act of 1996. The district court granted summary judgment to defendants, and the Fourth Circuit affirmed. I assisted with GTE South's opening and reply briefs at the Fourth Circuit.

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16. *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998).

I represented Meineke in the Fourth Circuit. Several franchisees sued Meineke, its in-house advertising agency, three officers of Meineke, and its corporate parent. The plaintiffs alleged that Meineke's advertising practices breached the parties' franchise agreements. The district court certified a class, and a jury returned a verdict in favor of the plaintiffs. I assisted with the reply brief at the Fourth Circuit, where Meineke argued that the district court had erred by certifying a class and also by allowing plaintiffs to rely on improper theories of tort and statutory liability. The Fourth Circuit agreed with Meineke on these issues, reversed the judgment in its entirety, and remanded the case to the district court.

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17. *Smith v. General Motors (In re General Motors)*, Nos. 00-3835, 00-8023, 01-1024
 (8th Cir.) (voluntarily dismissed because of settlement before oral argument).

In this case, I represented Kirkland's longtime client General Motors in several proceedings at the Eighth Circuit. The plaintiff, Tammi Smith, brought tort claims against General Motors. At the Eighth Circuit, I assisted with drafting a petition for a writ of mandamus, which was denied, and also with a subsequent petition to appeal under 28 U.S.C. § 1292(b). Before the court ruled on the petition, the parties settled, and General Motors dismissed the appeal.

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18. *Bush v. Holmes*, 767 So. 2d 668 (Fla. Dist. Ct. App. 2000), *appeal after remand*, 886 So. 2d 340 (Fla. Dist. Ct. App. 2004) (en banc), *overruled by* 919 So. 2d 392 (Fla. 2006).

In this series of cases, several individuals and groups sued then-Governor Jeb Bush and several other Florida officials after Florida adopted the Opportunity Scholarship Program. The trial court ruled that the Program violated Florida's Constitution. While at Kirkland, I assisted with drafting the briefs for Governor Bush's appeal to the intermediate Florida court of appeals, which reversed the trial court's decision and held that the Program did not violate Florida's Constitution. After I left Kirkland, the en banc court of appeals and the Florida Supreme Court held that the Program violated Florida's Constitution.

Principal co-counsel for Governor Bush

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19. *General Motors v. Green*, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff \$25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment but substantially reduced the damages award.

Co-counsel for Petitioner (General Motors)

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20. *United States v. Clark*, 24 F.3d 299 (D.C. Cir. 1994).

While at the Office of the Solicitor General, I assisted with drafting the brief for the United States in the D.C. Circuit. The defendant entered a conditional guilty plea and appealed his conviction for drug possession on the ground that the district court had erroneously denied his motion to suppress drugs found in his car and that the officers' use of force converted the stop into an arrest unsupported by probable cause. The D.C. Circuit rejected these arguments and affirmed the conviction.

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21. *United States v. Mora*, 994 F.2d 1129 (5th Cir. 1993).

While at the Office of the Solicitor General, I briefed and argued this case in the Fifth Circuit. Four defendants were found guilty at trial of conspiracy to possess with intent to distribute marijuana, and possession and aiding and abetting the possession of marijuana with intent to distribute it. On appeal, the defendants raised various claims, including entrapment, discovery abuses, and sufficiency of the evidence. The Fifth Circuit affirmed the convictions.

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Copies of the briefs in the cases above are supplied, with the exception of a few cases for which, after extensive efforts, representatives on my behalf have thus far been unable to locate copies.

17. **Litigation:** Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the

nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

- a. the date of representation;
 - b. the name of the court and the name of the judge or judges before whom the case was litigated; and
 - c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.
1. *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), *reversing*, 124 F.3d 230 (D.C. Cir. 1997).

I represented the United States and argued and briefed this case in both the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia Circuit. The court of appeals decision was in 1997, and the Supreme Court decision was in 1998.

The case presented the question whether the attorney-client privilege continues to apply in federal criminal proceedings when the client is deceased and therefore no longer available to testify. A federal grand jury issued a subpoena for communications that occurred between Vincent W. Foster, Jr., and his attorney James Hamilton nine days before Mr. Foster's suicide. Mr. Hamilton challenged the subpoena, arguing that the attorney-client privilege continued to apply after the death of the client and that he was not permitted to disclose what Mr. Foster had told him. The United States, represented by the Office of Independent Counsel, sought to enforce the grand jury subpoena, arguing that the attorney-client privilege did not apply with full force in federal criminal proceedings when the client was deceased. Many legal treatises, including the American Law Institute's Restatement of the Law, had agreed with the position advocated by the Office of Independent Counsel. The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge Patricia Wald and Judge Stephen Williams, ruled in favor of the Office of Independent Counsel. Judge Tatel dissented. The Supreme Court then granted certiorari and ruled 6-3 in favor of Mr. Hamilton in an opinion by Chief Justice Rehnquist. The dissent written by Justice O'Connor and joined by Justices Scalia and Thomas agreed with the position of the Office of Independent Counsel.

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2. *Concerned Citizens of Carderock v. Hubbard & Adat Shalom Reconstructionist Congregation*, 84 F. Supp. 2d 668 (D. Md. 2000).

I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland (Judge Andre Davis). The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the county. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

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3. *America Online 5.0 Litigation* (1999 – 2000), consolidated case reported at 168 F. Supp. 2d 1359 (S.D. Fla. 2001).

I represented America Online (AOL) in a series of class-action lawsuits. In particular, I filed briefs and conducted oral arguments for AOL in a number of federal district courts around the country. I also argued a proceeding before the Judicial Panel on Multidistrict Litigation and a motion to dismiss in a related case in the Circuit Court for Baltimore City. The complaints in these cases alleged that AOL had engaged in a variety of deceptive tactics and antitrust violations in designing and marketing AOL Version 5.0.

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4. *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998), *cert. denied*, *Office of the President v. Office of Independent Counsel*, 525 U.S. 996 (1998).

I represented the United States (Office of Independent Counsel) in this case. I briefed and argued the case in the U.S. Court of Appeals for the D.C. Circuit and worked on the brief in opposition to the petition for writ of certiorari in the Supreme Court of the United States. I also had worked on a petition for writ of certiorari before judgment to the Supreme Court.

This case arose out of a federal grand jury subpoena issued to Bruce R. Lindsey, an attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Office of Independent Counsel sought to have the subpoena enforced. The D.C. Circuit (Judges Randolph and Rogers for the majority; Judge Tatel in dissent) ruled in favor of the Office of Independent Counsel. The Office of the President then filed a petition for writ of certiorari in the Supreme Court. The Supreme Court denied the petition.

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Then with the U.S. Department of Justice
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9000

5. *Gonzalez v. Reno*, 215 F.3d 1243 (11th Cir. 2000) (denying petition for rehearing en banc), *cert. denied*, 530 U.S. 1270 (2000).

I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for stay in the Supreme Court of the United States, and petition for writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, application for stay, and petition for writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

Co-counsel for Respondent (Gonzalez)

Jeffrey Clark
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(202) 879-5960

Kendall Coffey
Coffey Burlington
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Penthouse One
Miami, Florida 33133
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Principal counsel for Petitioners (Reno, Meissner, Wallis, United States Immigration & Naturalization Service, & U.S. Department of Justice)

Edwin Kneedler
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2203

6. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 521 U.S. 1105 (1997).

I represented the United States (Office of Independent Counsel) in this case. I primarily wrote the brief in the U.S. Court of Appeals for the Eighth Circuit and worked on the brief in opposition to the petition for writ of certiorari in the Supreme Court of the United States. I also briefed the case in the United States District Court for the Eastern District of Arkansas.

This case arose out of a federal grand jury subpoena issued to the White House Office for documents of a government attorney employed in the White House. President Clinton asserted a government attorney-client privilege in response to the subpoena. The Eighth Circuit (Judges Bowman and Wollman for majority; Judge Kopf in partial dissent) ruled in favor of the United States, represented by the Independent Counsel. The Office of the President then filed a petition for writ of certiorari in the Supreme Court. The Supreme Court denied the petition.

Co-counsel for Respondent (Office of Independent Counsel)

Hon. Kenneth W. Starr
Then with the United States Office of Independent Counsel
Retired

Hon. John Bates
Then with the United States Office of Independent Counsel
United States District Court for the District of Columbia
333 Constitution Avenue, N.W.

Washington, D.C. 20001
(202) 354-3430

Principal counsel for Respondent (Hillary Clinton)

David Kendall
Williams & Connolly
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5145

Principal counsel for Petitioner (Office of the President)

Andrew Frey
Mayer Brown
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3291

7. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

In this case, I represented an amicus curiae, Sally Campbell, and filed an amicus brief.

The case involved a Free Speech Clause and Free Exercise Clause challenge to the community use policy of a school district in New York. The policy excluded religious organizations from using public school facilities after school hours. (Ms. Campbell had challenged a similar policy in Louisiana.) The question in the case was whether the exclusion of religious organizations was permitted under the Religion and Free Speech Clauses of the First Amendment. The amicus brief filed on behalf of Ms. Campbell argued that the policy was neither required nor permitted by the Constitution. The Supreme Court agreed in a 6-3 decision.

Principal counsel for Petitioner (Good News Club)

Hon. Thomas Marcelle
Then with Marcelle Law
Cohoes City Court
97 Mohawk Street
Cohoes, New York 12047
(518) 453-5501

Principal counsel for Respondent (Milford Central Schools)

Frank W. Miller
Law Firm of Frank W. Miller
6575 Kirkville Road

East Syracuse, New York 13057
(315) 234-9900

8. *Rubin v. United States*, 525 U.S. 990 (1998).

I represented the United States (Office of Independent Counsel) in the Supreme Court proceedings in which the Office of Independent Counsel opposed a petition for writ of certiorari filed by the Secretary of the Treasury and Director of the Secret Service.

The question presented was whether the federal courts should recognize a new “protective function” privilege in federal criminal proceedings that would prevent Secret Service agents from testifying in the grand jury. The U.S. Court of Appeals for the District of Columbia Circuit ruled in favor of the Office of Independent Counsel (Judges Williams, D.H. Ginsburg, and Randolph). The Secretary of the Treasury filed a petition for writ of certiorari and sought a stay of enforcement of the subpoena. The Supreme Court denied a stay and then denied the petition for writ of certiorari (over the dissents of Justices Ginsburg and Breyer).

Co-counsel for Respondent (United States)

Hon. Kenneth W. Starr
Then with *United States Office of Independent Counsel*
Retired

Principal counsel for Petitioners (Rubin & Merletti)

Edwin Kneedler
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2203

9. *General Motors v. Green*, 709 A.2d 205 (N.J. Super. Ct. App. Div. 1998).

General Motors was a significant institutional client of my former firm, Kirkland & Ellis. In this particular case, I was asked to represent General Motors and conduct oral argument on its behalf in the Appellate Division of the New Jersey Superior Court before Judges Dreier, Levy, and Wecker. The case was a design defect products liability case involving an alleged roof design defect. At trial, the jury had found General Motors liable and awarded plaintiff \$25 million. General Motors appealed on numerous grounds, challenging both the liability judgment and damages award. The Appellate Division affirmed the liability judgment and substantially reduced the damages award.

Co-counsel for Petitioner (General Motors)

Paul T. Cappuccio
Then with Kirkland & Ellis LLP
WarnerMedia
One Time Warner Center
New York, New York 10019
(212) 484-8000

Thomas F. Tansey
Then with Tansey, Fanning, Haggerty, Kelly, Convery and Tracy
Retired

Principal counsel for Respondent (Green)

Maurice Donovan
Then with Benjamin M. Delvento, P.A.
70 South Orange Avenue, Suite 135
Livingston, New Jersey 07039
(973) 758-1801

10. *Lewis v. Brunswick*, No. 97-288 (Supreme Court of the United States) (1997)
(dismissed as moot because of settlement after oral argument).

I represented General Motors in filing an amicus brief in the Supreme Court. The question presented in the case was whether the Boat Safety Act preempted a state common-law requirement that recreational boats be equipped with propeller guards. Because of the similarity of the question to a question under the National Traffic and Motor Vehicle Safety Act, General Motors filed an amicus brief. The Supreme Court subsequently dismissed the case after oral argument because the parties settled.

Co-counsel for Amicus Curiae (General Motors)

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Richard A. Cordray
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Principal counsel for Petitioner (Lewis)

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 Hull Barrett
 801 Broad Street, Suite 700
 Augusta, Georgia 30901
 (706) 722-4481

Principal counsel for Respondent (Brunswick)

Kenneth S. Geller
 Mayer Brown
 1999 K Street, N.W.
 Washington, D.C. 20006
 (202) 263-3225

18. **Legal Activities:** Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation, including your time in the Office of the Independent Counsel. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

Office of Independent Counsel:

In the summer of 1994 I joined the Office of Independent Counsel. In that Office, I performed six main functions during the course of my service.

First, I was a line attorney responsible for the Office's investigation into the death of former Deputy White House Counsel Vincent W. Foster, Jr. This assignment required management and coordination with a number of FBI agents and investigators, FBI laboratory officials, and outside experts on forensic and psychological issues. I was responsible for conducting and assisting with interviews of a wide variety of witnesses with respect to both the cause of death and Mr. Foster's state of mind. I was responsible for preparing a draft of the report on his death. The investigation and report resolved questions about the cause and manner of Mr. Foster's death, concluding that he committed suicide in Fort Marcy Park, Virginia.

Second, I was one of two line attorneys responsible for conducting the investigation into possible obstruction of justice in the wake of Mr. Foster's death, including whether documents had been unlawfully removed from his office or otherwise concealed from investigators. This was an extensive grand jury investigation. I conducted numerous interviews and grand jury sessions and, with another attorney, prepared a memorandum of more than 300 pages summarizing the matter. At the time, this matter also was being investigated by the Senate. The Office conducted a thorough investigation of the facts and did not seek criminal charges against any individuals.

Third, I was substantially responsible for writing briefs and conducting oral arguments regarding

privilege and other legal matters that arose frequently during the investigation. These included cases about the government attorney-client privilege, Secret Service privilege, and private attorney-client privilege. I argued once before the Supreme Court of the United States and twice before the U.S. Court of Appeals for the D.C. Circuit.

Fourth, I served as a legal advisor on a variety of issues facing the Office. I and several other attorneys sometimes served a function roughly equivalent to that of attorneys in the Office of Legal Counsel in the Justice Department. This required analysis of, for example, statutory reporting requirements, Rule 6(e) obligations, FOIA disclosure rules, and issues related to interaction with Congress.

Fifth, I was part of the team that prepared that part of Judge Starr's 1998 report to Congress, submitted pursuant to statute, that outlined information that "may constitute grounds" for impeachment. Although many volumes of evidence were provided to the House of Representatives under seal, the report as publicly released by the House of Representatives was divided into two parts. The first part was a summary of facts known as the "narrative" section. I did not draft that part of the report. The second part was a description of possible grounds for impeachment that identified areas where the President may have made false statements or otherwise obstructed justice. I drafted portions of that part of the report. This is a matter of some continuing controversy. As I have stated publicly before, I regret that the House of Representatives did not handle the report in a way that would have kept sensitive details in the report from public disclosure (as had occurred with the House's handling of the Special Prosecutor's report in 1974) or, if not, that the report did not further segregate certain sensitive details. The House of Representatives voted to publicly release the report without reviewing it beforehand.

Sixth, I was an attorney primarily responsible for assisting Judge Starr with preparation of his two-hour statement to the House Judiciary Committee, which he submitted in written form and delivered orally on November 19, 1998. The statement identified and discussed the investigation and evidence.

Kirkland & Ellis:

At Kirkland & Ellis, I worked primarily on appellate and pre-trial briefs in commercial and constitutional litigation. My most significant corporate clients were firm clients Verizon, America Online, General Motors, and Morgan Stanley. I represented them in a variety of litigation and administrative matters. I also represented individuals and non-corporate entities in litigation matters. I prepared pro bono briefs in several Supreme Court cases. I also represented pro bono a synagogue that was involved in a zoning dispute with Montgomery County, Maryland. In all of the matters, I was part of a larger litigation team.

Office of Counsel to the President:

I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims' compensation, terrorism insurance, medical liability,

and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House.

Assistant to the President and Staff Secretary:

I performed the standard duties of the Staff Secretary. The Staff Secretary's Office traditionally coordinates the staffing and presentation of documents for the President, among other responsibilities.

19. **Teaching:** What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, compensation received, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus for each year or term the course was taught, provide four (4) copies to the committee.

Harvard Law School

Separation of Powers (2008–2015). Syllabi supplied.

This course examined the structure of our national government and our system of separated powers with checks and balances.

The Supreme Court Since 2005 (2014, 2016, 2017, 2018). There was no syllabus for the 2014 class; available syllabi supplied.

This course analyzes and discusses important Supreme Court opinions that have been issued since 2005 when John Roberts became Chief Justice.

I was compensated by Harvard Law School in the following amounts for the relevant years:

2008	\$22,508.50
2009	\$22,508.50
2010	\$22,512.75
2011	\$22,512.75
2012	\$26,950.00
2013	\$26,950.00
2014	\$26,950.00
2015	\$27,220.00
2016	\$27,220.00
2017	\$27,490.00
2018	\$27,765.00

Yale Law School

National Security and Foreign Relations Law (2011). Syllabus supplied.

This seminar examined the constitutional and statutory law that governs U.S. national security activities and U.S. foreign relations.

I received \$4,400.00 compensation.

Georgetown University Law Center

Constitutional Interpretation (2007). Syllabus supplied.

This course examined how the United States Congress and Executive Branch interpret the Constitution.

I received \$12,000 compensation.

20. **Deferred Income/ Future Benefits:** List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

I plan to receive approximately \$28,045 from Harvard Law School in 2019 as part of my agreement to teach at the school in 2019.

21. **Outside Commitments During Court Service:** Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

I have an agreement to continue teaching at Harvard Law School in 2019.

22. **Sources of Income:** List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding \$500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

Please see the attached Financial Disclosure Report.

23. **Statement of Net Worth:** Please complete the attached financial net worth statement in detail (add schedules as called for).

Please see the attached Statement of Net Worth.

24. **Potential Conflicts of Interest:**

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would resolve any conflict of interest by looking to the Code of Conduct

for United States Judges (although it is not formally binding on members of the Supreme Court of the United States); the Ethics Reform Act of 1989, 28 U.S.C. § 455; and any other relevant prescriptions. I would seek guidance from judicial ethics officials to structure my limited financial investments to minimize the potential for conflicts. And I would recuse myself from matters in which I participated while a judge on the court of appeals.

25. **Pro Bono Work:** An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional work load, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

As a lawyer in private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives. I also filed pro bono amicus briefs in several significant Supreme Court cases involving religious liberty. And I participated in community work on occasion, such as participating in an all-day playground build in Washington, D.C.

The majority of my legal career, however, has been spent in public service for the United States Government in a variety of capacities. Many of these positions, including particularly my service on the D.C. Circuit, have limited my opportunities to engage in traditional pro bono legal work. Nonetheless, I have sought, and will continue to seek, other avenues by which I can live up to the professional obligation of an attorney to help the less fortunate.

Since my youth, I have devoted significant time to helping the disadvantaged. My goal has always been to be, in the words of my high school's motto, a "man for others." In high school, I served meals at soup kitchens and tutored intellectually disabled children at the Rockville public library. In college, I tutored children at Roberto Clemente Middle School. In law school, I participated at times in the Green Haven Prison Project, which involved visiting and discussing issues with inmates at a New York prison.

For many years, I have been a volunteer basketball coach. Although many of the girls and boys on my teams would not qualify as financially disadvantaged, I have devoted particular attention to several players who experienced emotional hardships – one boy whose father had died, a girl whose father died during the time when I was coaching her, and two sisters whose mother had died in a car accident. I continue to coach those three girls.

As a judge, I have tutored at J.O. Wilson School and the Washington Jesuit Academy. I now serve as a director of the Washington Jesuit Academy. For the last several years, I have regularly served meals to the homeless at Catholic Charities in D.C.

26. **Selection Process:**
- a. Describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and any interviews in

which you participated). List all interviews or communications you had with anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign. Additionally, list all interviews or communications you had regarding your nomination or your potential nomination by the current President with outside organizations or individuals at the behest of anyone in the Executive Office of the President, Justice Department, President-elect transition team, or presidential campaign. List all persons present, participating, or otherwise involved in such interviews or communications. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

Counsel to the President Don McGahn called me in the late afternoon on Wednesday, June 27, 2018. I met with Mr. McGahn on Friday, June 29. I interviewed with President Trump on Monday, July 2, with Mr. McGahn present. I interviewed with Vice President Pence on Wednesday, July 4, with Mr. McGahn and counsel for the Vice President present. I spoke to President Trump by phone on the morning of Sunday, July 8. On the evening of Sunday, July 8, I met with President Trump and Mrs. Trump at the White House. During that meeting, the President offered me the nomination, and I accepted. I also spoke later that evening with Mr. McGahn. I have also been in regular contact with members of the White House Counsel's Office and the Department of Justice.

b. Has anyone involved in the process of selecting you for this nomination (including, but not limited to anyone in the Executive Office of the President, the Justice Department, the President-elect transition team, presidential campaign, or the Senate and its staff) ever discussed with you any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully. Identify each communication you had prior to the announcement of your nomination with anyone in the Executive Office of the President, the Justice Department, the President-elect transition team or presidential campaign, outside organization or individual (at the behest of anyone working in the Executive Office of the President, the Justice Department, President-elect transition, or presidential campaign), or the Senate or its staff referring or relating to your views on any case, issue, or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

c. Did you make any representations to any individuals or organizations as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.

No.

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

SUPPLEMENTAL STATEMENT OF NET WORTH

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings), all liabilities (including debts, mortgages, loans and other financial obligations) of yourself, your spouse and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		26	989	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities				Notes payable to relatives			
Unlisted securities				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-see schedule		815	912
Real estate owned-see schedule	1	225	000	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		25	000				
Cash value-life insurance							
Other assets itemize:							
Federal Thrift Savings Plan #1		463	320				
Federal Thrift Savings Plan #2		16	130				
Employee Retirement System of Texas -- TexasSavr Empowerment Retirement		2	154	Total liabilities		815	912
				Net Worth		942	681
Total Assets	1	758	593	Total liabilities and net worth	1	758	593
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)			No
On leases or contracts				Are you defendant in any suits or legal actions?			No
Legal Claims				Have you ever taken bankruptcy?			No
Provision for Federal Income Tax							
Other special debt							

FINANCIAL STATEMENT
NET WORTH SCHEDULES

<u>Real Estate Owned</u>	
Personal Residence	<u>\$1,225,000</u>
Total Real Estate Owned	\$1,225,000
<u>Real Estate Mortgages Payable</u>	
Personal Residence – Mortgage	<u>\$815,912</u>
Total Real Estate Mortgages Payable	\$815,912

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 11(c)

Conferences, Symposia, Panels and Continuing Legal
Education Events

The following list was compiled after persons acting on my behalf performed a thorough review of my calendars.

Other than the one event in September 2017 noted with an asterisk, any funding for these events came, as best as we can reconstruct, from me or the government. Any funding consisted of reimbursement for my ordinary expenses.

Date	Sponsor	Description
Tuesday, June 6, 2006	Bench and Bar Conference	D.C. Circuit Judicial Conference
Tuesday, June 20, 2006	The Edward Coke Appellate Inn of Court	Monthly meeting. Panel discussing 2005-2006 Supreme Court term. Participants included Roy Englert, Jonathan Franklin, Seth Galanter, Greg Garre, Steffen Johnson, Bob Long and Deanne Maynard.
Tuesday, June 20, 2006	Yale Law School Alumni Association	Annual Reception
Monday, September 11, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Tuesday, September 19, 2006	The Edward Coke Appellate Inn of Court	Monthly meeting. The guest speaker was Solicitor General Paul Clement, and he discussed the upcoming term.
Wednesday, September 27, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Brett M. Kavanaugh
Tuesday, October 3, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Reception
Tuesday, October 17, 2006	D.C. Bar and Federal Bar Associations	Judicial Reception
Friday, October 27, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge Stephen F. Williams

Date	Sponsor	Description
Monday, October 30, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Ceremony to dedicate the William B. Bryant Annex to the E. Barrett Prettyman U.S. Courthouse of the U.S. Court of Appeals for the D.C. Circuit. Participants in the ceremony included Chief Justice John Roberts, U.S. Court of Appeals Judge Douglas Ginsburg, U.S. District Court Judge Thomas Hogan, Senator John Warner, Representative Eleanor Holmes Norton, and General Services Administrator Lurita Doan.
Tuesday, October 31, 2006	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Thursday, November 16, 2006	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels throughout the day featured a variety of speakers.
Wednesday, January 17, 2007	The Edward Coke Appellate Inn of Court	Monthly meeting. Met jointly with the Prettyman-Leventhal American Inn of Court. The program focused on the <i>Chevron</i> doctrine and, particularly, on the considerable attention <i>Chevron</i> is receiving in the United States Supreme Court.
Friday, January 26, 2007	Yale Law School	Lunch with Yale Law Journal students
Monday, February 26, 2007	U.S. Court of Appeals for the Third Circuit Meeting	Investiture Ceremony for Judge Kent A. Jordan
Wednesday, March 14, 2007	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a discussion on the Supreme Court and intellectual property law.
Wednesday, March 28, 2007	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Dinner to welcome Judge Kavanaugh and Mrs. Kavanaugh
Tuesday, May 3, 2007	D.C. Court of Appeals Meeting	Portrait Presentation Ceremony for Judge Judith W. Rogers

Date	Sponsor	Description
Tuesday, May 15, 2007	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a conversation between Justice Sandra Day O'Connor and Jan Crawford Greenburg.
Friday, June 1, 2007- Saturday, June 2, 2007	Yale Law School	Yale Law School Alumni Weekend
Tuesday, June 19, 2007	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured Justice Alito discussing his first year on the United States Supreme Court.
Tuesday, June 26, 2007	U.S. Court of Appeals for the D.C. Circuit Meeting	Reception for Judge Robert Bork
Wednesday, June 27, 2007	Yale Law School Alumni Association	Annual Reception
Thursday, June 28, 2007- Saturday, June 30, 2007	Bench and Bar Conference	D.C. Circuit Judicial Conference
Thursday, September 6, 2007	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Wednesday, September 26, 2007	The Edward Coke Appellate Inn of Court	Monthly meeting. United States Solicitor General Paul Clement discussed the upcoming Supreme Court term.
Thursday, October 11, 2007	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge Kenneth W. Starr
Friday, October 26, 2007	American Bar Association-Administrative Law Section	Reception at the Embassy of France
Thursday, November 1, 2007	U.S. District Court for the District of Columbia Meeting	Portrait Presentation Ceremony for Judge Louis F. Oberdorfer
Thursday, November 15, 2007	U.S. Department of Health and Human Services	Swearing-In Ceremony for Tevi Troy
Thursday, November 15, 2007- Saturday, November 17, 2007	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the convention featured a variety of speakers.
Thursday, November 29, 2007	Supreme Court of the United States	Reception in honor of Justice Anthony M. Kennedy

Date	Sponsor	Description
Wednesday, January 16, 2008	Harvard Law School	Met with Tom Goldstein's class.
Friday, February 1, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Attorney General Michael Mukasey.
Friday, February 8, 2008-Saturday, February 9, 2008	American Bar Association-Administrative Law Section	Mid-year meeting held in Los Angeles, CA
Friday, February 15, 2008	Yale Law School	Lunch with Yale Law School students in Washington, D.C.
Wednesday, February 27, 2008	Federal Judicial Center Program	Orientation Seminar for New Appellate Judges
Wednesday, February 27, 2008	Supreme Court of the United States	Reception
Monday, March 10, 2008	Harvard Law School	Dinner in honor of Justice Anthony M. Kennedy. A number of alumni, students, and faculty members attended the dinner.
Friday, March 14, 2008	The Edward Coke Appellate Inn of Court	Monthly meeting and dinner. Chief Justice Roberts joined the meeting for a reception at the Supreme Court, along with Justice Alito. Justice Alito provided remarks during the dinner and took questions from Inn members.
Sunday, March 30, 2008	Harvard Law School	Law and Society Program
Monday, April 7, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Thursday, April 24, 2008	Historical Society of the D.C. Circuit	Historical Society Reception for Chief Judges Ginsburg and Hogan
Friday, April 25, 2008	Georgetown University Law Center	Reception for Justice Antonin Scalia
Thursday, May 1, 2008	U.S. District Court for the District of Columbia	Chief Judge transition ceremony for outgoing Chief Judge Thomas Hogan and incoming Chief Judge Royce Lamberth
Tuesday, May 6, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Chief Justice Roberts.

Date	Sponsor	Description
Tuesday, June 3, 2008- Friday, June 6, 2008	Bench and Bar Conference	D.C. Circuit Judicial Conference
Wednesday, June 11, 2008	The White House	Presidential Medal of Freedom Ceremony, for Judge Silberman
Tuesday, June 17, 2008	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a panel on the October 2007 Supreme Court term. The panel featured Inn member Beth Brinkmann, as well as Edwin Kneeder, Deputy Solicitor General in the Solicitor General's Office. The panel was moderated by Inn member Greg Castanias.
Saturday, June 28, 2008- Sunday, June 29, 2008	Supreme Court of the United States	Justice Anthony M. Kennedy Law Clerk Reunion Weekend
Wednesday, July 16, 2008	Yale Law School	Event
Friday, July 25, 2008	D.C. Bar Association	Justice Antonin Scalia and Bryan Garner continuing legal education course. I took my clerks. The course covered their book <i>Making Your Case: The Art of Persuading Judges</i> .
Wednesday, July 30, 2008	The Federalist Society	Lunch with University of Chicago Law School's student chapter in Washington, D.C.
Tuesday, September 23, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Tuesday, September 23, 2008	The Edward Coke Appellate Inn of Court	Monthly meeting. Acting Solicitor General Gregory G. Garre was the guest.
Monday, October 6, 2008	U.S. Court of Appeals for the D.C. Circuit	D.C. Bar Reception
Wednesday, October 15, 2008	American Bar Association	Dinner in honor of Thomas Sussman at the Supreme Court of the United States.
Wednesday, October 22, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon

Date	Sponsor	Description
Wednesday, November 5, 2008	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Federal Public Defender A.J. Kramer.
Thursday, November 6, 2008	Federal Judicial Center Program	Reception at the Supreme Court
Thursday, November 06, 2008- Friday, November 07, 2008	Federal Judicial Center Program	Federal Judicial Center Symposium for U.S. Court of Appeals Judges
Tuesday, November 18, 2008	The Edward Coke Appellate Inn of Court	Panel on judicial selection in the Obama Administration. Panelists included Rachel Brand and Eleanor Acheson, who headed the Office of Legal Policy during the Bush Administration and the Clinton Administration, respectively. Andrew Effron, Chief Judge of the U.S. Court of Appeals for the Armed Forces, served as moderator.
Thursday, November 20, 2008- Saturday, November 22, 2008	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the convention featured a variety of speakers.
Friday, December 5, 2008	Federal Circuit Meeting	Portrait Presentation Ceremony for Judge Arthur Gajarsa
Thursday, December 19, 2008	Department of Justice	Portrait Presentation Ceremony for Alberto Gonzales
Wednesday, January 14, 2009	The Edward Coke Appellate Inn of Court	Monthly meeting. The Coke Inn held a joint meeting with the Giles S. Rich Inn of Court, which focused on intellectual property law.
Thursday, January 15, 2009	The Federalist Society	Lunch with Harvard Law School's student chapter
Tuesday, January 20, 2009	The Federalist Society	Event at Harvard Law School
Friday, February 27, 2009	The Federalist Society	Yale Federalist Society Dinner in Washington, D.C.

Date	Sponsor	Description
Thursday, March 5, 2009	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured Seventh Circuit Judge Richard A. Posner and Federal Circuit Chief Judge Paul R. Michel, both commenting on Judge Posner's recent book <i>How Judges Think</i> .
Friday, March 27, 2009	Department of Justice	Installation Ceremony for Attorney General Eric Holder
Saturday, April 18, 2009- Sunday, April 19, 2009	American Bar Association-Administrative Law Section	Conference in Williamsburg, VA
Monday, May 18, 2009	American Law Institute	New Member Lunch
Tuesday, May 19, 2009	American Law Institute	American Law Institute Dinner
Thursday, May 21, 2009	Yale Law School	Lunch with Yale Law Journal students in Washington, D.C.
Tuesday, June 2, 2009- Friday, June 5, 2009	Bench and Bar Conference	D.C. Circuit Judicial Conference
Tuesday, June 16, 2009	The Edward Coke Appellate Inn of Court	Monthly meeting. The program was a panel discussion about Justice Souter's tenure on the Supreme Court.
Saturday, July 11, 2009	The Federalist Society	Summer Reception
Monday, July 20, 2009- Thursday, July 23, 2009	Bench and Bar Conference	The Ninth Circuit Judicial Conference Judges' Education Program
Thursday, August 3, 2009	The Federal Judicial Center	Event with the Federal Public Defender
Thursday, September 3, 2009	The Federal Judicial Center	Appellate Writing Seminar
Tuesday, September 15, 2009	The Edward Coke Appellate Inn of Court	Monthly meeting. Solicitor General Elena Kagan gave an overview of the upcoming Supreme Court term and her experiences as Solicitor General.
Tuesday, September 22, 2009	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Wednesday, October 7, 2009	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was General Michael Hayden.

Date	Sponsor	Description
Tuesday, October 13, 2009	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Dinner in honor of Judge Randolph
Saturday, October 24, 2009	American Bar Association-Administrative Law Section	Meeting
Wednesday, November 4, 2009	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Paul Tagliabue.
Tuesday, November 10, 2009	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured three authors who have written books on subjects relating to appellate litigation: Cliff Sloan, the co-author of <i>The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court</i> ; Charles Lane, the author of <i>The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction</i> ; and Joan Biskupic, the author of <i>American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia</i> . The discussion was moderated by Kannon Shanmugam of Williams & Connolly.
Thursday, November 12, 2009- Saturday, November 14, 2009	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels throughout the day featured a variety of speakers.
Thursday, December 3, 2009- Friday, December 4, 2009	United States Judicial Conference	Judicial Branch Committee Meeting
Tuesday, December 8, 2009	U.S. District Court for the District Of Columbia Meeting	Portrait Presentation Ceremony for Judge Robertson
Thursday, December 10, 2009	Supreme Court of United States	Chief Justice Rehnquist reception for unveiling of his bust
Wednesday, January 20, 2010	The Federalist Society	Reception at Harvard Law School

Date	Sponsor	Description
Tuesday, March 9, 2010	The Edward Coke Appellate Inn of Court	Monthly meeting. Featured a panel on Appellate Lawyers and the War on Terror. Participants included Deputy Assistant Attorney General Ian Gershengorn, Professor Steve Vladeck, and Larry Rosenberg.
Wednesday, March 31, 2010	Historical Society of the D.C. Circuit	Meeting
Wednesday, April 21, 2010	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Wednesday, April 28, 2010	Historical Society of the D.C. Circuit	Annual Meeting
Thursday, April 29, 2010	Georgetown Law Supreme Court Institute	Reception honoring Justice Anthony M. Kennedy
Wednesday, May 12, 2010	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Monday, May 17, 2010	American Law Institute	Justice Breyer Lecture and Reception
Tuesday, May 18, 2010	The Edward Coke Appellate Inn of Court	Dinner at the Supreme Court
Monday, May 24, 2010	Department of Justice	Investiture Ceremony for U.S. Attorney Ronald Machen
Wednesday, May 26, 2010	The Judge Thomas A. Flannery Lecture Committee	Second Annual Judge Thomas A. Flannery Lecture. Justice Antonin Scalia delivered the lecture.
Friday, June 4, 2010	D.C. Superior Court Meeting	Investiture Ceremony for Judge Stuart Nash
Monday, June 7, 2010- Tuesday, June 8, 2010	United States Judicial Conference	Judicial Branch Committee Meeting
Tuesday, June 8, 2010- Friday, June 11, 2010	Bench and Bar Conference	D.C. Circuit Judicial Conference
Tuesday, June 15, 2010	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a round-up of the Supreme Court term, along with thoughts on Justice Stevens's legacy.
Wednesday, June 30, 2010	Yale Law School	Lunch with Yale Law School students

Date	Sponsor	Description
Monday, August 16, 2010- Thursday, August 19, 2010	Bench and Bar Conference	Ninth Circuit Judicial Conference
Monday, September 20, 2010	The Edward Coke Appellate Inn of Court	Monthly meeting. The featured speaker was Acting Solicitor General Neal Katyal. He discussed the upcoming Supreme Court term.
Tuesday, September 21, 2010	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Thursday, September 30, 2010	U.S. District Court for the Northern District of Illinois Meeting	Investiture Ceremony for Judge Gary Feinerman
Sunday, October 3, 2010- Thursday, October 7, 2010	The Federal Judicial Center	Federal Judicial Conference
Tuesday, November 2, 2010	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Tuesday, November 16, 2010	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured an Oxford Union-style debate on the proposition: <i>Resolved, there has never been a better time to be a Supreme Court litigator.</i>
Thursday, November 18, 2010- Friday, November 19, 2010	United States Judicial Conference	Judicial Branch Committee Meeting
Thursday, November 18, 2010- Friday, November 19, 2010	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers.
Thursday, December 9, 2010- Friday, December 10, 2010	Administrative Conference of the United States	53rd Plenary Session. Remarks provided by Chairman Paul Verkuil and Justice Antonin Scalia.
Tuesday, January 18, 2011	The Federalist Society	Lunch with Harvard Law School student chapter
Tuesday, March 15, 2011	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Chief Judge Beryl Howell
Wednesday, April 6, 2011	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon

Date	Sponsor	Description
Friday, April 8, 2011-Sunday, April 10, 2011	American Bar Association-Administrative Law Section	Conference in Charlottesville, VA
Thursday, April 28, 2011	Georgetown University Law Center	Event for Neal Katyal
Thursday, May 12, 2011-Friday, May 13, 2011	United States Judicial Conference	Judicial Branch Committee Meeting
Tuesday, May 17, 2011-Thursday, May 19, 2011	U.S. Sentencing Commission	Annual National Seminar on the Federal Sentencing Guidelines
Friday, May 20, 2011	U.S. District Court for the District of Columbia	Swearing-In Ceremony for Judge Boasberg
Monday, June 13, 2011	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Robert L. Wilkins
Thursday, June 16, 2011	Supreme Court of United States	Portrait Ceremony Reception for Justice Anthony M. Kennedy
Tuesday, June 21, 2011	Yale Law School	Lunch with Yale Law School students
Thursday, June 23, 2011	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a panel of lawyers discussing election law litigation that was already underway or anticipated, including issues that were likely to make it to appellate courts. The panelists were Marc Elias, Gerry Hebert, Rob Kelner, and Mark Braden. The panel was moderated by Willy Jay.
Monday, June 27, 2011-Wednesday, June 29, 2011	Bench and Bar Conference	D.C. Circuit Judicial Conference
Monday, July 11, 2011	Yale Law School Alumni Association	Annual Reception
Tuesday, September 20, 2011	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception

Date	Sponsor	Description
Tuesday, October 11, 2011	The Edward Coke Appellate Inn of Court	Monthly meeting. Solicitor General of the United States, Donald B. Verrilli, discussed the upcoming Supreme Court term.
Thursday, October 13, 2011	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Lunch. The guest was Senator Mike Lee.
Thursday, October 20, 2011	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Justice Kagan.
Monday, October 24, 2011	The Dwight D. Opperman Foundation	Devitt Award Ceremony for Judge Ricardo Hinojosa
Thursday, November 3, 2011 - Friday, November 4, 2011	United States Judicial Conference	National Court of Appeals Symposium
Thursday, November 10, 2011 - Saturday, November 12, 2011	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels throughout the day featured a variety of speakers.
Tuesday, November 15, 2011	The Edward Coke Appellate Inn of Court	Monthly meeting. "The Future of Appellate Practices In Big Law Firms." The guests were Steve Harper, former partner at Kirkland & Ellis, author, and commentator on the state of life in large law firms today. The panelists were Seth Waxman, former Solicitor General and chair of WilmerHale's Supreme Court and appellate litigation practice group; Roy Englert, partner of Robbins, Russell, Englert, Orseck, Untereiner & Sauber; and Marisa Kashino, staff writer at the <i>Washingtonian</i> covering the legal industry. The discussion was moderated by Kannon Shanmugam.
Monday, November 28, 2011	The Federalist Society	Lunch with Yale Federalist Society Chapter
Saturday, December 3, 2011	Harvard Law School	Event in honor of Justice Antonin Scalia
Thursday, December 8, 2011 - Friday, December 9, 2011	United States Judicial Conference	Judicial Branch Committee Meeting

Date	Sponsor	Description
Monday, January 23, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Lunch
Wednesday, March 14, 2012	The Edward Coke Appellate Inn of Court	Monthly meeting. The topic was the then-upcoming Supreme Court arguments in the litigation concerning the Affordable Care Act.
Tuesday, March 20, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was William Suter.
Wednesday, March 21, 2012	American Enterprise Institute	Event for Professor Goldsmith
Thursday, April 12, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Professor Harold Koh.
Thursday, April 19, 2012	The Edward Bennett Williams Inn of Court	Monthly meeting
Thursday, April 26, 2012	Georgetown University Law Center	Event
Thursday, May 10, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Tuesday, May 15, 2012	The Edward Bennett Williams Inn of Court	Monthly meeting
Thursday, May 17, 2012- Friday, May 18, 2012	United States Judicial Conference	Judicial Branch Committee Meeting
Friday, May 25, 2012- Sunday, May 27, 2012	Yale Law School	Yale Law School Alumni Weekend
Thursday, May 31, 2012	The White House	President George W. Bush and Mrs. Bush Portrait Unveiling
Tuesday, June 12, 2012	Duke Law School	Reception in Washington, D.C. with David Levi
Friday, June 15, 2012	Yale Law School	Lunch with Yale Law School students in Washington, D.C.
Wednesday, June 20, 2012	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Rudolph Contreras
Thursday, June 28, 2012	Yale Law School	Dinner in honor of Justice Clarence Thomas

Date	Sponsor	Description
Thursday, September 13, 2012	American Enterprise Institute	Lecture
Tuesday, September 18, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Friday, September 28, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge Douglas H. Ginsburg
Friday, November 2, 2012	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge A. Raymond Randolph
Thursday, November 15, 2012- Saturday, November 17, 2012	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers.
Wednesday, December 5, 2012	The Dwight D. Opperman Foundation	Devitt Award Ceremony for Judge Thomas F. Hogan
Monday, December 3, 2012- Tuesday, December 4, 2012	United States Judicial Conference	Judicial Branch Committee Meeting
Tuesday, January 15, 2013	The Federalist Society	Dinner with the Harvard Law School chapter
Thursday, January 17, 2013	The Federalist Society	Luncheon
Thursday, March 7, 2013	Supreme Court of the United States	Reception for Judge Royce Lamberth
Tuesday, March 12, 2013	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a panel of experienced in-house counsel from three premier high-tech companies on innovation, the courts, and the perspective of in-house lawyers. The moderator was John Thorne of Kellog Huber and former Deputy General Counsel at Verizon Communications. The panelists were Austin Schlick, former General Counsel at the FCC and now Director of Communications Law at Google; Gail Levine, Vice President and Associate General Counsel at Verizon Communications; and Colin Stretch, Deputy General Counsel at Facebook.

Date	Sponsor	Description
Thursday, March 14, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Luncheon in honor of Justice O'Connor
Friday, March 22, 2013	U.S. District Court for the District of Columbia Meeting	Event for Judge Oberdorfer
Friday, April 5, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge David B. Sentelle
Wednesday, April 24, 2013- Thursday, April 25, 2013	George W. Bush Presidential Center	Dedication of the George W. Bush Presidential Center
Thursday, May 9, 2013	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Ketanji Brown Jackson
Tuesday, May 14, 2013	The Edward Coke Appellate Inn of Court	Dinner at the Supreme Court. The Supreme Court dinner honored General William Suter for 22 years of service as Clerk of the Supreme Court.
Sunday, May 19, 2013	American Law Institute	Dinner
Monday, May 21, 2013	American Law Institute	Lunch/Awards Ceremony
Wednesday, June 5, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Event for Judge Harry Edwards
Tuesday, June 11, 2013	Yale Law School	Lunch with Yale Law School students
Wednesday, June 12, 2013- Thursday, June 13, 2013	United States Judicial Conference	Judicial Branch Committee Meeting
Friday, June 14, 2013- Sunday, June 16, 2013	Supreme Court of the United States	Justice Kennedy Law Clerk Reunion
Monday, June 17, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Swearing-In Ceremony for Judge Sri Srinivasan
Tuesday, June 18, 2013	Historical Society of the D.C. Circuit	Reception

Date	Sponsor	Description
Tuesday, June 18, 2013	The Edward Coke Appellate Inn of Court	Monthly meeting. A panel of appellate experts gave their perspective on the 2012-2013 Supreme Court term. Panelists were Bert Rein of Wiley Rein; Allison Zieve, director at Public Citizen Litigation Group; Nicole Saharsky, Assistant to the Solicitor General; and Amanda Leiter, associate professor of law, American University Washington College of Law. This panel was moderated by Lawrence Hurley, Supreme Court correspondent for Reuters.
Wednesday, July 10, 2013	Yale Law School Alumni Association	Annual Reception
Thursday, August 22, 2013	Department of Justice	Event for Sri Srinivasan
Wednesday, September 11, 2013	The Edward Coke Appellate Inn of Court	Monthly meeting. The Solicitor General spoke on the upcoming Supreme Court term.
Thursday, September 19, 2013	The Edward Bennett Williams Inn of Court	Monthly meeting
Tuesday, September 24, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Thursday, September 26, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Sri Srinivasan
Thursday, October 17, 2013	The Edward Bennett Williams Inn of Court	Monthly meeting
Tuesday, November 12, 2013	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting was "Thinking Outside the Box: Creative Responses to Difficult Situations on Appeals." Jeff Wall, former Assistant to the Solicitor General and new co-leader of Sullivan & Cromwell's appellate practice, moderated the discussion. Panelists were Eric Feigin of the Office of the Solicitor General, Erin Murphy of Bancroft, and Hashim Mooppan of Jones Day.

Date	Sponsor	Description
Wednesday, November 13, 2013- Thursday, November 14, 2013	United States Judicial Conference	Judicial Branch Committee Meeting
Thursday, November 14, 2013- Saturday, November 16, 2013	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers. Also, attended a lunch with the Abigail Adams Society.
Thursday, November 21, 2013	The Edward Bennett Williams Inn of Court	Monthly meeting
Thursday, December 5, 2013	United States Judicial Conference	Advisory Committee on Rules of Appellate Procedure Lunch
Wednesday, December 18, 2013	U.S. Court of Appeals for the D.C. Circuit Meeting	Swearing-In Ceremony for Judge Cornelia T. L. Pillard
Thursday, January 16, 2014	The Edward Bennett Williams Inn of Court	Monthly meeting
Friday, January 24, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Swearing-In Ceremony for Judge Robert L. Wilkins
Wednesday, January 29, 2014	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting covered emergency brief writing, oral argument on one day's notice, and other such topics with our panel: Michelle Brace, senior staff attorney, Virginia Capital Representation Resource Center; Todd Geremia of Jones Day and Andrew Mergen, deputy chief of DOJ's ERND Appellate Section. The moderator was Scott Meisler, DOJ Criminal Division, Appellate.
Thursday, January 30, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon
Friday, February 20, 2014	The Edward Bennett Williams Inn of Court	Monthly meeting
Wednesday, February 26, 2014	Historical Society of the D.C. Circuit	Meeting
Friday, February 28, 2014	U.S. Court of Appeals of the D.C. Circuit Meeting	Investiture Ceremony for Judge Patricia Millett

Date	Sponsor	Description
Thursday, March 13, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Cornelia T. L. Pillard
Tuesday, March 18, 2014	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a group of current and former state Solicitors General. They discussed the growth of the state SG role, challenges facing an SG within a state AG's office, and advocating for the States before the Supreme Court. The panel included: Barbara Underwood, Solicitor General of New York; Elbert Lin, Solicitor General of West Virginia; Ben Mizer, Deputy Assistant Attorney General at OLC and former Solicitor General of Ohio; and Mike Scodro of Jenner & Block, former Solicitor General of Illinois.
Thursday, March 20, 2014	The Edward Bennett Williams Inn of Court	Monthly meeting
Wednesday, April 30, 2014	Historical Society of the D.C. Circuit	Event
Wednesday, May 7, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Senator Sheldon Whitehouse.
Wednesday, May 21, 2014- Thursday, May 22, 2014	United States Judicial Conference	Judicial Branch Committee Meeting
Monday, July 21, 2014	The Federalist Society	Lunch with the Harvard Law School chapter in Washington, D.C.
Friday, September 12, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Robert L. Wilkins
Thursday, September 18, 2014	The Edward Bennett Williams Inn of Court	Monthly meeting
Friday, September 19, 2014	U.S. District Court for the District of Columbia Meeting	Portrait Presentation Ceremony for Judge Friedman
Monday, September 22, 2014	U.S. Court of Appeals for the Third Circuit Meeting	Investiture Ceremony for Judge Cheryl Krause
Tuesday, September 23, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception

Date	Sponsor	Description
Wednesday, October 1, 2014	Historical Society of the D.C. Circuit	Meeting
Thursday, October 16, 2014	The Edward Bennett Williams Inn of Court	Monthly meeting
Tuesday, October 21, 2014	U.S. Court of Appeals for the D.C. Circuit Meeting	Reception
Thursday, October 23, 2014	The Judge Thomas A. Flannery Lecture Committee	Sixth Annual Judge Thomas A. Flannery Lecture. Former FBI Director Robert Mueller delivered the lecture.
Friday, November 7, 2014	United States Judicial Conference	National Court of Appeals Symposium
Thursday, November 13, 2014- Saturday, November 15, 2014	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers. Also, attended a lunch with the Abigail Adams Society
Tuesday, December 2, 2014- Wednesday, December 3, 2014	United States Judicial Conference	Judicial Branch Committee Meeting and Reception for Justice Stephen Breyer
Friday, January 16, 2015	U.S. Court of Appeals for the Fourth Circuit Meeting	Investiture Ceremony for Judge Pamela Harris
Thursday, January 29, 2015	The Edward Coke Appellate Inn of Court	Monthly meeting
Friday, February 6, 2015	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Tanya S. Chutkan
Thursday, March 12, 2015	The Edward Coke Appellate Inn of Court	Dinner at the Supreme Court
Friday, April 24, 2015	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Randolph Moss
Wednesday, April 29, 2015	Historical Society of the D.C. Circuit	Event
Wednesday, May 13, 2015- Thursday, May 14, 2015	United States Judicial Conference	Judicial Branch Committee Meeting
Thursday, May 15, 2015	The Edward Coke Appellate Inn of Court	Monthly meeting

Date	Sponsor	Description
Wednesday, May 20, 2015	Georgetown Law Supreme Court Institute	End-of-Term Reception Honoring Judges Taranto, Srinivasan, Millett, Pillard, and Harris. Dean Bill Treanor and Paul Clement gave remarks.
Thursday, May 21, 2015	The Edward Bennett Williams Inn of Court	Meeting
Wednesday, June 10, 2015	The Federalist Society	Reception
Wednesday, June 17, 2015	Yale Law School Alumni Association	Annual Reception
Wednesday, June 24, 2015- Friday, June 26, 2015	Bench and Bar Conference	D.C. Circuit Judicial Conference
Tuesday, July 7, 2015	The Federalist Society	Harvard Federalist Society Lunch
Saturday, July 11, 2015	The Federalist Society	Reception
Tuesday, July 21, 2015	Yale Law School	Yale Law Journal Event
Tuesday, September 15, 2015	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Wednesday, September 30, 2015	The Edward Coke Appellate Inn of Court	Monthly meeting
Thursday, October 29, 2015	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was former President George W. Bush.
Thursday, October 29, 2015- Friday, October 30, 2015	United States Judicial Conference	Fall Meeting of the Advisory Committee on Rules of Appellate Procedure
Thursday, November 12, 2015- Saturday, November 14, 2015	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers. Also, attended a lunch with the Abigail Adams Society.
Monday, November 16, 2015	Historical Society of the D.C. Circuit	Law Clerk Reception
Tuesday, November 17, 2015- Wednesday, November 18, 2015	Harvard Law School	The Scalia Lecture: <i>A Dialogue with Justice Kagan on the Reading of Statutes</i>
Thursday, November 19, 2015	The Edward Bennett Williams Inn of Court	Meeting

Date	Sponsor	Description
Wednesday, December 2, 2015- Thursday, December 3, 2015	United States Judicial Conference	Judicial Branch Committee Meeting
Thursday, January 21, 2016	The Edward Bennett Williams Inn of Court	Meeting
Tuesday, February 9, 2016	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Dinner
Thursday, February 18, 2016	The Edward Bennett Williams Inn of Court	Meeting
Friday, February 19, 2016	Supreme Court of the United States	Viewing of Justice Scalia at the Supreme Court
Wednesday, March 9, 2016	The Edward Coke Appellate Inn of Court	Monthly meeting
Monday, April 4 2016- Wednesday, April 6, 2016	United States Judicial Conference	Spring Advisory Committee on Rules of Appellate Procedure Meeting. Meeting was held in Denver, CO.
Wednesday, April 27, 2016	Historical Society of the D.C. Circuit	Meeting
Thursday, April 28, 2016	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Chief Judge Beryl Howell
Wednesday, May 11, 2016- Thursday, May 12, 2016	United States Judicial Conference	Judicial Branch Committee Meeting
Tuesday, May 17, 2016	American Law Institute	Annual Dinner
Wednesday, June 8, 2016	Historical Society of the D.C. Circuit	Meeting
Wednesday, June 22, 2016	Yale Law School	Dinner
Thursday, September 15, 2016	The Edward Bennett Williams Inn of Court	Monthly meeting
Thursday, September 15, 2016	American Enterprise Institute	Walter Berns Constitution Day Lecture: <i>Terrorism and the Bill of Rights</i> , delivered by Former Attorney General Michael Mukasey
Tuesday, September 20, 2016	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception

Date	Sponsor	Description
Thursday, September 29, 2016	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge Ellen Segal Huvelle
Thursday, October 6, 2016	Antonin Scalia Law School	Dedication of the Antonin Scalia Law School
Tuesday, October 18, 2016	United States Judicial Conference	Fall Advisory Committee on Rules of Appellate Procedure Meeting.
Wednesday, November 9, 2016	Women's Bar Association of the District of Columbia, Co-sponsored by Kirkland & Ellis LLP and Paul, Weiss, Rifkind, Wharton & Garrison LLP	Panel: <i>May She Please the Court</i>
Tuesday, November 15, 2016	The Judge Thomas A. Flannery Lecture	The Eighth Annual Thomas A. Flannery Lecture. Attorney General Loretta E. Lynch delivered the lecture.
Wednesday, November 16, 2016	Mikva Challenge D.C.	Memorial Tribute for Judge Mikva
Thursday, November 17, 2016	The Edward Bennett Williams Inn of Court	Meeting
Thursday, November 17, 2016- Friday, November 18, 2016	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers. Also, attended a lunch with the Abigail Adams Society
Thursday, December 8, 2016	United States Judicial Conference	Judicial Branch Committee Meeting
Thursday, February 16, 2017	The Edward Bennett Williams Inn of Court	Monthly meeting
Thursday, March 2, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was Mayor Bowser.
Monday, March 6, 2017	Harvard Law School	The Justice Antonin Scalia Lecture: <i>Without the Pretense of Legislative Intent</i>
Tuesday, April 4, 2017	Harvard Law School Federalist Society	Breakfast with students
Tuesday, April 11, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was David Dorsen.

Date	Sponsor	Description
Thursday, April 27, 2017	Georgetown Law Supreme Court Institute	Celebration of the Supreme Court Institute's October Term 2016 Moot Court Program and a reception to honor Jeffrey P. Minear, with remarks by Edwin S. Kneeder.
Tuesday, May 2, 2017	United States Judicial Conference	Spring Advisory Committee on Rules of Appellate Procedure Meeting.
Monday, May 8, 2017	The Edward Coke Appellate Inn of Court	Biennial Banquet
Tuesday, May 9, 2017	American Enterprise Institute	Lunch
Wednesday, May 17, 2017- Thursday, May 18, 2017	United States Judicial Conference	Judicial Branch Committee Meeting
Friday, May 26, 2017- Sunday, May 28, 2017	Yale Law School Alumni Association	Annual Reception
Monday, June 5, 2017	Department of Justice	Swearing-In Ceremony for Rachel Brand
Friday, June 9, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Portrait Presentation Ceremony for Judge Gladys Kessler
Thursday, June 15, 2017	Supreme Court of the United States	Investiture Ceremony for Justice Neil Gorsuch
Wednesday, June 21, 2017	Yale Law School	Dinner
Saturday, June 24, 2017- Sunday, June 25, 2017	Supreme Court of the United States	Justice Anthony M. Kennedy Law Clerk Reunion
Tuesday, June 28, 2017- Friday, June 30, 2017	Bench and Bar Conference	D.C. Circuit Judicial Conference
Tuesday, September 19, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Law Clerk Reception
Thursday, September 28, 2017	The Dwight D. Opperman Foundation*	Devitt Award Ceremony for Judge Ralph K. Winter
Friday, September 29, 2017	U.S. Department of State	Swearing-In Ceremony of Ambassador Nathan A. Sales
Thursday, October 19, 2017	The Edward Bennett Williams Inn of Court	Monthly meeting

Date	Sponsor	Description
Thursday, October 26, 2017	Historical Society of the D.C. Circuit	Law Clerk Reception
Wednesday, November 1, 2017	The Judge Thomas A. Flannery Lecture Committee	Ninth Annual Judge Thomas A. Flannery Lecture. Deputy Attorney General Rod Rosenstein delivered the lecture.
Thursday, November 9, 2017	United States Judicial Conference	Fall Advisory Committee on Rules of Appellate Procedure Meeting.
Monday, November 13, 2017	The Edward Coke Appellate Inn of Court	Monthly meeting. The meeting featured a conversation with the General Counsel of the U.S. House of Representatives, Tom Hungar, and the General Counsel of the U.S. Senate, Pat Bryan. Melissa Patterson was the moderator.
Thursday, November 16, 2017- Friday, November 17, 2017	The Federalist Society	National Lawyers Convention at the Mayflower Hotel in Washington, D.C. Panels over the course of the conference featured a variety of speakers.
Friday, November 17, 2017	U.S. District Court for the District of Columbia Meeting	Portrait Presentation Ceremony for Judge Royce Lamberth
Friday, December 1, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was J.D. Vance.
Tuesday, December 5, 2017	United States Judicial Conference	Judicial Branch Committee Meeting
Monday, December 11, 2017	U.S. Court of Appeals for the D.C. Circuit Meeting	Swearing-In ceremony for Judge Katsas
Friday, January 19, 2018	U.S. Court of Appeals for the D.C. Circuit Meeting	Judges' Luncheon. The guest was David Ferriero.
Wednesday, February 7, 2018	The Federalist Society	Cornell Law School Luncheon
Friday, February 23, 2018	U.S. Court of Appeals for the Seventh Circuit Meeting	Investiture Ceremony for Judge Amy Coney Barrett
Friday, March 16, 2018	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Timothy J. Kelly

Date	Sponsor	Description
Thursday, April 5, 2018- Friday, April 6, 2018	United States Judicial Conference	Spring Advisory Committee on Rules of Appellate Procedure Meeting.
Friday, April 13, 2018	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge McFadden
Wednesday, April 25, 2018	Georgetown University Law Center	Reception
Friday, April 27, 2018	U.S. Court of Appeals for the D.C. Circuit Meeting	Investiture Ceremony for Judge Gregory G. Katsas
Wednesday, May 9, 2018- Thursday, May 10, 2018	United States Judicial Conference	Judicial Branch Committee Meeting
Friday, May 11, 2018	U.S. District Court for the District of Columbia Meeting	Portrait Presentation Ceremony for Judge Richard J. Leon
Friday, May 18, 2018	U.S. District Court for the District of Columbia Meeting	Investiture Ceremony for Judge Dabney Friedrich
Monday, May 21, 2018	American Law Institute	Members' Reception and Buffet. Justice Kagan and Paul Clement were the speakers.
Tuesday, May 22, 2018	The Federalist Society	Federalist Society Lunch at American Law Institute's Annual Meeting
Wednesday, May 23, 2018	The Senate Judiciary Committee	Hearing for Britt Grant to be United States Circuit Judge for the Eleventh Circuit
Monday, June 4, 2018	U.S. Court of Appeals for the D.C. Circuit	Judicial Wellness Committee Meeting
Thursday, June 14, 2018	The Yale Law School Association of Washington, D.C.	Annual Dinner with keynote speaker William E. Kennard, "37 Years Later: Reflections on a Yale Law School Degree," and a Yale Law School update by Dean Heather Gerken

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 12(D)
SPEECHES

Appendix: 12(d)

The following response supplements my previous response to Question 12(d):

March 8, 2003: Panelist, Federalist Society Southern Leadership Meeting, New Orleans, Louisiana. I have no notes, transcript, or recording. The address of the Federalist Society is 1101 K Street, N.W., Suite 700, Washington, D.C. 20006.

January 27, 2003: Guest lecturer, National Security Law class, Washington University in St. Louis School of Law, St. Louis, Missouri. I spoke on the topics of attorney-client privilege, executive privilege, and federal judicial selection. I have no notes, transcript, or recording. The address of the Washington University in St. Louis School of Law is One Brookings Drive, St. Louis, Missouri 63130.

December 11, 2002: Panelist, "Judicial Nominations in a Partisan Era," Washington Council of Lawyers, Washington, D.C. I spoke as part of a panel on federal judicial selection. I have no notes, transcript, or recording. The address of the Washington Council of Lawyers is 601 Massachusetts Avenue, N.W., Suite 5409, Washington, D.C. 20001.

December 9, 2002: Panelist, "The Confirmation Crisis: Politics and Ideology in the Appointment of Federal Judges," New York City Bar Association, New York City, New York. I spoke as part of a panel on federal judicial selection. I have no notes, transcript, or recording. The address of the New York City Bar Association is 42 West 44th Street, New York, New York 10036

November 2, 2002: Panelist, Federalist Society conference, Minneapolis, Minnesota. I have no notes, transcript, or recording. The address of the Federalist Society is 1101 K Street, N.W., Suite 700, Washington, D.C. 20006.

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 12(E)
INTERVIEWS

Appendix: 12(e)

The following response supplements my previous response to Question 12(e):

During my time as Associate Counsel to the President, I occasionally gave brief radio interviews, usually on the topic of federal judicial selection. I do not have records of the details of these interviews, but individuals acting on my behalf have identified the following:

Roger Hedgecock Radio Show (KSDO radio broadcast May 5, 2003).

The Shannon Burke Show (WFLA radio broadcast Mar. 17, 2003).

Wake-Up Call with Bear Henley (WFTW radio broadcast Mar. 17, 2003).

Investor's Edge (radio broadcast Mar. 17, 2003).

Schnitt Show (WFLA radio broadcast Mar. 17, 2003).

The Randi Rhodes Show (radio broadcast Mar. 14, 2003).

Radio interview (KWLS radio broadcast Mar. 6, 2003).

Radio interview (KTFA radio broadcast Mar. 6, 2003).

Good Day USA (Radio America Network radio broadcast Mar. 3, 2003).

The Inga Barks Show (KERN radio broadcast Feb. 13, 2003).

Radio interview (KXNT Radio Las Vegas radio broadcast Feb. 7, 2003).

Rick Jensen Show (radio broadcast Feb. 7, 2003).

Ken Hamblin Show (radio broadcast Feb. 7, 2003).

Tonya McMeans Show (KTSA CBS San Antonio radio broadcast Feb. 6, 2003).

Georgene Rice Show (KPDQ radio broadcast Feb. 6, 2003).

Paul W. Smith Show (radio broadcast Feb. 6, 2003).

Rick Jensen Show (radio broadcast Feb. 6, 2003).

Hot Talk with Scott Heman (KCNN radio broadcast Feb. 6, 2003).

Morning Magazine (radio broadcast Feb. 6, 2003).

Shannon Burke Show (WFLA radio broadcast Feb. 5, 2003).

Martha Zoller Show (WDUN radio broadcast Feb. 5, 2003).

Battleline with Alan Nathan (radio broadcast Feb. 5, 2003).

Lars Larson Show (radio broadcast Feb. 5, 2003).

Ollie North Show (radio broadcast Feb. 5, 2003).

Roger Hedgecock Show (radio broadcast Feb. 5, 2003).

Neil Boortz Show (radio broadcast Feb. 5, 2003).

Dom Giordano Show (radio broadcast Feb. 5, 2003).

Morning Edition (NPR radio broadcast Feb. 5, 2003).

Radio interviews (USA Radio Network radio broadcast Feb. 4, 2003).

The Inga Barks Show (radio broadcast Jan. 31, 2003).

The Dave Elswick Show (radio broadcast Jan. 31, 2003).

Live from LA (KKLA radio broadcast Nov. 11, 2002).

Radio interview (KTSM radio broadcast Oct. 4, 2002).

Radio interview (WFTW radio broadcast Oct. 3, 2002).

Midday with Charlie Sykes (WTMJ radio broadcast Sept. 25, 2002).

Rick Jensen Show (WDEL radio broadcast Sept. 25, 2002).

Shannon Burke Show (WFLA radio broadcast Sept. 25, 2002).

Martha Zoller Show (WDUN radio broadcast Sept. 24, 2002).

Duffy & Co. (KKLA radio broadcast Aug. 28, 2002).

Good Day USA (Radio America Network radio broadcast May 8, 2002).

Jerry Bowyer Show (radio broadcast Mar. 20, 2002).

Ken Hamblin Show (radio broadcast Mar. 20, 2002).

Radio interview (Pennsylvania Radio Network radio broadcast Mar. 19, 2002).

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Radio interview (radio broadcast Mar. 18, 2002).

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 13(B)
CITATIONS FOR WRITTEN OPINIONS

Below is a list of opinions I have written (including concurrences and dissents) that are available on Westlaw.

Saint Francis Med. Ctr. v. Azar, No. 17-5098, 2018 WL 3188393 (D.C. Cir. June 29, 2018)

Clemente v. FBI, 714 Fed. App'x 2 (D.C. Cir. 2018)

United States v. Brown, 892 F.3d 385 (D.C. Cir. June 15, 2018)

Island Architectural Woodwork, Inc. v. NLRB, No. 16-1303, 2018 WL 2992909 (D.C. Cir. June 15, 2018)

PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018)

United States v. Haight, 892 F.3d 1271 (D.C. Cir. 2018)

FTC v. Boehringer Ingelheim Pharmaceuticals, Inc., 892 F.3d 1264 (D.C. Cir. 2018)

Santa Fe Disc. Cruise Parking, Inc. v. Fed. Mar. Comm'n, 889 F.3d 795 (D.C. Cir. 2018)

United States v. Lee, 888 F.3d 503 (D.C. Cir. 2018)

Laccetti v. SEC, 885 F.3d 724 (D.C. Cir. 2018)

Nw. Corp. v. FERC, 884 F.3d 1176 (D.C. Cir. 2018)

Casey v. McDonald's Corp., 880 F.3d 564 (D.C. Cir. 2018)

Saad v. SEC, 873 F.3d 297 (D.C. Cir. 2017)

Ortiz-Diaz v. HUD, 697 Fed. App'x 6 (D.C. Cir. 2017)

Ortiz-Diaz v. HUD, 867 F.3d 70 (D.C. Cir. 2017)

Competitive Enter. Inst. v. U. S. Dep't of Transp., 863 F.3d 911 (D.C. Cir. 2017)

Navajo Nation v. U.S. Dep't of Interior, 852 F.3d 1124 (D.C. Cir. 2017)

Garza v. Hargan, 874 F.3d 735 (D.C. Cir. 2017), *vacated sub nom.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018)

Lorenzo v. SEC, 872 F.3d 578 (D.C. Cir. 2017), *cert. granted*, No. 17-1077, 2018 WL 646998 (U.S. June 18, 2018)

Midwest Div. – MMC, LLC v. NLRB, 867 F.3d 1288 (D.C. Cir. 2017)

NLRB v. CNN Am., Inc., 865 F.3d 740 (D.C. Cir. 2017)

Washington All. of Tech. Workers v. DHS, 857 F.3d 907 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1276 (2018)

U.S. Telecom Ass'n v. FCC, 855 F.3d 381 (D.C. Cir. 2017)

United States v. Anthem, Inc., 855 F.3d 345 (D.C. Cir.), *cert. dismissed*, 137 S. Ct. 2250 (2017)

John Doe Co. v. CFPB, 849 F.3d 1129 (D.C. Cir. 2017)

Fourstar v. Garden City Group, Inc., 875 F.3d 1147 (D.C. Cir. 2017)

Multicultural Media, Telecom & Internet Council v. FCC, 873 F.3d 932 (D.C. Cir. 2017)

Mexichem Fluor, Inc. v. EPA, 866 F.3d 451 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-1703

Ams. for Clean Energy v. EPA, 864 F.3d 691 (D.C. Cir. 2017)

Allina Health Servs. v. Price, 863 F.3d 937 (D.C. Cir. 2017), *petition for cert. filed*, No. 17-1484

NRG Power Mktg., LLC v. FERC, 862 F.3d 108 (D.C. Cir. 2017)

Ames v. DHS, 861 F.3d 238 (D.C. Cir. 2017)

Envtl. Integrity Project v. EPA, 864 F.3d 648, 649 (D.C. Cir. 2017)

Limnia, Inc. v. U. S. Dep't of Energy, 857 F.3d 379 (D.C. Cir. 2017)

Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. 2017)

Kahl v. Bureau of Nat'l Affairs, Inc., 856 F.3d 106 (D.C. Cir.), *cert. denied*, 138 S. Ct. 366 (2017)

Kincaid v. Gov't of D.C., 854 F.3d 721 (D.C. Cir. 2017)

Carpenters Indus. Council v. Zinke, 854 F.3d 1 (D.C. Cir. 2017)

Bais Yaakov of Spring Valley v. FCC, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018)

Johnson v. Interstate Mgmt. Co., 849 F.3d 1093 (D.C. Cir. 2017)

Ctr. for Regulatory Reasonableness v. EPA, 849 F.3d 453 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1041 (2018)

Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 313 (2017)

United States v. Williams, 836 F.3d 1 (D.C. Cir. 2016)

Ortiz-Diaz v. HUD, 831 F.3d 488 (D.C. Cir. 2016)

Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016)

Int'l Union, Sec., Police & Fire Professionals of Am. v. Faye, 828 F.3d 969 (D.C. Cir. 2016)

Wesby v. D.C., 816 F.3d 96 (D.C. Cir. 2016)

PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016)

United States v. Burnett, 827 F.3d 1108 (D.C. Cir.), *cert. denied sub nom., Young v. United States*, 137 S. Ct. 456 (2016)

Stovic v. R.R. Ret. Bd., 826 F.3d 500 (D.C. Cir.), *cert. denied*, 137 S. Ct. 399 (2016)

Verizon New England Inc. v. NLRB, 826 F.3d 480 (D.C. Cir. 2016)

United States v. Knight, 824 F.3d 1105 (D.C. Cir. 2016)

United States v. Nwoye, 824 F.3d 1129 (D.C. Cir. 2016)

Sack v. Dep't of Def., 823 F.3d 687 (D.C. Cir. 2016)

In re Khadr, 823 F.3d 92 (D.C. Cir. 2016)

D.C. v. Dep't of Labor, 819 F.3d 444 (D.C. Cir. 2016)

Indep. Inst. v. FEC, 816 F.3d 113 (D.C. Cir. 2016)

United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015)

Klayman v. Obama, 805 F.3d 1148 (D.C. Cir. 2015)

Meshal v. Higgenbotham, 804 F.3d 417 (D.C. Cir. 2015)

Eley v. D.C., 793 F.3d 97 (D.C. Cir. 2015)

Ege v. DHS, 784 F.3d 791 (D.C. Cir. 2015)

Sissel v. HHS, 799 F.3d 1035 (D.C. Cir. 2015)

Mexichem Specialty Resins, Inc. v. EPA, 787 F.3d 544 (D.C. Cir. 2015)

Priests for Life v. HHS, 808 F.3d 1 (D.C. Cir. 2015)

Morgan Drexen, Inc. v. CFPB, 785 F.3d 684 (D.C. Cir. 2015)

Jackson v. Mabus, 808 F.3d 933 (D.C. Cir. 2015)

Abtew v. DHS, 808 F.3d 895 (D.C. Cir. 2015)

Friends of Animals v. Ashe, 808 F.3d 900 (D.C. Cir. 2015)

Fla. Bankers Ass'n v. U.S. Dep't of the Treasury, 799 F.3d 1065 (D.C. Cir. 2015)

EME Homer City Generation, LP v. EPA, 795 F.3d 118 (D.C. Cir. 2015)

State Nat. Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015)

Initiative & Referendum Inst. v. U.S. Postal Serv., 794 F.3d 21 (D.C. Cir. 2015)

- Energy Future Coal. v. EPA*, 793 F.3d 141 (D.C. Cir. 2015)
- S. New England Tel. Co. v. NLRB*, 793 F.3d 93 (D.C. Cir. 2015)
- Venetian Casino Resort, LLC v. NLRB*, 793 F.3d 85 (D.C. Cir. 2015)
- Indep. Producers Group v. Librarian of Cong.*, 792 F.3d 132 (D.C. Cir. 2015)
- United States v. Bostick*, 791 F.3d 127 (D.C. Cir. 2015)
- In re Stevenson*, 789 F.3d 197 (D.C. Cir. 2015)
- In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015)
- United States v. Williams*, 784 F.3d 798 (D.C. Cir. 2015)
- Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328 (D.C. Cir. 2015)
- Cannon v. D.C.*, 783 F.3d 327 (D.C. Cir. 2015)
- Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18 (D.C. Cir. 2014)
- Util. Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014)
- Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127 (D.C. Cir. 2014)
- Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014)
- White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *rev'd sub nom.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015)
- SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (D.C. Cir. 2014)
- Alaska v. U.S. Dep't of Agric.*, 772 F.3d 899 (D.C. Cir. 2014)
- Mathew Enter., Inc. v. NLRB*, 771 F.3d 812 (D.C. Cir. 2014)
- Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014)

- Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014)
- Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243 (D.C. Cir. 2014)
- In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014)
- Illinois Pub. Telecommunications Ass'n v. FCC*, 752 F.3d 1018 (D.C. Cir. 2014)
- BNSF Ry. Co. v. Surface Transp. Bd.*, 748 F.3d 1295 (D.C. Cir. 2014)
- Wu v. Stomber*, 750 F.3d 944 (D.C. Cir. 2014)
- Nat'l Sec. Archive v. CIA*, 752 F.3d 460 (D.C. Cir. 2014)
- United States v. Brice*, 748 F.3d 1288 (D.C. Cir. 2014)
- Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014)
- Nat'l Ass'n of Mfrs. v. EPA*, 750 F.3d 921 (D.C. Cir. 2014)
- Teltschik v. Williams & Jensen, PLLC*, 748 F.3d 1285 (D.C. Cir. 2014)
- NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)
- Communities for a Better Env't v. EPA*, 748 F.3d 333 (D.C. Cir. 2014)
- United States v. Wright*, 745 F.3d 1231 (D.C. Cir. 2014)
- Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014)
- Public Employees for Environmental Responsibility v. United States Section, International Boundary & Water Commission, United States–Mexico*, 740 F.3d 195 (D.C. Cir. 2014)
- Agape Church, Inc. v. FCC*, 738 F.3d 397 (D.C. Cir. 2013)
- United States v. Duvall*, 740 F.3d 604 (D.C. Cir. 2013)
- Ctr. for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013)

Morley v. CIA, 719 F.3d 689 (D.C. Cir. 2013), *vacated*, 810 F.3d 841 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 174 (2016)

Chlorine Inst., Inc. v. Fed. R.R. Admin., 718 F.3d 922 (D.C. Cir. 2013)

Comcast Cable Commc 'ns, LLC v. FCC, 717 F.3d 982 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1287 (2014)

Ayissi-Etoh v. Fannie Mae, 712 F.3d 572 (D.C. Cir. 2013)

In re Sealed Case, 716 F.3d 603 (D.C. Cir. 2013), *cert. dismissed*, 134 S. Ct. 1535 (2014)

United States v. Martinez-Cruz, 736 F.3d 999 (D.C. Cir. 2013)

United States v. Malenya, 736 F.3d 554 (D.C. Cir. 2013)

Texas v. EPA, 726 F.3d 180 (D.C. Cir. 2013)

Huthnance v. D.C., 722 F.3d 371 (D.C. Cir. 2013)

Howard v. Office of Chief Admin. Officer of U.S. House of Representatives, 720 F.3d 939 (D.C. Cir. 2013)

Gordon v. Holder, 721 F.3d 638 (D.C. Cir. 2013)

Grocery Mfrs. Ass'n v. EPA, 704 F.3d 1005 (D.C. Cir.), *cert. denied*, 570 U.S. 917 (2013)

Moore v. Hartman, 704 F.3d 1003 (D.C. Cir.), *cert. denied*, 571 U.S. 944 (2013)

Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Employees of Library of Cong., Inc. v. Billington, 737 F.3d 767 (D.C. Cir. 2013)

Ali v. Obama, 736 F.3d 542 (D.C. Cir. 2013)

Beaumont Independent School Dist. v. U.S., 944 F.Supp.2d 23 (D.D.C. 2013)

In re Aiken Cty., 725 F.3d 255 (D.C. Cir. 2013)

Int'l Bhd. of Teamsters v. U.S. Dep't of Transp., 724 F.3d 206 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1157 (2014)

Park v. Comm'r of IRS, 722 F.3d 384 (D.C. Cir. 2013)

Int'l Internship Program v. Napolitano, 718 F.3d 986 (D.C. Cir. 2013)

U.S. Postal Serv. v. Postal Regulatory Comm'n, 717 F.3d 209 (D.C. Cir. 2013)

N. Valley Commc'ns, LLC v. FCC, 717 F.3d 1017 (D.C. Cir. 2013)

Int'l Bhd. of Teamsters v. U.S. Dep't of Transp., 714 F.3d 580 (D.C. Cir.), *opinion amended and superseded on denial of reh'g*, 724 F.3d 206 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1157 (2014)

United States v. Cardoza, 713 F.3d 656 (D.C. Cir. 2013)

United States v. Fareri, 712 F.3d 593 (D.C. Cir. 2013)

Indiana Boxcar Corp. v. R.R. Ret. Bd., 712 F.3d 590 (D.C. Cir. 2013)

Citizens for Responsibility & Ethics in Washington v. FEC, 711 F.3d 180 (D.C. Cir. 2013)

Cytori Therapeutics, Inc. v. Food & Drug Admin., 715 F.3d 922 (D.C. Cir. 2013)

Farouki v. Petra Int'l Banking Corp., 705 F.3d 515 (D.C. Cir. 2013), *aff'd*, 608 Fed. App'x 8 (D.C. Cir. 2015)

United States v. Duvall, 705 F.3d 479 (D.C. Cir. 2013)

Honeywell Int'l, Inc. v. EPA, 705 F.3d 470 (D.C. Cir. 2013)

Am. Rd. & Transp. Builders Ass'n v. EPA, 705 F.3d 453 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1125 (2014)

Hodge v. FBI, 703 F.3d 575 (D.C. Cir. 2013)

South Carolina v. United States, No. CV 12-203 BMKJDBCKK, 2012 WL 11922225 (D.D.C. Aug. 22, 2012)

Rollins v. Wackenhut Servs., Inc., 703 F.3d 122 (D.C. Cir. 2012)

United States v. Mohammed, 693 F.3d 192 (D.C. Cir. 2012)

In re Aiken Cty., No. 11-1271, 2012 WL 3140360 (D.C. Cir. Aug. 3, 2012)

Taylor v. Reilly, 685 F.3d 1110 (D.C. Cir. 2012)

Hall v. Sebelius, No. 11-5076, 2012 WL 1940654 (D.C. Cir. May 30, 2012)

Coal. for Responsible Regulation, Inc. v. EPA, No. 09-1322, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012)

Grocery Mfrs. Ass'n v. EPA, 693 F.3d 169 (D.C. Cir. 2012)

Miller v. Clinton, 687 F.3d 1332 (D.C. Cir. 2012)

United States v. Burwell, 690 F.3d 500 (D.C. Cir. 2012)

Angellino v. Royal Family Al-Saud, 688 F.3d 771 (D.C. Cir. 2012)

Rattigan v. Holder, 689 F.3d 764 (D.C. Cir. 2012)

Nat'l Fed'n of Fed. Employees—IAM v. Vilsack, 681 F.3d 483 (D.C. Cir. 2012)

Angellino v. Royal Family Al-Saud, 681 F.3d 463 (D.C. Cir. 2012)

Belize Soc. Dev. Ltd. v. Gov't of Belize, 668 F.3d 724 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 882 (2012)

Vann v. U.S. Dep't of Interior, 701 F.3d 927 (D.C. Cir. 2012)

Judicial Watch, Inc. v. Soc. Sec. Admin., 701 F.3d 379 (D.C. Cir. 2012)

Hamdan v. United States, 696 F.3d 1238 (D.C. Cir. 2012)

South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012)

EME Homer City Generation, L.P. v. EPA, 696 F.3d 7 (D.C. Cir. 2012), *rev'd*, 134 S. Ct. 1584 (2014)

Chevron Corp. v. Weinberg Group, 682 F.3d 96 (D.C. Cir. 2012)

United States v. Glover, 681 F.3d 411 (D.C. Cir. 2012)

Nat'l Ass'n of Indep. Labor v. FLRA, 680 F.3d 839 (D.C. Cir. 2012)

Mobil Pipe Line Co. v. FERC, 676 F.3d 1098 (D.C. Cir. 2012)

New York–New York, LLC v. NLRB, 676 F.3d 193 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1244 (2013)

Mfrs. Ry. Co. v. Surface Transp. Bd., 676 F.3d 1094 (D.C. Cir. 2012)

Metroil, Inc. v. ExxonMobil Oil Corp., 672 F.3d 1108 (D.C. Cir. 2012)

Coal. for Mercury-Free Drugs v. Sebelius, 671 F.3d 1275 (D.C. Cir. 2012)

Veritas Health Servs., Inc. v. NLRB, 671 F.3d 1267 (D.C. Cir. 2012)

Keohane v. United States, 669 F.3d 325 (D.C. Cir. 2012)

Bakhtiar v. Islamic Republic of Iran, 668 F.3d 773 (D.C. Cir. 2012)

Hall v. Sebelius, 667 F.3d 1293 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1085 (2013)

U.S. Dep't of Navy v. Fed. Labor Relations Auth., 665 F.3d 1339 (D.C. Cir. 2012)

Ne. Hosp. Corp. v. Sebelius, 657 F.3d 1 (D.C. Cir. 2011)

Stephens v. U.S. Airways Group, 644 F.3d 437 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1857 (2012)

In re Aiken Cty., 645 F.3d 428 (D.C. Cir. 2011)

Mahoney v. Doe, 642 F.3d 1112 (D.C. Cir. 2011)

Seven-Sky v. Holder, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 951 (2012)

Heller v. D.C., 670 F.3d 1244 (D.C. Cir. 2011)

Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 Fed. App'x 7 (D.C. Cir. 2013)

Cohen v. United States, 650 F.3d 717 (D.C. Cir. 2011)

Roth v. U.S. Dep't of Justice, 642 F.3d 1161 (D.C. Cir. 2011)

Rattigan v. Holder, 643 F.3d 975 (D.C. Cir. 2011)

United States v. Franklin, 663 F.3d 1289 (D.C. Cir. 2011)

Bluman v. FEC, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 565 U.S. 1104 (2012)

Otay Mesa Prop., L.P. v. U.S. Dep't of Interior, 646 F.3d 914 (D.C. Cir. 2011)

America v. Mills, 643 F.3d 330 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 937 (2012)

Omar v. McHugh, 646 F.3d 13 (D.C. Cir. 2011)

Blackwell v. FBI, 646 F.3d 37 (D.C. Cir. 2011)

Southwest Airlines Co. v. TSA, 650 F.3d 752 (D.C. Cir. 2011)

United States v. Brice, 649 F.3d 793 (D.C. Cir. 2011)

Univ. of Texas M.D. Anderson Cancer Ctr. v. Sebelius, 650 F.3d 685 (D.C. Cir. 2011)

Knop v. Mackall, 645 F.3d 381 (D.C. Cir. 2011)

United States v. Papagno, 639 F.3d 1093 (D.C. Cir. 2011)

Companhia Brasileira Carbureto de Calcio v. Applied Indus. Materials Corp., 640 F.3d 369 (D.C. Cir. 2011)

United States v. Smith, 640 F.3d 358 (D.C. Cir. 2011)

Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury, 638 F.3d 794 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 986 (2012)

- Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012)
- Vatel v. All. of Auto. Mfrs.*, 627 F.3d 1245 (D.C. Cir. 2011)
- Apache Corp. v. FERC*, 627 F.3d 1220 (D.C. Cir. 2010)
- Hoop Valley Tribe v. FERC*, 629 F.3d 209 (D.C. Cir. 2010)
- Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 929 (2011)
- United States v. Moore*, 612 F.3d 698 (D.C. Cir. 2010)
- El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1178 (2011)
- Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1001 (2011)
- United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010), *aff'd*, 565 U.S. 400 (2012)
- Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010)
- Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306 (D.C. Cir. 2010)
- Riordan v. SEC*, 627 F.3d 1230 (D.C. Cir. 2010), *abrogated by Kokesh v. SEC*, 137 S. Ct. 1635 (2017)
- Koretov v. Vilsack*, 614 F.3d 532 (D.C. Cir. 2010)
- Blumenthal v. FERC*, 613 F.3d 1142 (D.C. Cir. 2010)
- In re Any & All Funds or Other Assets in Brown Bros. Harriman & Co. Account #8870792 in the Name of Tiger Eye Investments Ltd.*, 613 F.3d 1122 (D.C. Cir. 2010)
- RLI Ins. Co. v. All Star Transp. Inc.*, 608 F.3d 848 (D.C. Cir. 2010)
- Schaefer v. McHugh*, 608 F.3d 851 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1135 (2011)
- Recording Indus. Ass'n of Am., Inc. v. Librarian of Cong.*, 608 F.3d 861 (D.C. Cir. 2010)

Action All. of Senior Citizens v. Sebelius, 607 F.3d 860 (D.C. Cir. 2010)

Washington Gas Light Co. v. FERC, 603 F.3d 55 (D.C. Cir. 2010)

Am. Trucking Associations, Inc. v. EPA, 600 F.3d 624 (D.C. Cir. 2010)

Republican Nat. Comm. v. FEC, 698 F. Supp. 2d 150 (D.D.C.), *aff'd*, 561 U.S. 1040 (2010)

Pasternack v. Nat'l Transp. Safety Bd., 596 F.3d 836 (D.C. Cir. 2010)

Stewart v. St. Elizabeths Hosp., 589 F.3d 1305 (D.C. Cir. 2010)

Davis v. Pension Ben. Guar. Corp., 571 F.3d 1288 (D.C. Cir. 2009)

In re Grand Jury Subpoenas, 571 F.3d 1200 (D.C. Cir. 2009)

SoundExchange, Inc. v. Librarian of Cong., 571 F.3d 1220 (D.C. Cir. 2009)

SEC v. Fed. Labor Relations Auth., 568 F.3d 990 (D.C. Cir. 2009)

City of S. Bend, Ind. v. Surface Transp. Bd., 566 F.3d 1166 (D.C. Cir. 2009)

Kiyemba v. Obama, 561 F.3d 509 (D.C. Cir. 2009)

In re Sealed Case, 551 F.3d 1047 (D.C. Cir. 2009)

Cohen v. United States, 578 F.3d 1 (D.C. Cir. 2009), *reh'g granted*, 650 F.3d 717 (D.C. Cir. 2011)

Nyunt v. Chairman, Broad. Bd. of Governors, 589 F.3d 445 (D.C. Cir. 2009)

Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union, 589 F.3d 437 (D.C. Cir. 2009)

Winslow v. FERC, 587 F.3d 1133 (D.C. Cir. 2009)

Camden Cty. Council on Econ. Opportunity v. U.S. Dep't of Health & Human Servs., 586 F.3d 992 (D.C. Cir. 2009)

Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2009)

- AD HOC Telecom. Users Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009)
- Stilwell v. Office of Thrift Supervision*, 569 F.3d 514 (D.C. Cir. 2009)
- Moshea v. Nat'l Transp. Safety Bd.*, 570 F.3d 349 (D.C. Cir. 2009)
- Landstar Exp. Am., Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493 (D.C. Cir. 2009)
- Westar Energy, Inc. v. FERC*, 568 F.3d 985 (D.C. Cir. 2009)
- Montanans For Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009)
- Baptist Mem'l Hosp.—Golden Triangle v. Sebelius*, 566 F.3d 226 (D.C. Cir. 2009)
- Nat'l Tel. Co-op. Ass'n v. FCC*, 563 F.3d 536 (D.C. Cir. 2009)
- Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495 (D.C. Cir. 2009)
- United States v. Washington*, 559 F.3d 573 (D.C. Cir. 2009)
- E. Niagara Pub. Power All. & Pub. Power Coal. v. FERC*, 558 F.3d 564 (D.C. Cir. 2009)
- City of Anaheim, Cal. v. FERC*, 558 F.3d 521 (D.C. Cir. 2009)
- Bryant v. Gates*, 532 F.3d 888 (D.C. Cir. 2008)
- Noble v. Sombrotto*, 525 F.3d 1230 (D.C. Cir. 2008)
- Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008)
- F.T.C. v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008)
- Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667 (D.C. Cir. 2008), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010)
- Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)
- United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008)

In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008)

Am. Bird Conservancy, Inc. v. FCC, 516 F.3d 1027 (D.C. Cir. 2008)

Agri Processor Co. v. N.L.R.B., 514 F.3d 1 (D.C. Cir. 2008)

Raymond F. Kravis Ctr. for Performing Arts, Inc. v. N.L.R.B., 550 F.3d 1183 (D.C. Cir. 2008)

Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. 2008)

Long v. Howard Univ., 550 F.3d 21 (D.C. Cir. 2008)

United States v. Gardellini, 545 F.3d 1089 (D.C. Cir. 2008)

Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. ex rel. Fed. Nat. Mortg. Ass'n v. Raines, 534 F.3d 779 (D.C. Cir. 2008), *abrogated by Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553 (2017)

In re Navy Chaplaincy, 534 F.3d 756 (D.C. Cir. 2008)

United States v. Spencer, 530 F.3d 1003 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1017

Puerto Rico Ports Auth. v. Fed. Mar. Comm'n, 531 F.3d 868 (D.C. Cir. 2008)

United States v. Settles, 530 F.3d 920 (D.C. Cir. 2008)

Rossello ex rel. Rossello v. Astrue, 529 F.3d 1181 (D.C. Cir. 2008)

Kay v. FCC, 525 F.3d 1277 (D.C. Cir. 2008)

BNSF Ry. Co. v. Surface Transp. Bd., 526 F.3d 770 (D.C. Cir. 2008)

Adeyemi v. D.C., 525 F.3d 1222 (D.C. Cir. 2008)

Clark Cty., Nev. v. FAA, 522 F.3d 437 (D.C. Cir. 2008)

Harbury v. Hayden, 522 F.3d 413 (D.C. Cir. 2008)

Brady v. Office of Sergeant at Arms, 520 F.3d 490 (D.C. Cir. 2008)

United Food & Commercial Workers, AFL-CIO v. N.L.R.B., 519 F.3d 490 (D.C. Cir. 2008)

Essex Ins. Co. v. Doe ex rel. Doe, 511 F.3d 198 (D.C. Cir. 2008)

Valdes v. United States, 475 F.3d 1319 (D.C. Cir. 2007)

United States v. Henry, 472 F.3d 910 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 888 (2007)

Doe v. Exxon Mobil Corp., 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 554 U.S. 909 (2008)

Sims v. Johnson, 505 F.3d 1301 (D.C. Cir. 2007)

United States v. Bullock, 510 F.3d 342 (D.C. Cir. 2007)

Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n, 509 F.3d 562 (D.C. Cir. 2007)

Mills v. Giant of Md., LLC, 508 F.3d 11 (D.C. Cir. 2007)

Hester v. D.C., 505 F.3d 1283 (D.C. Cir. 2007)

Jackson v. Gonzales, 496 F.3d 703 (D.C. Cir. 2007)

Hundley v. D.C., 494 F.3d 1097 (D.C. Cir. 2007)

E.I. Du Pont de Nemours & Co. v. N.L.R.B., 489 F.3d 1310 (D.C. Cir. 2007)

Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin., 489 F.3d 1279 (D.C. Cir. 2007)

United States v. Lathern, 488 F.3d 1043 (D.C. Cir. 2007)

Doe ex rel. Tarlow v. D.C., 489 F.3d 376 (D.C. Cir. 2007)

Am. Fed'n of Gov't Employees, AFL-CIO v. Gates, 486 F.3d 1316 (D.C. Cir. 2007)

United States v. Bryson, 485 F.3d 1205 (D.C. Cir. 2007)

Transcon. Gas Pipe Line Corp. v. FERC, 485 F.3d 1172 (D.C. Cir. 2007)

We the People Found., Inc. v. United States, 485 F.3d 140 (D.C. Cir. 2007)

United States v. Askew, 482 F.3d 532 (D.C. Cir. 2007), *reh'g granted, vacated*, 529 F.3d 1119 (D.C. Cir. 2008)

Watts v. SEC, 482 F.3d 501 (D.C. Cir. 2007)

N. Baja Pipeline, LLC v. FERC, 483 F.3d 819 (D.C. Cir. 2007)

United States v. Martinez, 476 F.3d 961 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 968 (2007)

Steven R. Perles, PC v. Kagy, 473 F.3d 1244 (D.C. Cir. 2007)

Nuvio Corp. v. FCC, 473 F.3d 302 (D.C. Cir. 2006)

Baker & Hostetler LLP v. U.S. Dep't of Commerce, 471 F.3d 1355 (D.C. Cir. 2006)

Baker & Hostetler LLP v. U.S. Dep't of Commerce, 473 F.3d 312 (D.C. Cir. 2006)

Nat'l Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006)

Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872 (D.C. Cir. 2006)

I have one opinion for which I am the named author that is not available on Westlaw.

Redman v. Graham, No. 05-7160 (D.C. Cir. Nov. 13, 2006). Copy supplied.

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE

SUPPLEMENTAL APPENDIX 13(B)
CITATIONS FOR WRITTEN OPINIONS

Appendix: 13(b)

The following response supplements my previous response to Question 13(b):

I have located a second case for which I authored a dissent that is not available on Westlaw.

In re Al-Nashiri, No. 14-1203 (D.C. Cir. Nov. 12, 2014). Copy supplied.

HON. BRETT M. KAVANAUGH QUESTIONNAIRE ATTACHMENT, APPENDIX 13(C)

The link listed below is a Submission for the Record not printed due to voluminous nature, previously printed by an agency of the Federal Government, or other criteria determined by the Committee:

Kavanaugh, Hon. Brett M., Nominee to serve as Associate Justice of the Supreme Court of the United States, questionnaire attachment, Appendix 13(c):
[https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2013\(c\)%20Attachments.pdf](https://www.judiciary.senate.gov/imo/media/doc/Brett%20M.%20Kavanaugh%2013(c)%20Attachments.pdf)

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 13(F)
CASES IN WHICH CERTIORARI
WAS REQUESTED OR GRANTED

APPENDIX 13(f)

The following is a list of cases in which I participated, where certiorari to the Supreme Court of the United States or other relief was requested or granted.

Certiorari Granted or Probable Jurisdiction Noted

- *Lorenzo v. SEC*, 872 F.3d 578 (D.C. Cir. 2017), *cert. granted*, No. 17-1077, 2018 WL 646998 (June 18, 2018)
 - Judge Kavanaugh dissented.
- *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (en banc), *cert. granted, judgment vacated sub nom.*, *Azar v. Garza*, 138 S. Ct. 1790 (2018)
 - Judge Kavanaugh dissented.
- *Raymond J. Lucia Companies, Inc. v. SEC*, 868 F.3d 1021 (D.C. Cir. 2017) (en banc), *reversed and remanded*, 138 S. Ct. 2044 (2018)
 - The petition was denied by judgment, without memorandum, by an equally divided en banc court.
- *White Stallion Energy Center, LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014), *reversed sub nom.*, *Michigan v. EPA*, 135 S. Ct. 2699 (2015)
 - Judge Kavanaugh concurred in part and dissented in part.
- *EME Homer City Generation, LP v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), *reversed and remanded*, 134 S. Ct. 1584 (2014)
 - Judge Kavanaugh dissented.
- *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011), *affirmed in part sub nom.*, *Smith v. United States*, 568 U.S. 106 (2013)
 - Opinion filed per curiam.
- *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011), *cert. granted, judgment vacated*, 567 U.S. 901 (2012)
 - Opinion by Judge Henderson.
- *Free Enterprise Fund v. PCAOB*, 537 F.3d 667 (D.C. Cir. 2008), *affirmed in part, reversed in part, and remanded*, 561 U.S. 477 (2010)
 - Judge Kavanaugh dissented.
- *Zalita v. Bush*, No. 07-5129 (Apr. 25, 2007), *vacated and remanded for further consideration in light of Boumediene v. Bush*, 553 U.S. 723 (2008)
 - Special Panel matter.
- *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), *vacated*, 553 U.S. 674 (2008)
 - Opinion by Judge Sentelle.

- *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *affirmed*, 565 U.S. 1104 (2012)
 - Opinion by Judge Kavanaugh.
- *Republican Nat'l Comm. v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010), *affirmed*, 561 U.S. 1040 (2010)
 - Opinion by Judge Kavanaugh.

Certiorari Requested

- *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017), *petition for cert. docketed* June 28, 2018
 - Opinion by Judge Kavanaugh
- *Quiroz v. Moran*, 707 F. App'x 1 (D.C. Cir. 2017), *petition for cert. docketed* May 8, 2018
 - Per curiam judgment.
- *United States v. Benbow*, 709 F. App'x 25 (D.C. Cir. 2018), *cert. denied*, 138 S. Ct. 2036 (2018)
 - Per curiam judgment.
- *Holmes v. FEC*, 875 F.3d 1153 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 2018 (2018)
 - Opinion by Judge Srinivasan for en banc court.
- *Pettaway v. Teachers Ins. & Annuity Assoc. of America*, No. 16-7137, 2017 WL 2373078 (D.C. Cir. Apr. 4, 2017), *cert. denied*, 138 S. Ct. 2019 (2018)
 - Per curiam judgment.
- *United States v. Gooch*, 842 F.3d 1274 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 2005 (2018)
 - Opinion by Judge Wilkins.
- *Allina Health Servs. v. Price*, 863 F.3d 937 (D.C. Cir. 2017), *petition for cert. docketed* Apr. 30, 2018
 - Opinion by Judge Kavanaugh.
- *United Source One, Inc. v. Dep't of Agric.*, 865 F.3d 710 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1332 (2018)
 - Opinion by Judge Henderson.
- *Williams v. Court Servs. & Offender Supervision Agency*, No. 15-5275, 2016 WL 10968672 (D.C. Cir. May 31, 2016), *cert. denied*, 138 S. Ct. 1266 (2018), *reh'g denied*, 138 S. Ct. 2019 (2018)
 - Per curiam order.

- *Washington Alliance of Technology Workers v. DHS*, 857 F.3d 907 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1276 (2018)
 - Judge Kavanaugh dissented.
- *Passmore v. Dep't of Justice*, No. 17-5083, 2017 WL 4231167 (D.C. Cir. Sept. 13, 2017), *cert. denied*, 138 S. Ct. 1269 (2018)
 - Per curiam order.
- *Center for Regulatory Reasonableness v. EPA*, 849 F.3d 453 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1041 (2018)
 - Opinion by Judge Kavanaugh.
- *Nat'l Railroad Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm.*, 855 F.3d 335 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 979 (2018)
 - Opinion by Judge Randolph.
- *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 1043 (2018)
 - Opinion by Judge Kavanaugh.
- *Morris v. U.S. Sentencing Comm.*, 696 F. App'x 515 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 711 (2018)
 - Per curiam judgment.
- *Paracha v. Trump*, 697 F. App'x 703 (D.C. Cir. 2017), *petition for cert. docketed* September 27, 2017
 - Per curiam judgment.
- *Modrall v. Deutsch*, 686 F. App'x 9 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 386 (2017)
 - Per curiam judgment.
- *Kahl v. Bureau of National Affairs, Inc.*, 856 F.3d 106 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 366 (2017)
 - Opinion by Judge Kavanaugh.
- *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016), *cert. denied sub nom., al Bahlul v. United States*, 138 S. Ct. 313 (2017)
 - Per curiam opinion; Judge Kavanaugh concurred.
- *White v. O'Reilly*, 672 F. App'x 26 (D.C. Cir. 2016), *cert. denied*, 138 S. Ct. 147 (2017), *reh'g denied*, 138 S. Ct. 494 (2017)
 - Special Panel matter.
- *Modrall v. Johns Hopkins Univ.*, 686 F. App'x 10 (D.C. Cir. 2017), *cert. dismissed*, 138 S. Ct. 235 (2017)

- Per curiam judgment.
- *Duarte v. Nolan*, No. 16-7102, 2017 WL 7736939 (D.C. Cir. Apr. 18, 2017), *cert. denied* on October 2, 2017
 - Per curiam judgment.
- *Boyd v. Exec. Office for U.S. Attorneys*, No. 16-5133, 2016 WL 6237850 (D.C. Cir. Sept. 16, 2016), *cert. denied*, 138 S. Ct. 95 (2017)
 - Per curiam order.
- *Hall v. Federal Bureau of Prisons*, No. 15-5303, 2016 WL 6237817 (D.C. Cir. Sept. 1, 2016), *cert. denied*, 138 S. Ct. 182 (2017)
 - Per curiam order.
- *Johnson v. BAE Systems, Inc.*, 650 F. App'x 28 (D.C. Cir. 2016), *motion for leave to proceed IFP denied* January 9, 2017, *case considered closed* July 27, 2017
 - Per curiam judgment.
- *Fields v. Harris*, 671 F. App'x 808 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 2248 (2017)
 - Per curiam judgment.
- *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325, 2326 (2017)
 - Judge Kavanaugh concurred.
- *Wang by & through Wong v. New Mighty U.S. Trust*, 843 F.3d 487 (D.C. Cir. 2016), *cert. denied sub nom., New Mighty U.S. Trust v. Wang ex rel. Wong*, 137 S. Ct. 2266 (2017)
 - Opinion by Judge Henderson.
- *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), *cert. dismissed*, 137 S. Ct. 2250 (2017)
 - Judge Kavanaugh dissented.
- *United States v. Matthews*, 672 F. App'x 8 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1608 (2017)
 - Per curiam judgment
- *Novak v. United States*, No. 16-3031 (D.C. Cir. Dec. 9, 2016), *cert. denied*, 137 S. Ct. 1604 (2017)
 - Per curiam order
- *W. Virginia ex rel. Morrissey v. U.S. Dep't of Health & Human Servs.*, 827 F.3d 81 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1614 (2017)
 - Opinion by Judge Silberman.

- *Fuller v. Okun*, 672 F. App'x 21 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1826, (2017)
 - Per curiam judgment.
- *Jones v. Dufek*, 830 F.3d 523 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1336 (2017)
 - Opinion by Judge Randolph.
- *Knorr v. Sec. & Exch. Comm'n*, 672 F. App'x 5 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 1232 (2017)
 - Per curiam judgment.
- *Bikundi v. United States*, No. 16-3066 (July 14, 2016), *cert. denied*, 137 S. Ct. 685 (2017)
 - Per curiam order.
- *Wilson v. James*, No. 15-5338, 2016 WL 3043746 (D.C. Cir. May 17, 2016), *cert. denied*, 137 S. Ct. 695 (2017)
 - Per curiam order.
- *Newco Ltd. v. Gov't of Belize*, 650 F. App'x 14 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 619 (2017)
 - Per curiam judgment.
- *BCB Holdings Ltd. v. Gov't of Belize*, 650 F. App'x 17 (D.C. Cir. 2016), *cert. denied*, 137 S. Ct. 619 (2017)
 - Per curiam judgment.
- *Morrow v. United States*, No.15-3046 (D.C. Cir. Mar. 31, 2016), *cert. denied*, 137 S. Ct. 700 (2017)
 - Per curiam order.
- *U.S. ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 625 (2017)
 - Opinion by Judge Rogers.
- *Sai v. TSA*, No. 16-5004 (June 6, 2016), *cert. denied*, 137 S. Ct. 711 (2017)
 - Per curiam order.
- *Buhl v. Dep't of Justice*, No. 14-5294, *cert. denied*, 137 S. Ct. 607, 196 L. Ed. 2d 479 (2016)
 - Per curiam order.
- *Simon v. U.S. Dep't of Justice*, No. 16-5031, 2016 WL 3545484 (D.C. Cir. June 10, 2016), *cert. denied*, 137 S. Ct. 593 (2016)
 - Per curiam order.
- *Jordan v. Ormond*, No. 15-7151, 2016 WL 4098823 (D.C. Cir. July 22, 2016), *cert. denied*, 137 S. Ct. 515 (2016)

- Per curiam order.
- *Watson v. U.S. District Court for the District of Columbia*, No. 14-5049 (D.C. Cir. June 6, 2016), *cert. denied*, 137 S. Ct. 539 (2016)
- *Mellen v. U.S. Park Police*, No. 15-5328, 2016 WL 4098769 (D.C. Cir. July 12, 2016), *cert. denied*, 137 S. Ct. 517 (2016)
 - Per curiam order.
- *Bethea v. United States*, No. 16-5021 (D.C. Cir. July 22, 2016), *cert. denied*, 137 S. Ct. 529 (2016)
 - Per curiam order.
- *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir.), *cert. denied sub nom.*, *Young v. United States*, 137 S. Ct. 456 (2016), *and cert. denied*, 137 S. Ct. 457 (2016)
 - Opinion by Judge Kavanaugh.
- *Modrall v. Biggs*, 653 F. App'x 766 (D.C. Cir.), *cert. denied*, 137 S. Ct. 246 (2016)
 - Per curiam judgment.
- *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500 (D.C. Cir.), *cert. denied*, 137 S. Ct. 399 (2016)
 - Opinion by Judge Kavanaugh.
- *Friends of Animals v. Jewell*, 824 F.3d 1033 (D.C. Cir.), *cert. denied*, 137 S. Ct. 388 (2016)
 - Opinion by Judge Sentelle.
- *Law v. FCC*, 627 F. App'x 1 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 343 (2016)
 - Per curiam judgment.
- *Ark Initiative v. Tidwell*, 816 F.3d 119 (D.C. Cir.), *cert. denied*, 137 S. Ct. 301, (2016)
 - Opinion by Judge Pillard.
- *Ctr. for Art & Mindfulness, Inc. v. Postal Regulatory Comm'n*, No. 15-1079 (D.C. Cir. Jan. 4, 2016), *cert. denied*, 137 S. Ct. 294 (2016)
 - Per curiam order.
- *Artis v. Yellen*, No. 15-5260, 2015 WL 10583057 (D.C. Cir. Dec. 21, 2015), *cert. denied sub nom.*, *Terrell v. Yellen*, 137 S. Ct. 149 (2016)
 - Per curiam order.
- *Nickerson-Malpher v. U.S. Federal Corp.*, No. 15-5231 (D.C. Cir. Jan. 19, 2016), *cert. denied*, 137 S. Ct. 81 (2016)
 - Per curiam order.

- *United States v. Haipe*, 769 F.3d 1189 (D.C. Cir. 2014), *cert. denied*, 137 S. Ct. 187 (2016)
 - Opinion by Judge Williams.
- *United States v. Bostick*, 791 F.3d 127 (D.C. Cir. 2015), *cert. denied sub nom.*, *Johnson v. U.S.*, 137 S. Ct. 172 (2016), *and denied sub nom.*, *Edelin v. United States*, 137 S. Ct. 176 (2016), *and denied sub nom.*, *Edelin v. United States*, 137 S. Ct. 184 (2016)
 - Opinion by Judge Kavanaugh.
- *Odhiambo v. Republic of Kenya*, 764 F.3d 31 (D.C. Cir. 2014), *cert. denied*, 136 S. Ct. 2504 (2016)
 - Opinion by Judge Kavanaugh.
- *White Stallion Energy Ctr., LLC v. Envtl. Prot. Agency*, No. 12-1100, 2015 WL 11051103 (D.C. Cir. Dec. 15, 2015), *cert. denied sub nom.*, 136 S. Ct. 2463 (2016)
 - Per curiam order.
- *Rail-Term Corp. v. Surface Transportation Bd. & United States of Am.*, 654 F. App'x 1 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2409 (2016)
 - Per curiam order.
- *Fla. Bankers Ass'n v. U.S. Dep't of the Treasury*, 799 F.3d 1065 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 2429 (2016)
 - Opinion by Judge Kavanaugh.
- *Vieira v. California*, No. 14-7201 (D.C. Cir. Mar. 15, 2016), *cert. denied*, 135 S. Ct. 2845
 - Clerk's order.
- *Modrall v. O'Rourke*, No. 15-5249 (D.C. Cir. Jan. 19, 2016), *cert. denied*, 136 S.C. 2020
 - Per curiam judgment.
- *Burley v. Nat'l Passenger Rail Corp.*, 801 F.3d 290 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 1685 (2016)
 - Opinion by Judge Pillard.
- *Rattigan v. Holder*, 780 F.3d 413 (D.C. Cir. 2015); *cert. denied sub nom.*, *Rattigan v. Lynch*, 136 S. Ct. 1513 (2016)
 - Opinion by Judge Williams.
- *Wagner v. Fed. Election Comm'n*, 793 F.3d 1 (D.C. Cir. 2015); *cert. denied sub nom. Miller v. FEC*, 136 S. Ct. 895 (2016)
 - Opinion by Chief Judge Garland.
- *Ryskamp v. C.I.R.*, 797 F.3d 1142 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 834 (2016)
 - Opinion by Judge Pillard.

- *In re Stevenson*, 789 F.3d 197 (D.C. Cir. 2015), *cert. denied sub nom.*, *Stevenson v. First Am. Title Ins. Co.*, 136 S. Ct. 820 (2016)
 - Opinion by Judge Kavanaugh.
- *Smith v. Scalia*, No. 14-5180, 2015 WL 13710107 (D.C. Cir. Jan. 14, 2015), *cert. denied*, 136 S. Ct. 554 (2015)
 - Per curiam order.
- *Cannon v. D.C.*, 783 F.3d 327 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 491 (2015)
 - Opinion by Judge Kavanaugh.
- *Hill v. Contreras*, 598 F. App'x 6 (D.C. Cir. 2015), *cert. denied*, 136 S. Ct. 488 (2015)
 - Per curiam judgment.
- *Black Farmers Ass'n v. Vilsack*, No. 14-5175 (D.C. Cir. Nov. 18, 2014), *cert. denied*, 136 S. Ct. 94 (2015)
 - Per curiam order.
- *United States v. Verrusio*, 762 F.3d 1 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2911 (2015)
 - Opinion by Chief Judge Garland.
- *Gross v. United States*, 771 F.3d 10 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1746 (2015)
 - Opinion by Judge Rogers.
- *Kempo v. United States*, 574 F. App'x 1 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 2057 (2015)
 - Per curiam opinion.
- *United States v. Project on Gov't Oversight*, 766 F.3d 9 (D.C. Cir. 2014), *cert. denied*, *Berman v. United States*, 135 S. Ct. 1568 (2015).
 - Per curiam opinion.
- *Illinois Pub. Telecommunications Ass'n v. FCC*, 752 F.3d 1018 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1583 (2015)
 - Opinion by Judge Kavanaugh.
- *Jackson v. Suter*, 574 F. App'x 4 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1477 (2015)
 - Per curiam judgment.
- *Ladeairous v. Holder*, 574 F. App'x 3 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1186 (2015)
 - Per curiam judgment.
- *Naegele v. Albers*, No. 13-7110, 2014 WL 4980898 (D.C. Cir. June 23, 2014), *cert. denied*, 135 S. Ct. 1177 (2015)

- Per curiam order.
- *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015)
 - Opinion by Judge Kavanaugh.
- *Hickey v. Scott*, No. 11-7160 (D.C. Cir. Mar. 25, 2014), *cert. denied*, 135 S. Ct. 879 (2014)
 - Per curiam order.
- *Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 711 (2014)
 - Opinion by Judge Kavanaugh.
- *Ham v. Metro. Police Dep't*, No. 14-7032, 2014 WL 4628886 (D.C. Cir. Aug. 5, 2014), *cert. denied*, 135 S. Ct. 729 (2014)
 - Per curiam order.
- *United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 8 (2014)
 - Opinion by Judge Griffith.
- *Klayman v. Obama*, No. 14-5016 (D.C. Cir.), *cert. denied*, 134 S. Ct. 1795 (2014)
 - Per curiam orders.
- *Adams v. EEOC*, No. 12-5271 (D.C. Cir. Mar. 1, 2013), *cert. denied*, 133 S. Ct. 814 (2012)
 - Per curiam order.
- *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1196 (2013)
 - Judge Kavanaugh dissented.
- *Shade v. Cong.*, No. 13-5185, 2013 WL 5975978 (D.C. Cir. Oct. 15, 2013), *cert. denied*, 135 S. Ct. 194 (2014)
 - Per curiam order.
- *Ali v. Obama*, 736 F.3d 542 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 118 (2014)
 - Opinion by Judge Kavanaugh.
- *Shephard v. U.S. District Court for the District of Columbia*, No. 13-5167 (D.C. Cir. Sept. 13, 2013), *cert. denied*, 571 U.S. 1144 (2014)
 - Per curiam order.
- *United States v. Graves*, 561 F. App'x 1 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 210 (2014)
 - Per curiam judgment.

- *In re Navy Chaplaincy*, 738 F.3d 425 (D.C. Cir. 2013), *cert. denied*, 135 S. Ct. 86 (2014)
 - Opinion by Senior Judge Williams.
- *Mahoney v. Donovan*, 721 F.3d 633 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2724 (2014)
 - Opinion by Senior Judge Randolph.
- *Baszak v. FBI*, No. 12-5180, 2012 WL 4774659 (D.C. Cir. Sept. 28, 2012), *cert. denied*, 134 S. Ct. 2675 (2014)
 - Per curiam order.
- *Winstead v. D.C.*, 548 F. App'x 1 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2680 (2014)
 - Per curiam judgment.
- *Al Warafi v. Obama*, 716 F.3d 627 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 2134 (2014)
 - Opinion by Senior Judge Sentelle.
- *Toole v. Obama*, 542 F. App'x 1 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1948 (2014)
 - Per curiam judgment.
- *Peterson v. Ayers*, No. 12-5046 (D.C. Cir. Oct. 12, 2012), *petition to proceed in forma pauperis denied*, 571 U.S. 811 (2013)
 - Per curiam order.
- *Hopkins v. United States*, No. 12-3089 (D.C. Cir. July 30, 2013), *cert. denied*, 132 S. Ct. 1781 (2014)
 - Per curiam order denying certificate of appealability.
- *Mingo Logan Coal Co. v. U.S. EPA*, 714 F.3d 608 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1540 (2014)
 - Opinion by Judge Henderson.
- *Cottrell v. Vilsack*, No. 13-5024, 2013 WL 4711683 (D.C. Cir. July 31, 2013), *cert. denied*, 134 S. Ct. 1553 (2014)
 - Per curiam order.
- *In re Sealed Case*, 716 F.3d 603 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1535 (2014)
 - Opinion by Judge Griffith; concurring opinion by Judge Kavanaugh.
- *Jones v. Commissioner of Social Security*, No. 13-5149, 2013 WL 5975969, (D.C. Cir. Oct. 24, 2013), *cert. denied*, 134 S. Ct. 1520 (2014)
 - Per curiam order.
- *Oakey v. U.S. Airways Pilots Disability Income Plan*, 723 F.3d 227 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 1513 (2014)
 - Opinion by Judge Henderson.

- *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982 (D.C. Cir. 2013), *cert. denied*, *Tennis Channel, Inc. v. Comcast Cable Commc'ns*, 571 U.S. 1198 (2014)
 - Opinion by Judge Williams; concurring opinion by Judge Kavanaugh.
- *Drew v. United States*, No. 13-3042 (D.C. Cir. Oct. 24, 2013), *cert. denied*, 572 U.S. 1182 (2014)
 - Per curiam order.
- *Am. Rd. & Transp. Builders Ass'n v. EPA*, 705 F.3d 453 (D.C. Cir. 2013), *cert. denied*, 143 S. Ct. 985 (2014)
 - Opinion by Judge Kavanaugh.
- *Int'l Bhd. of Teamsters v. U.S. Dep't of Transp.*, 724 F.3d 206 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 922 (2014)
 - Opinion by Judge Kavanaugh.
- *Akl v. Sebelius*, No. 12-5315 (D.C. Cir. Mar. 11, 2013), *cert. denied*, 571 U.S. 1111 (2013)
 - Per curiam order.
- *In re W.A.R. LLP*, 491 F. App'x 196 (D.C. Cir. 2012), *cert. denied*, *Robertson v. Cartinhour*, 571 U.S. 1098 (2013)
 - Per curiam judgment.
- *Potts v. Howard Univ. Hosp.*, 493 F. App'x 114 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1073 (2013)
 - Per curiam judgment.
- *Green v. Am. Fed'n of Labor & Cong. of Indus. Orgs.*, No. 13-7009, 2013 WL 3357816 (D.C. Cir. May 31, 2013), *cert. denied*, 571 U.S. 1026 (2013)
 - Per curiam order.
- *United States v. Thompson*, 721 F.3d 711 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1014 (2013)
 - Opinion by Judge Griffith
- *Justice v. IRS*, 485 F. App'x 439 (D.C. Cir. 2012), *cert. denied*, 571 U.S. 992 (2013)
 - Per curiam judgment.
- *Moore v. Hartman*, 704 F.3d 1003 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 944 (2013)
 - Per curiam opinion; dissenting opinion by Judge Kavanaugh.
- *United States v. Davis*, 711 F.3d 174 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 1002 (2013)
 - Opinion by Chief Judge Garland.

- *Richardson v. United States*, 516 F. App'x 2 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 981 (2013)
 - Per curiam judgment.
- *Atherton v. D.C. Office of Mayor*, 706 F.3d 512 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 984 (2013)
 - Opinion by Judge Brown.
- *Johnson v. Ware*, No. 12-5388, 2013 WL 2395115 (D.C. Cir. Apr. 30, 2013), *cert. denied*, 571 U.S. 969 (2013)
 - Per curiam order.
- *Clevenger v. Cartinhour*, No. 12-7010 (D.C. Cir. Dec. 4, 2012), *cert. denied*, 571 U.S. 962 (2013)
 - Per curiam judgment.
- *O'Donnell v. CIR*, 489 F. App'x 469 (D.C. Cir. 2012), *cert. denied*, 571 U.S. 955 (2013)
 - Per curiam judgment.
- *Paul v. Astrue*, No. 12-5028, 2012 WL 3791292 (D.C. Cir. Aug. 8, 2012), *cert. denied*, *Paul v. Colvin*, 571 S. Ct. 820 (2013)
 - Per curiam order.
- *Kareem v. FDIC*, 482 F. App'x 594 (D.C. Cir. 2012), *cert. denied*, 571 U.S. 911 (2013)
 - Per curiam judgment.
- *United States v. Lewis*, 505 F. App'x 1 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 943 (2013)
 - Per curiam judgment.
- *In re. Alonzo Shephard*, No. 12-7109 (D.C. Cir. Apr. 16, 2013), *cert. denied*, *Shephard v. U.S. Court of Appeals for D.C.*, 571 U.S. 837 (2013)
 - Per curiam order.
- *United States v. Lopesierra-Gutierrez*, 708 F.3d 193 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 928 (2013)
 - Opinion by Judge Tatel.
- *United States v. Watson*, 717 F.3d 196 (D.C. Cir. 2013), *cert. denied*, 571 U.S. 921 (2013)
 - Opinion by Judge Henderson.
- *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *cert. denied*, *Am. Fuel Petrochemical Mfrs. v. EPA*, 570 U.S. 917 (2013)
 - Opinion by Chief Judge Sentelle; dissenting opinion by Judge Kavanaugh.
- *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *cert. denied*, *Alliance of*

- Automobile Mfrs. v. EPA.*, 570 U.S. 917 (2013)
- Opinion by Chief Judge Sentelle; dissenting opinion by Judge Kavanaugh.
- *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169 (D.C. Cir. 2012), *cert. denied*, 570 U.S. 917 (2013)
 - Opinion by Chief Judge Sentelle; dissenting opinion by Judge Kavanaugh.
 - *Robinson-Reeder v. Kearns*, No. 11-5356, 2012 WL 5896842 (D.C. Cir. Oct. 16, 2012), *cert. denied*, 569 U.S. 1033 (2013)
 - Per curiam order.
 - *Reedom v. Crappell*, 493 F. App'x 113 (D.C. Cir. 2012), *cert. denied*, 569 U.S. 929 (2013)
 - Per curiam order.
 - *Hurt v. D.C. Court Servs. & Offender Supervision Agency*, No. 12-5011 (D.C. Cir. Aug. 8, 2012), *cert. denied*, 569 U.S. 907 (2013)
 - Per curiam order.
 - *Krug v. Roberts*, No. 11-5162, 2011 WL 6759556 (D.C. Cir. Dec. 20, 2011), *cert. denied*, 568 U.S. 1248 (2013)
 - Per curiam order.
 - *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 682 F.3d 72 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1230 (2013)
 - Opinion by Judge Tatel.
 - *New York-New York, LLC v. NLRB*, 676 F.3d 193 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1580 (2013)
 - Opinion by Judge Kavanaugh.
 - *Texas All. for Home Care Servs. v. Sebelius*, 681 F.3d 402 (D.C. Cir. 2012), *cert. denied*, 586 U.S. 1157 (2013)
 - Opinion by Judge Henderson.
 - *Taylor v. Reilly*, 685 F.3d 1110 (D.C. Cir. 2012), *cert. denied*, 586 U.S. 1147
 - Judge Kavanaugh concurred.
 - *Nat'l Env'tl. Dev. Ass'n's Clean Air Project v. EPA*, 686 F.3d 803 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1143 (2013)
 - Opinion by Judge Sentelle.
 - *Angellino v. Royal Family Al-Saud*, 681 F.3d 463 (D.C. Cir.), *opinion amended and superseded*, 688 F.3d 771 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1087 (2013)
 - Judge Kavanaugh dissented.

- *Hall v. Sebelius*, 667 F.3d 1293 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 1065 (2013)
 - Opinion by Judge Kavanaugh.
- *Deyerberg v. Holder*, 455 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 568 U.S. 1088
 - Per curiam judgment.
- *Belize Soc. Dev. Ltd. v. Gov't of Belize*, 668 F.3d 724 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 882 (2012)
 - Judge Kavanaugh dissented.
- *McLeod v. Jarrett*, 442 F. App'x 565 (D.C. Cir. 2011), *cert. denied*, 568 U.S. 836 (2012)
 - Per curiam judgment.
- *United States v. Glover*, 681 F.3d 411 (D.C. Cir. 2012), *cert. denied*, 586 U.S. 995 (2012) and *sub nom.*, *Price v. United States*, 586 U.S. 988
 - Opinion by Judge Kavanaugh.
- *Carter v. U.S. Dep't of the Navy*, 466 F. App'x 2 (D.C. Cir. 2012), *cert. denied*, 568 U.S. 980 (2012)
 - Per curiam order.
- *United States v. Suggs*, 688 F. App'x 17 (D.C. Cir. 2017), *cert. denied*, 586 U.S. 988 (2012)
 - Per curiam judgment.
- *Onyewuchi v. Gonzalez*, No. 11-5099, 2011 WL 6759483 (D.C. Cir. Dec. 2, 2011), *cert. denied*, 568 U.S. 963 (2012)
 - Special panel matter.
- *Robertson v. Cartinhour*, 475 F. App'x 767 (D.C. Cir. 2012), *cert. denied*, 586 U.S. 951 (2012)
 - Per curiam order.
- *Hamm v. Obama*, 448 F. App'x 76 (D.C. Cir. 2012), *cert. denied*, 586 U.S. 803 (2012)
 - Special panel matter.
- *Sibley v. Supreme Court of the U.S.*, No. 11-5164, 2011 WL 4376121 (D.C. Cir. Aug. 3, 2011), *affirmed under 28 U.S.C. § 2109*, October 1, 2012
 - En banc.
- *Gladden v. Bolden*, No. 11-5279, 2012 WL 1449249 (D.C. Cir. Apr. 12, 2012), *cert. denied*, 568 U.S. 924 (2012)
 - Special panel matter.
- *Almerfed v. Obama*, 654 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012)

- Opinion by Judge Silberman.
- *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 951 (2012)
 - Judge Kavanaugh dissented.
- *Kandari v. United States*, 462 F. App'x 1 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012)
 - Per curiam order.
- *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011), *cert. denied*, 567 U.S. 905 (2012)
 - Opinion by Judge Kavanaugh.
- *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 986 (2012)
 - Opinion by Judge Kavanaugh.
- *Am. v. Mills*, 643 F.3d 330 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 937 (2012)
 - Opinion by Judge Kavanaugh.
- *Bonilla v. Wainwright*, No. 11-7083 (D.C. Cir., Dec. 8, 2011), *cert. denied*, 566 U.S. 957 (2012)
 - Special panel matter.
- *Abdah v. Obama*, No. 05-5224 (D.C. Cir., Apr. 25, 2011), *cert. denied*, 566 U.S. 956 (2012)
 - Per curiam order.
- *United States v. Ventura*, 650 F.3d 746 (D.C. Cir. 2011), *cert. denied*, 566 U.S. 923 (2012)
 - Opinion by Judge Brown.
- *Stephens v. U.S. Airways Grp., Inc.*, 644 F.3d 437 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1857 (2012)
 - Judge Kavanaugh concurred in the judgment.
- *Robinson-Reeder v. Am. Council on Educ.*, 417 F. App'x 4 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 1237 (2012)
 - Special panel matter.
- *Dorsey v. Gov't of D.C.*, No. 10-7172, 2011 WL 1766035 (D.C. Cir. Apr. 12, 2011), *cert. denied*, 565 U.S. 1201 (2012)
 - Special panel matter.
- *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1116 (2010)
 - Per curiam judgment.

- *Breeden v. Novartis Pharm. Corp.*, 646 F.3d 43 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 1158 (2012)
 - Opinion by Judge Henderson.
- *Tchibassa v. United States*, No. 09-3122 (D.C. Cir. Apr. 15, 2012), *cert. denied*, 565 U.S. 1131 (2012)
 - Special panel matter.
- *United States v. Laureys*, 653 F.3d 27 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 1132 (2012)
 - Per curiam judgment.
- *Voinche v. Obama*, 428 F. App'x 2 (D.C. Cir. 2011), *case considered closed* December 1, 2011
 - Per curiam judgment.
- *SEC v. Brown*, No. 10-5396, 2011 WL 4376091 (D.C. Cir. Apr. 19, 2011), *cert. denied*, 565 U.S. 1094 (2011)
 - Special panel matter.
- *Middlebrooks v. St. Coletta of Greater Washington, Inc.*, No. 10-7064, 2011 WL 1770464 (D.C. Cir. Apr. 4, 2011), *cert. denied*, 565 U.S. 879 (2011)
 - Special panel matter.
- *Sturdza v. United Arab Emirates*, No. 10-7053 (D.C. Cir. Jan. 4, 2011), *cert. denied*, 565 U.S. 900 (2011)
 - Special panel matter.
- *Newdow v. Roberts*, 603 F.3d 1002 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1001 (2011)
 - Judge Kavanaugh concurred in the judgment.
- *Winston & Strawn, LLP v. Doley*, 384 F. App'x 1 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1219 (2010)
 - Per curiam order.
- *Heade v. Washington Metro. Area Transit Auth.*, No. 10-7043, 2010 WL 3521596 (D.C. Cir. Sept. 2, 2010), *cert. denied*, 564 U.S. 1060
 - Per curiam order.
- *Sibley v. Alito*, No. 09-5069, 2009 WL 5125168 (D.C. Cir. Nov. 30, 2009), *affirmed under 28 U.S.C. § 2109*, 559 U.S. 965 (2010)
 - Per curiam order.
- *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 564 U.S. 1037

- Opinion by Judge Silberman.
- *Robinson v. U.S. Marshals Serv.*, No. 09-5451, 2010 WL 3521599 (D.C. Cir. Sept. 1, 2010), *cert. denied*, 564 U.S. 1026 (2011)
 - Special matter panel.
- *Daniel Chapter One v. FTC*, 405 F. App'x 505 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1009 (2011)
 - Per curiam judgment.
- *Joyner v. O'Brien*, No. 10-5083, 2010 WL 5558285 (D.C. Cir. Oct. 5, 2010) *cert. denied*, 563 U.S. 1027 (2011)
 - Special panel matter.
- *Mohammed v. Obama*, No. 10-5218 (D.C. Cir. July 8, 2010), *cert. dismissed*, 131 S. Ct. 2091 (2011)
 - Per curiam orders.
- *Winningham v. Shulman*, 377 F. App'x 23 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 911 (2011)
 - Special panel matter.
- *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 929 (2011)
 - Opinion by Judge Brown.
- *Rodriguez v. U.S. Tax Court*, 398 F. App'x 614 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 918 (2011)
 - Special panel matter.
- *Howard v. U.S. Dist. Court for S. Dist. of Ohio*, No. 10-5106 (D.C. Cir. Oct. 1, 2010), *cert. denied*, 131 S. Ct. 1719 (2011)
 - Per curiam order.
- *Rafi v. Sebelius*, 377 F. App'x 24 (D.C. Cir. 2010), *reh'g denied*, 563 U.S. 970 (2011)
 - Per curiam judgment.
- *Partovi v. Matuszewski*, No. 09-5334, 2010 WL 3521597 (D.C. Cir. Sept. 2, 2010), *cert. denied*, 562 U.S. 1228 (2011)
 - Special panel matter.
- *In re Mitrano*, No. 09-7021 (D.C. Cir. Nov. 6, 2009), *petition for cert. docketed* April 14, 2010
 - Per curiam order.
- *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 119 (2011)
 - Opinion by Judge Randolph.

- *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836 (D.C. Cir. 2010), 562 U.S. 1178 (2011)
 - Judge Kavanaugh concurred in the judgment.
- *Apotex, Inc. v. Sebelius*, 384 F. App'x 4 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1194 (2011)
 - Per curiam judgment.
- *Maldonado v. LogLogic, Inc.*, 383 F. App'x 9 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1140 (2011)
 - Per curiam judgment.
- *Schaefer v. McHugh*, 608 F.3d 851 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1135 (2011)
 - Opinion by Judge Kavanaugh.
- *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010), *cert. denied sub nom., United States v. Blackson*, 709 F.3d 36 (D.C. Cir. 2010)
 - Per curiam judgment.
- *Zavala v. Drug Enforcement Admin.*, No. 09-5357, 2010 WL 2574068 (D.C. Cir. June 7, 2010), *cert. denied*, 562 U.S. 1015 (2010)
 - Special panel matter.
- *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1003 (2010)
 - En banc.
- *United States v. Hopkins*, 370 F. App'x 122 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 903 (2010)
 - Per curiam judgment.
- *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 839 (2010)
 - Opinion by Judge Silberman.
- *Trescott v. Fed. Highway Admin.*, No. 09-5280, 2009 WL 5125803 (D.C. Cir. Dec. 9, 2009)
 - Special panel matter.
- *Brookens v. Solis*, No. 09-5249, 2009 WL 5125192 (D.C. Cir. Dec. 9, 2009), *cert. denied*, 562 U.S. 890 (2010)
 - Special panel matter.
- *United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 847 (2010)

- Opinion by Judge Brown.
- *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109 (D.C. Cir. 2009), *cert. denied*, 562 U.S. 836 (2010)
 - Opinion by Judge Williams.
- *Clark v. Sherrill*, 358 F. App'x 199 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1051 (2010)
 - Special panel matter.
- *Footbridge Ltd. Tr. v. Zhang*, 358 F. App'x 189 (D.C. Cir. 2009), *cert. denied*, 561 U.S. 1027 (2010)
 - Per curiam judgment.
- *Elliott v. U.S. Dep't of Agric.*, 596 F.3d 842 (D.C. Cir. 2010), *cert. denied*, 596 F.3d 842 (2010)
 - Opinion by Judge Tatel.
- *Rogers v. Schapiro*, No. 08-5069, 2009 WL 5125200 (D.C. Cir. Dec. 9, 2009), *cert. dismissed*, 560 U.S. 950 (2010)
 - Per curiam order.
- *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225 (D.C. Cir. 2009), *cert. denied*, 560 U.S. 926 (2010)
 - Opinion by Judge Kavanaugh.
- *United States v. Carter*, 591 F.3d 656 (D.C. Cir. 2010), *cert. denied*, 560 U.S. 918 (2010)
 - Opinion by Judge Griffith.
- *Cason v. D.C. Dep't of Corr.*, No. 08-7129, 2009 WL 6407589 (D.C. Cir. Aug. 14, 2009), *cert. denied*, 560 U.S. 914 (2010)
 - Per curiam order.
- *Atherton v. D.C. Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009), *cert. denied sub nom.*, *Zachem v. Atherton*, 560 U.S. 918 (2010)
 - Opinion by Judge Edwards.
- *Henry v. United States*, No. 08-3063 (D.C. Cir. Nov. 13, 2009), *cert. denied*, 559 U.S. 1114 (2010)
 - Per curiam judgment.
- *Scinto v. Fed. Bureau of Prisons*, 352 F. App'x 448 (D.C. Cir. 2009), *cert. denied*, 599 U.S. 1112 (2010)
 - Per curiam judgment.
- *Brown v. Howard Cty. Police Dep't*, 358 F. App'x 186 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1108 (2010)

- Special panel matter.
- *Brown v. State Capitol Office of the Governor*, No. 09-7093 (D.C. Cir. Dec. 2, 2009), *cert. denied*, 559 U.S. 1097 (2010)
 - Special panel matter.
- *Disraeli v. SEC*, 334 F. App'x 334 (D.C. Cir. 2009), *cert. denied*, 599 U.S. 1008 (2010)
 - Special panel matter.
- *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1005 (2010)
 - Judge Kavanaugh filed a concurring opinion.
- *Atherton v. D.C. Office of Mayor*, 567 F.3d 672 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1039 (2010)
 - Opinion by Judge Edwards.
- *United States v. Bran*, 353 F. App'x 446 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 1025 (2010)
 - Per curiam judgment.
- *United States v. Harrison*, 356 F. App'x 423 (D.C. Cir. 2009), *cert. denied*, 599 U.S. 1022 (2010)
 - Per curiam judgment.
- *United States v. Thomas*, 572 F.3d 945 (D.C. Cir. 2009), *cert. denied*, 559 U.S. 986 (2010)
 - Opinion by Judge Henderson.
- *Brookens v. Chao*, No. 08-5527 (D.C. Cir. May 8, 2009), *cert. denied sub nom., Brookens v. Solis*, 130 S. Ct. 759 (2009)
 - Per curiam order.
- *Thomas v. Shinseki*, No. 08-5349, 2009 WL 2414419 (D.C. Cir. May 7, 2009), *cert. denied*, 558 U.S. 1050 (2009)
 - Special panel matter.
- *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 989 (2009)
 - Opinion by Judge Kavanaugh.
- *Appleby v. Geren*, 330 F. App'x 196 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 880 (2009)
 - Per curiam judgment.
- *St. John's United Church of Christ v. FAA*, 550 F.3d 1168 (D.C. Cir. 2008), *cert. denied sub nom., St. John's United Church of Christ v. Babbitt*, 558 U.S. 820 (2009)

- Opinion by Judge Williams.
- *Kay v. FCC*, 525 F.3d 1277 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1049 (2008)
 - Opinion by Judge Kavanaugh.
- *Pickering-George v. Attorney Gen. of U.S.*, 285 F. App'x 762 (D.C. Cir. 2008), *cert. dismissed*, 556 U.S. 1206 (2009)
 - Per curiam judgment.
- *United States v. James*, No. 08-3076, 2008 WL 5704477 (D.C. Cir. Dec. 19, 2008), *cert. denied*, 557 U.S. 1288 (2009)
 - Special panel matter.
- *Slovinec v. Am. Univ.*, No. 08-7086, 2009 WL 1201574 (D.C. Cir. Jan. 29, 2009), *cert. denied*, 557 U.S. 940 (2009)
 - Special panel matter.
- *Crum v. D.C.*, No. 06-7139, 2007 WL 1838819 (D.C. Cir. Apr. 30, 2007), *cert. denied*, 552 U.S. 907 (2007)
 - Per curiam judgment.
- *Lawrence v. Washington*, 204 F. App'x 27 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1232 (2007)
 - Per curiam judgment.
- *Mwabira-Simera v. Sodexo Marriot Mgmt. Servs.*, 204 F. App'x 902 (D.C. Cir. 2006), *cert. denied*, 551 U.S. 1155 (2007)
 - Per curiam judgment.
- *Hurt v. D.C. Parole Bd.*, 204 F. App'x 903 (D.C. Cir. 2006), *cert. denied*, 552 U.S. 831 (2007)
 - Per curiam judgment.
- *Israel v. Young*, 204 F. App'x 906 (D.C. Cir. 2006), *cert. denied*, 550 U.S. 909 (2007)
 - Per curiam judgment.
- *Bell v. Kitchings*, 226 F. App'x 8 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 915 (2007), *cert. denied*, 552 U.S. 915 (2007)
 - Per curiam judgment.
- *Bell v. Davenport*, 226 F. App'x 9 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 907 (2007)
 - Per curiam judgment.
- *Bell v. Nordstrom*, 226 F. App'x 9 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 917 (2007)
 - Per curiam judgment.

- *Johnson v. Gadson*, 252 F. App'x 321 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1258 (2008)
 - Per curiam judgment.
- *Johnson v. Gadson*, 252 F. App'x 321 (D.C. Cir. 2007), *cert. denied*, 553 U.S. 1053 (2008)
 - Per curiam judgment.
- *Kilgroe v. Nat'l Transp. Safety Bd.*, 252 F. App'x 321 (D.C. Cir. 2007), *cert. denied*, 553 U.S. 1094 (2008)
 - Per curiam judgment.
- *United Elec. Contractors Ass'n v. NLRB*, 258 F. App'x 331 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1312 (2008)
 - Per curiam judgment.
- *Hobley v. Wachovia Corp.*, 275 F. App'x 16 (D.C. Cir. 2008), *cert. dismissed*, 555 U.S. 1042 (2008)
 - Per curiam judgment.
- *B.T. Produce Co. v. Dep't of Agric.*, 296 F. App'x 78 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1208 (2009)
 - Per curiam judgment.
- *Bell-Boston v. Ann Taylor Co.*, 296 F. App'x 81 (D.C. Cir. 2008), *cert. dismissed*, 555 U.S. 1083 (2008)
 - Per curiam judgment.
- *Smith v. Suter*, 308 F. App'x 451 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1195 (2009)
 - Per curiam judgment.
- *United States v. Campbell*, 463 F.3d 1 (D.C. Cir. 2006), *cert. denied*, 551 U.S. 1140 (2007)
 - Per curiam order.
- *United States v. Henry*, 472 F.3d 910 (D.C. Cir. 2007), *cert. denied sub nom.*, 552 U.S. 888 (2007)
 - Per curiam opinion; concurring opinion by Judge Kavanaugh.
- *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), *cert. denied*, 554 U.S. 907 (2007)
 - Opinion by Judge Sentelle; dissenting opinion by Judge Kavanaugh.
- *Gaviria v. Reynolds*, 476 F.3d 940, (D.C. Cir. 2007), *cert. denied*, 552 U.S. 904 (2007)
 - Opinion by Judge Rogers.

- *Hamdan v. Gates*, No. 07-5042, 2007 WL 4962132 (D.C. Cir. July 24, 2007), *cert. denied* October 1, 2007
 - En banc.
- *United States v. Martinez*, 476 F.3d 961 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 968 (2007)
 - Opinion by Judge Kavanaugh.
- *United States v. Andrews*, 479 F.3d 894 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 879 (2007)
 - Opinion by Judge Griffith.
- *United States v. Bryson*, 485 F.3d 1205 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 911 (2007)
 - Opinion by Judge Kavanaugh.
- *We the People Found., Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1102 (2008)
 - Opinion by Judge Kavanaugh.
- *United States v. Bullock*, 510 F.3d 342, 343 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1024 (2008)
 - Opinion by Judge Kavanaugh.
- *Agri Processor Co. v. NLRB*, 514 F.3d 1 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1031 (2008)
 - Opinion by Judge Tatel; dissenting opinion by Judge Kavanaugh
- *Role Models Am., Inc. v. Geren*, 514 F.3d 1308 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 994 (2008)
 - Opinion by Judge Randolph.
- *Harbury v. Hayden*, 522 F.3d 413 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 881 (2008)
 - Opinion by Judge Kavanaugh.
- *Adeyemi v. D.C.*, 525 F.3d 1222 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1036 (2008)
 - Opinion by Judge Kavanaugh.
- *United States v. Cassell*, 530 F.3d 1009 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1155 (2009)
 - Opinion by Chief Judge Garland.
- *United States v. Settles*, 530 F.3d 920 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1140 (2009)
 - Opinion by Judge Kavanaugh.

- *Puerto Rico Ports Auth. v. Fed. Mar. Comm'n*, 531 F.3d 868 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1170 (2009)
 - Opinion by Judge Kavanaugh.
- *United States v. Tamm*, 532 F.3d 868 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1088 (2008)
 - Opinion by Judge Ginsburg.
- *In re Navy Chaplaincy*, 534 F.3d 756 (D.C. Cir. 2008), *cert. denied*, 556 U.S. 1167 (2009)
 - Opinion by Judge Kavanaugh.
- *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1097 (2009)
 - Opinion by Judge Rogers.
- *United States v. Law*, 528 F.3d 888 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1147 (2009)
 - Per curiam opinion.
- *Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1159 (2008)
 - En banc opinion by Judge Griffith.
- *We the People Found., Inc. v. United States*, 485 F.3d 140 (D.C. Cir. 2007), *cert. denied*, *Schulz v. United States*, 552 U.S. 1102 (2008)
 - Opinion by Judge Kavanaugh.
- *Mavity v. Fraas*, No. 06-7201 (D.C. Cir. Apr. 26, 2007), *cert. denied*, 555 U.S. 1149 (2009)
 - Per curiam opinion.
- *Ivey v. Treasury*, No. 07-5378 (D.C. Cir. July 8, 2008), *cert. dismissed*, 556 U.S. 1124 (2009)
 - Per curiam judgment.
- *Slovinec v. Am. Univ.*, No. 07-7180 (D.C. Cir. May 20, 2008), *cert. denied*, 556 U.S. 1171 (2009)
 - Per curiam order.
- *Am. Fed'n of Gov't Employees, AFL-CIO v. Gates*, 486 F.3d 1316 (D.C. Cir. 2007), *cert. dismissed*, 552 U.S. 1171 (2008)
 - Opinion by Judge Kavanaugh.
- *Resper v. Miner*, No. 07-5061 (D.C. Cir. Sept. 13, 2007), *cert. denied*, 552 U.S. 1223 (2008)
 - Per curiam order.

- *Sibley v. Breyer*, No. 07-5009 (D.C. Cir. May 15, 2007), *cert. denied*, 552 U.S. 897 (2007)
 - Per curiam order.
- *United States v. Powell*, 483 F.3d 836 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1043 (2007)
 - En banc.
- *Rattler v. Dep't of Labor*, No. 07-5029 (D.C. Cir. Apr. 12, 2007), *cert. denied*, 552 U.S. 843 (2007)
 - Per curiam order.
- *Sisson v. Wilcox*, No. 06-7108 (D.C. Cir. Apr. 8, 2008), *cert. denied*, 555 U.S. 1013 (2008)
 - Per curiam order.
- *United States v. Williams*, 488 F.3d 1004 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 939 (2007)
 - Opinion by Judge Henderson.
- *Hicks v. Fenty*, No. 06-5017 (D.C. Cir. Aug. 7, 2006), *cert. denied*, 550 U.S. 923 (2007)
 - Per curiam order.
- *Chia v. Fidelity Invs.*, No. 05-7184 (D.C. Cir. Oct. 31, 2006), *cert. denied*, 550 U.S. 962 (2007)
 - Per curiam order.
- *Stephens v. Wynne*, No. 06-5176, 2006 WL 2521275 (D.C. Cir. Aug. 24, 2006), *cert. dismissed*, 548 U.S. 942 (2006)
 - Per curiam order.
- *United States v. Spencer*, 530 F.3d 1003 (D.C. Cir. 2008), *cert. denied*, 555 U.S. 1017 (2008)
 - Opinion by Judge Kavanaugh.
- *Hinnant v. Britton-Jackson*, No. 07-7011 (D.C. Cir. Mar. 16, 2007), *cert. denied*, 552 U.S. 863 (2007)
 - Per curiam order.

JUDGE BRETT M. KAVANAUGH
SENATE JUDICIARY COMMITTEE
QUESTIONNAIRE

APPENDIX 14
RECUSALS

Cases in which I was named as a defendant in a lawsuit:

Case No.	Case Name
06-5411	<i>Hurt v. U.S. Court of Appeals for the D.C. Circuit</i>
08-5469	<i>Newby v. Bush</i>
12-5021	<i>Brodie v. Rosen</i>
16-5176	<i>Shelden v. DOJ</i>
17-5197	<i>Shelden v. DOJ</i>

Cases involving matters, issues, or individuals from my time in government:

Case No.	Case Name
06-3105	<i>United States v. Rayburn House Office Building</i>
08-5188	<i>CREW v. Office of Administration</i>
08-5357	<i>Committee on the Judiciary of the United States House of Representatives v. Miers</i>
08-5500	<i>Cobell v. Salazar (and consolidated case)</i>
11-5158	<i>Cobell v. Salazar</i>
14-5119	<i>Cobell v. Jewell</i>
17-5111	<i>Cobell v. Zinke (and consolidated case)</i>

Cases involving matters, issues, or individuals from my time in private practice:

Case No.	Case Name
06-5267	<i>United States v. Philip Morris USA (and consolidated cases)</i>
11-5145	<i>United States v. Philip Morris USA (and consolidated case)</i>
13-5028	<i>United States v. Philip Morris USA (and consolidated case)</i>
15-5210	<i>United States v. Philip Morris USA</i>
16-5101	<i>United States v. Philip Morris USA (and consolidated case)</i>

Cases in which I recused based on a relationship or contact with an attorney, party, potential party, or witness in the proceedings:

Case No.	Case Name
02-5181	<i>Shepard v. Bush</i>
04-7203	<i>Boehner v. McDermott</i>
06-5209	<i>Rasul v. Rumsfeld (and consolidated case)</i>
07-5080	<i>Tooley v. Napolitano</i>
07-5144	<i>Hyland v. Roberts</i>
07-5178	<i>Ali v. Rumsfeld (and consolidated cases)</i>
07-5216	<i>Powers v. Clinton</i>
07-5257	<i>Wilson v. Libby</i>
07-5312	<i>Beaird v. Gonzales</i>

Case No.	Case Name
08-5119	<i>Nattah v. Bush</i>
08-5168	<i>Ruston v. Bush</i>
09-7039	<i>Regnery Publishing, Inc. v. Minter</i>
09-8507	<i>In re Claude Allen</i>
10-5015	<i>Malyutin v. Rice</i>
10-5150	<i>In re: Gerald Walpin</i>
10-5221	<i>Walpin v. Corporation for National and Community Services</i>
10-5372	<i>In re Contempt Finding in U.S. v. Stevens</i>
10-5393	<i>Al-Zahrani v. Rumsfeld</i>
11-5153	<i>Caldwell, Sr. v. Kagan</i>
11-5209	<i>Doe v. Rumsfeld</i>
12-5017	<i>Janko v. Gates</i>
12-5340	<i>Klayman v. Kollar-Kotelly</i>
12-5400	<i>Doe v. Rumsfeld</i>
13-5081	<i>Klay v. Panetta</i>
13-5096	<i>Allaithi v. Rumsfeld (and consolidated case)</i>
16-5103	<i>Jones v. Bush</i>
17-5132	<i>Friends of the Capital Crescent Trail v. FTA</i>
17-7053	<i>Turner v. Enzler</i>
18-5142	<i>In re Application to Unseal Dockets Related to the Independent Counsel's 1998 Investigation of President Clinton</i>

The D.C. Circuit does not require judges to list their reasons for *sua sponte* recusals, which are left to each judge's discretion. As a consequence, and because the court's data systems often do not contain the reasons for recusals, I am unable to reconstruct with sufficient certainty the reasons for recusals in the following cases:

Case No.	Case Name
02-1135	<i>Sierra Club v. EPA (and consolidated cases)</i>
05-1097	<i>State of New Jersey v. EPA (and consolidated cases)</i>
05-1161	<i>Louisiana Public Service Commission v. FERC</i>
05-1244	<i>North Carolina v. EPA (and consolidated cases)</i>
05-1372	<i>Consolidated Edison Company of New York v. FERC (and consolidated case)</i>
05-1441	<i>Sierra Club v. EPA (and consolidated cases)</i>
05-1462	<i>Louisiana Public Service Commission v. FERC (and consolidated cases)</i>
05-5173	<i>Owens v. Republic of Sudan</i>
05-5386	<i>Nurridin v. Griffin</i>
06-1018	<i>Consolidated Edison Company of New York v. FERC</i>
06-1025	<i>Consolidated Edison Company of New York v. FERC (and consolidated case)</i>
06-1042	<i>Burlington Resources Inc. v. FERC</i>
06-1148	<i>New York v. EPA (and consolidated case)</i>

Case No.	Case Name
06-1221	<i>Sierra Club v. EPA</i> (and consolidated cases)
06-5079	<i>Owens v. Republic of Sudan</i>
06-5232	<i>Public Citizen v. U.S. District Court for the District of Columbia</i>
06-5242	<i>National Institute of Military Justice v. DOD</i>
06-5259	<i>Kaufman v. Mukasey</i>
06-5267	<i>United States v. Council for Tobacco Research</i>
06-5403	<i>Association of Community Organizations for Reform NOW, Inc. v. FEMA</i> (and consolidated case)
07-1228	<i>Louisiana Public Service Commission v. FERC</i>
07-1278	<i>TC Ravenswood, LLC v. FERC</i> (and consolidated case)
07-1306	<i>Exxon Mobil Corp. v. FERC</i> (and consolidated cases)
07-1343	<i>Entergy Services, Inc. v. FERC</i>
07-1356	<i>National Cable Telecom v. FCC</i>
07-1360	<i>M2Z Networks, Inc. v. FCC</i> (and consolidated case)
07-1446	<i>In re Core Communications, Inc.</i>
07-5023	<i>Center for Arms Control and Non-Proliferation v. Pray</i>
07-5119	<i>Richards v. Duke University</i>
07-5317	<i>Emergency Coalition v. TREA</i>
07-5318	<i>Loving v. DOD</i>
07-5379	<i>Wuterich v. Murtha</i>
07-7162	<i>In re Series 7 Broker Qualification Exam Score Litigation</i>
08-1330	<i>Arkansas Public Service Commission v. FERC</i>
08-1368	<i>Consolidated Edison Company of New York v. FERC</i>
08-5409	<i>CREW v. DHS</i>
08-7074	<i>Nader v. Democratic National Committee</i>
08-7083	<i>Carr v. District of Columbia</i>
09-1060	<i>Florida Municipal Power Agency v. FERC</i>
09-1113	<i>Navistar, Inc. v. EPA</i> (and consolidated case)
09-1150	<i>New York Regional Interconnect v. FERC</i>
09-1309	<i>New York Regional Interconnect v. FERC</i>
09-3112	<i>United States v. Safavian</i>
09-3121	<i>United States v. Stadd</i>
09-5014	<i>CREW v. DHS</i> (and consolidated case)
09-5322	<i>In re Christopher Strunk</i>
09-5331	<i>Khalid Al Odah v. United States</i>
09-5337	<i>Lardner v. DOJ</i>
09-5354	<i>Gerlich v. DOJ</i>
09-5388	<i>Navab-Safavi v. Broadcasting Board of Governors</i>
10-1190	<i>NRG Power Marketing, LLC v. FERC</i>
10-5057	<i>American Bar Association v. FTC</i>

Case No.	Case Name
10-5140	<i>Alexander v. FBI</i> (and consolidated case)
10-5156	<i>Hickman v. FBI</i>
10-5233	<i>Sassower v. Thornburgh</i>
10-5262	<i>Chambers v. Department of Interior</i>
10-5388	<i>Adair v. Solis</i>
10-7023	<i>Dorsey v. CitiBank</i>
10-7133	<i>Shipkovitz v. Sullivan</i>
11-1201	<i>NRG Power Marketing, LLC v. FERC</i>
11-3024	<i>United States v. Scanlon</i>
11-3100	<i>United States v. Ring</i>
11-5133	<i>Convertino v. DOJ</i>
11-5140	<i>Judicial Watch, Inc. v. DOJ</i>
11-5282	<i>Judicial Watch, Inc. v. United States Secret Service</i>
11-7025	<i>Pereira v. CitiBank</i>
11-7041	<i>Gaskins v. Williams & Connolly</i>
11-7073	<i>Carpenter, Jr. v. King</i>
11-7082	<i>Patton Boggs, LLP v. Chevron Corporation</i> (and consolidated case)
12-1118	<i>In re People's Mojahedin Organization of Iran</i>
12-5094	<i>Jones v. TREA</i>
12-5134	<i>Nader v. FEC</i>
12-5223	<i>CREW v. DOJ</i>
12-5399	<i>Al Bakri v. Obama</i>
12-7069	<i>Araya v. Bayly, Jr.</i>
13-1155	<i>Louisiana Public Service Commission v. FERC</i>
13-5112	<i>United States v. Bank of America Corp.</i>
13-5165	<i>In re Morris Coe-Bey, et al.</i> (and consolidated case)
13-5258	<i>In re Larry Klayman</i>
13-5262	<i>In re Morris Coe-Bey</i>
13-5303	<i>Pigford v. Vilsack</i>
13-7091	<i>Spaeth v. Georgetown University</i>
13-7157	<i>Buchwald v. Citibank, N.A.</i>
14-5247	<i>United States v. Bank of America Corp.</i>
14-7208	<i>Segelstrom v. Citibank, N.A.</i>
16-1382	<i>Louisiana Public Service Commission v. FERC</i>
16-5220	<i>United States v. Bank of America Corp.</i>
16-5366	<i>Judicial Watch, Inc. v. NARA</i>
17-5104	<i>In re State of Maryland</i>
17-5217	<i>In re U.S. Office of Personnel Management</i> (and consolidated case)

Nomination of Judge Brett Kavanaugh to the Supreme Court
Senate Judiciary Hearing: September 4, 2018
Senator Blumenthal Opening Remarks

Thank you, Mr. Chairman, for your conducting these hearings as fairly and patiently as you have, and I am going to be remarking further on what procedurally I think is appropriate here. But I want to begin by thanking Judge Kavanaugh and your family for your commitment to public service.

I want to thank the many, many Americans who are paying attention to this hearing, not only in this room but also across the country. I want to thank them for their interest and indeed their passion – that is what sustains democracy. That commitment to ordinary, everyday Americans participating and engaging in this process.

There is a t-shirt worn by a number of folks walking around this building that says, “I am what’s at stake.”

This vote, and this proceeding, could not be more consequential in light of what’s at stake: whether women can decide when they want to have children and become pregnant, whether the people of American can decide whom they would like to marry, whether we drink clean water and breathe clean air, whether consumers are protected against defective products and financial abuses, and whether we have a real system of checks and balances, or, alternatively, an imperial presidency.

I will not cast a vote more important than this one, and I suspect few of my colleagues will as well.

And what’s at stake is indeed, also, the rule of law.

My colleague Senator Flake quoted the President’s tweet yesterday. I’m going to repeat it: “Two long running, Obama era, investigations of two very popular Republican Congressmen were brought to a well-publicized charge, just ahead of the Mid-Terms, by the Jeff Sessions Justice Department. Two easy wins now in doubt because there is not enough time. Good job Jeff.”

I’ve had my disagreements with this Department of Justice. I want to note, for the record, that at least one high-ranking member of the Department of Justice was in this room. I want to urge the Department of Justice to stand strong and hold fast against this onslaught, which threatens the basic principles of our democracy.

And I want to join my colleague Senator Sasse in his hope that you, Judge Kavanaugh, would condemn this attack on the rule of law and our judiciary, because at the end of this dark era, when the history of this time is written, I believe that the heroes will be our independent judiciary and our free press.

You are nominated by that very President who has launched this attack on our Department of Justice, on the rule of law, on law enforcement like the FBI, law enforcement at every level whose

integrity he has questioned, and your responses to our questions will be highly enlightening about whether you join us in defending the judiciary and the rule of law.

That very President has nominated you in this unprecedented time, unprecedented because he is an unindicted co-conspirator who has nominated a potential Justice who will cast the swing vote on issues related to his possible criminal culpability – in fact, whether he is required to obey a subpoena, to appear before a grand jury, whether he is required to testify in a prosecution of his friends or associates or other officials in his administration, or whether in fact he is required to stand trial, if he is indicted while he is President of the United States.

There is a basic principle of our Constitution, and it was articulated by the Founders: No one can select a judge in his own case. That's what the President's potentially doing here: selecting a Justice on the Supreme Court who potentially will cast a decisive vote in his own case. That is a reason why this proceeding is so consequential.

Senator Sasse urged us to do our job. I agree. Part of our job is to review the record of the nominee as thoroughly and deliberately as possible, looking to all the relevant and probative evidence. We can't do that on this record.

Mr. Chairman, you have said multiple times that your staff has already reviewed the 42,000 pages of documents produced to this committee at 5:41 PM yesterday. Both sides are using the same computer platform to review the documents from Mr. Burck. The documents had to be loaded into this platform overnight and couldn't be concluded until 6:45 AM this morning. How is it possible that your staff concluded its review last night before the documents were even uploaded? That's this platform that both sides are using here. Simply not possible, Mr. Chairman, that any senator has seen these new materials, much less all of the other relevant documents that have been screened by Bill Burck, who is not the National Archivist.

And this situation, when we say it's unprecedented, is truly without parallel in our history and I'm going to quote from the National Archivist, "[it's] something that has never happened before." And the Archivist continued, "This effort by former President Bush does not represent the National Archives or the George W. Bush Presidential Library."

So, Mr. Chairman, I renew my motion to adjourn so that we have time to conclude our review of these documents and so that also, my request under the Freedom of Information Act, which is now pending, to the National Archivist, to the Department of Justice, to other relevant agencies, can be considered and judged. That Freedom of Information Act will require some time, I assume, to conclude.

I renew my motion, Mr. Chairman, and ask for a vote on the motion to adjourn. As I said earlier, Rule Four provides, "The committee chairman shall entertain a non-debatable motion to bring a matter before the committee to a vote."

That seems pretty clear to me, Mr. Chairman. I've made a motion to bring before the committee a motion to adjourn under the rules. With all respect, you are required to entertain my motion.

And I would just add this final point. All these documents will come out. They will come out eventually. As soon as 2019 and 2020. By law, these documents belong to the American people. They don't belong to President Bush or President Trump. They belong to the American people.

It's only a matter of time, my Republican colleagues, before you will have to answer for what's in these documents. We don't know what's in them. But the question is: what are they concealing that you will have to answer to history for?

Mr. Chairman, I renew my motion to adjourn.

...

So, I will be asking Judge Kavanaugh whether you believe *Roe v. Wade* was correctly decided, whether you believe *Brown v. Board of Education* was correctly decided.

Judicial nominees have figured out all kinds of ways to avoid answering that question.

First, they said they felt it would violate the canons of ethic. There are no canons of ethics that preclude response. Then they said that they felt a decision might come before them, an issue in a case that might arise. And more recently, they've adopted the mantra that they think all Supreme Court decisions are correctly decided.

But you're in a different position. You've been nominated to the highest court in the land, and your decisions, as a potential swing vote, could overturn even well-settled precedent. And there are indications in your writings, your opinions, as well as the articles you've written and some of the memos that have come to light, that you believe for example *Roe v. Wade* could be overturned.

And that's why I'll wanted to know from you whether you think it was correctly decided in the first place, and other decisions that are regarded as well-settled or long-established.

In fact, I have these fears because, Judge Kavanaugh, this system and process has changed so radically. In fact, you have spent decades showing us in many ways what you believe. Or to put it more precisely, you've spent decades showing those groups, like the Federalist Society and the Heritage Foundation and others, what you believe.

They're the ones who have really nominated you, because the President outsourced this decision to them. In those opinions and writings and statements and interviews, you've done everything in your power to show those far-right groups that you will be a loyal soldier on the court.

And I'm going to use of those writings and some of the timing and other indications, to show that you are more than a nominee; in fact, a candidate in a campaign that you have conducted.

That seems to be, unfortunately, the way the system has worked in your case. The norms have been dumbed-down and the system has been degraded, but I think that we have an obligation to do our job and elicit from you where you will go as a Justice on the United States Supreme Court based on what you've written and said, and also what you will tell the American people in these hearings.

I join in the request that's been made of you that you show the initiative and ask for a postponement on these hearings. I think that this process has been a great disservice to you, as well as this committee and the American people.

If you are confirmed after this truncated and concealed process, there will always be a taint, there will always be an asterisk, after your name. Appointed by a President named as an unindicted co-conspirator after the vast majority of documents relating to the most instructive period of his life were concealed.

The question will always be: why was all that material concealed? You've coached and you've mentored judges in going through this process. You are as sophisticated and knowledgeable as anyone who will ever come before us as a judicial nominee, so you know that we have an obligation to inquire as to everything that can be relevant.

And it's not the numbers of documents, it's the percentage. There were no emails when Justice Ginsburg was the nominee. The documents that we've been provided contain duplicates full of junk.

We need everything that is relevant, including the three years that you served in the White House as Staff Secretary, the most instructive period of your professional career.

So, let me just conclude by saying, you know, what we share is a deep respect and reverence for the United States Supreme Court. I was a law clerk as you were. I've argued cases before the court. Most of my life has been spent in the courtroom, as U.S. Attorney or as Attorney General. The power of the Supreme Court depends not armies or police force—it has none—but on its credibility, the trust and confidence of the American people.

I ask you to help us uphold that trust by asking this committee to suspend this hearing and come back when we have a full picture with the full sunlight that our Chairman is so fond of espousing, so that can fully and fairly evaluate your nomination. Thank you, Mr. Chairman.

Senator Chris Coons
Kavanaugh Confirmation Hearing Opening Statement
September 4, 2018

Thank you, Mr. Chairman. Welcome, Judge Kavanaugh, and welcome to you, to your family, and to your friends that are here.

As you know, we both went to the same law school and even clerked in the same courthouse in Wilmington, Delaware, so I have long known you and your reputation for nearly 30 years. And I know well that you have a reputation as good classmate, good roommate, a good husband and a family man, that you've contributed to your community. I think we'll hear later today that you've even been a great youth basketball coach.

But frankly, we're not here to consider you as the president of our neighborhood civic association, and we're not here to consider you to be a basketball coach.

We're here to consider you for a lifetime appointment to the Supreme Court, where you would help shape the future of this country and have an impact on the lives of millions of Americans for decades to come.

To make that decision, to exercise our constitutional role, we have to look very closely at your decisions, statements, and writings to understand how you might interpret our Constitution.

The next Justice will play a pivotal role in defining a wide range of political issues, including the scope of the President's power and determining whether the President might be above the law.

The next Justice will impact essential rights enshrined in our modern understanding of the Constitution – the right to privacy, including rights to contraception, abortion, intimacy, and marriage; the freedom to worship as we choose; the ability to participate in our democracy as full citizens; and the promise of equal protection of the laws.

That's because the cases that come before the Supreme Court aren't just academic, esoteric, or theoretical. They involve real people and they have real and lasting consequences.

With stakes this high, I deeply regret the process that has gotten us to this point – the excesses and partisan gamesmanship of the last few years and that history bears briefly repeating.

When Justice Scalia passed in February of 2016, I called the White House and urged President Obama to nominate a jurist who could gain support from both sides of the aisle and help build a strong center on the Supreme Court.

He did just that when he nominated Merrick Garland, the Chief Judge of the DC Circuit, whom I know you also admire, but my Republican colleagues refused to even meet with him, much less hold a hearing or vote on his confirmation.

During the 400 days that Republicans refused to fill the vacancy, then-candidate Donald Trump also released a list of potential nominees to the Supreme Court, a list compiled by two highly partisan organizations: the Federalist Society and the Heritage Foundation.

After our president was elected, he picked from that list and nominated Neil Gorsuch to the Supreme Court.

When Judge Gorsuch testified before this very Committee, he told us repeatedly how deeply he respected precedent and he even cited a book on precedent that he'd co-authored with you.

But in his first 15 months of service, Justice Gorsuch has already voted to overrule at least five important Supreme Court precedents and to question several others.

To name just one, given it was just Labor Day, Justice Gorsuch voted to gut public-sector unions, overturning a 41-year-old precedent and impacting millions of workers across the country.

My point is that Justice Gorsuch was confirmed to the Court in one of the most partisan processes in Senate history, only after Republicans deployed the nuclear option to end the filibuster for Supreme Court nominations, that brings us to today and to your nomination.

When Justice Kennedy announced his retirement, I once again called the White House and encouraged President Trump to select someone for this seat who could win support from both sides of the aisle.

Judge Kavanaugh, I'm concerned that you may not that nominee.

Your record prior to joining the bench places you in the midst of some of the most pitched partisan battles of recent history – from Ken Starr's investigation of President Clinton, to the 2000 election recount, to the controversies of the Bush administration, including surveillance, torture, access to justice, and the culture wars.

So, Judge Kavanaugh, it is critical that this Committee and the American people fully examine your record to understand what kind of Supreme Court Justice you would be.

Unfortunately, as we've all discussed at length today, that has been rendered impossible.

The majority has blocked access to millions of pages of documents from your service in the White House.

For the first time since Watergate, the nonpartisan National Archives has been cut out of the process for reviewing and producing your records.

Senate Republicans have worked to keep "Committee confidential" nearly 200,000 pages of the documents we were given so the public could not view them.

Your former deputy, who has made his career representing Republicans, is in charge of designating what documents this Committee and the American people get to see.

Not only that, but for the first time in history, the President has invoked executive privilege to withhold more than 100,000 documents on a Supreme Court nominee from the Judiciary Committee.

That leads to a difficult, but important, question: What might President Trump or the majority be trying to hide?

Mr. Chairman, I want to make an appeal to work together to restore the integrity of this committee. We are better than this process. We are better than proceeding with a nominee without engaging in a full and transparent process. This committee is failing the American people by proceeding in this way. And, I fully support the motions made by my colleagues earlier in this hearing and regret that we proceeded without observing the rules of the committee.

That said, Judge Kavanaugh, I have reviewed the parts of your record that I've been able to access. What I have been able to see from your available speeches, writings, and decisions, and I have to say it troubles me.

While serving on the bench, you have dissented at a higher rate than any circuit judge elevated to the Supreme Court since 1980 – that count includes even Judge Bork.

Your dissents also reveal some interesting views and positions that fall well outside of the mainstream of legal thought.

You have suggested, as have been referenced, that the President has the authority to refuse to enforce the Affordable Care Act were he to decide it was unconstitutional.

You have voted to strike down net neutrality rules, gun safety laws, the organization of the Consumer Financial Protection Bureau, and many of your dissents would undercut environmental protections, workers' rights, and antidiscrimination laws, and you've recently praised Justice Rehnquist's dissent in *Roe v. Wade*.

You have embraced a view of substantive due process that would undermine the rights and protections of millions of Americans, from basic protections for LGBT Americans to access to contraception, access to health care, and the ability for Americans to love and marry whom they wish.

I'm concerned your writings demonstrate a hostility to civil rights, including affirmative action.

Finally, you have repeatedly and enthusiastically embraced an interpretation of presidential power so expansive that it could result in a dangerously unaccountable President – at the very time when we are most in need of checks and balances.

I want to pause for a moment on this last point, because the context of your nomination troubles me the most.

In reviewing your records, Judge, you have questioned the lawfulness of *United States v. Nixon*, an historic decision in which a unanimous Court said that the President had to comply with a grand jury subpoena for evidence.

You have questioned the correctness of *Morrison v. Olson*, a 30-year-old precedent holding that Congress can create an independent counsel with authority to investigate the President, who the President can't just fire on a whim.

You have questioned whether a President and his aides should be subject to any civil or criminal investigations while in office.

And, given these positions about presidential power, which I view as being at one extreme of the record of circuit judges, we have to confront an uncomfortable, but important question about whether President Trump may have selected you, Judge Kavanaugh, with an eye towards protecting himself.

So, Judge Kavanaugh, I am going to ask you about these issues, as we did when we met in my office, and I expect you to address them fully.

When we spoke, you agreed that we have a shared concern about the legitimacy of the Supreme Court, that it is critical to our system of rule of law. In my view, it is today in jeopardy.

You are participating in a process that is featured in unprecedented concealment and partisanship around your record. A few moments ago, Senator Durbin proposed a bold step, which would be for you to support suspending this hearing until all of your records are produced and available to this Committee and the American people, and I encourage you to do this.

There are also members of both parties who have not stated how they will vote on your nomination, and I urge you to answer questions about your prior work; your writings; about precedent; and the Constitution itself, to trust the American people, and to help build our trust in the Court on which you may well soon serve.

I have been to too many hearings in which judicial nominees tell us that they will evenhandedly apply the text of laws or the Constitution only to watch them ascend to the bench and whittle away the individual rights of Americans or to narrow and overturn long-settled precedent.

This Supreme Court vacancy comes at a critical time for our country, when our institutions of law that are the foundations of our democracy are being gravely tested.

If we are going to safeguard the rule of law in this country, our courts – and in particular, our Supreme Court – must be a constitutional bulwark against violations of law, deprivations of freedom, and abuses of power by anyone – including the President.

No one said it better than our former colleague, Senator John McCain, who once asked:

“What makes us exceptional? Our wealth? Our natural resources? Our military power? Our big, bountiful country?”

No, our founding ideals and our fidelity to them at home and in our conduct in the world make us exceptional. They are the source of our wealth and power. Living under the rule of law. Facing threats with confidence that our values make us stronger than our enemies.”

Judge Kavanaugh, we are here to determine whether you would uphold or undermine those founding ideals and the rule of law.

We are here to determine whether you would continue in the traditions of the Court or transform it into a body far more conservative than a majority of Americans.

We are here to determine whether your confirmation would compromise the legitimacy of the Court itself.

I urge you to answer our questions and confront these significant challenges.

These are weighty questions, and the American people deserve real answers. Thank you, and I look forward to your testimony.

Senator Dick Durbin
Hearing on the Supreme Court Nomination of Brett Kavanaugh
Opening Statement
September 4, 2018

Thank you Mr. Chairman. Judge Kavanaugh it is good to see you again and I thank the members of your family who are weathering this hearing. Thank you very much for being here today.

This is a different hearing for the Supreme Court than I have ever been through. It is different in what has happened in this room just this morning. What we have heard is the noise of democracy. This is what happens in a free country when people can stand up and speak and not be jailed, imprisoned, tortured, or killed because of it. It is not mob rule. There have been times [during the hearing] when it is uncomfortable. I'm sure it was for your children. I hope you can explain this to them at some point, but it does represent what we are about in this democracy.

Why is this happening for the first time in the history of this Committee? I think we need to be honest about why it is happening. I think it is the same reason why when I go to Illinois after being in this public service job for over 30 years, I hear a question that I have never ever heard before, repeatedly. As people pull me to the side and say, "Senator, are we going to be alright? Is America going to be alright?" They are genuinely concerned about the future of this country. You come to this moment in history, in a rare situation. You are aspiring to be the most decisive vote on the Supreme Court on critical issues, Justice Kennedy did that for 12 years, and you are called to that responsibility and we realize the gravity of that opportunity and that responsibility.

Secondly, of course, your record and the statements of others suggest that there is real genuine concern about changing life and death values in this country, because you see things differently. We've heard that over and over again and I think you must understand the depth of feeling about that possibility.

And third, try as they might, I'm afraid the majority just cannot get beyond the fact that there are parts of your public life that they want to conceal. They don't want Americans to see it. I think that is a serious mistake and I will make a suggestion at the end of my remarks. But over and above all of those things is this, you are the nominee of President Donald John Trump. This is a President who has shown us consistently that he is contemptuous of the rule of law. He has said and done things as President, which we have never seen before in our history. He has dismissed the head of the Federal Bureau of Investigation when he would not bend to his will. He harasses and threatens his own Attorney General on almost a daily basis, in the exercise of his office. And I did not vote for Jeff Sessions, but I have to tell you there should be some respect at least for the office that he serves in. It is that President, who has decided you are his man. You are the person he wants on the Supreme Court. You are his personal choice.

So, are people nervous about this? Are they concerned about it? Of course they are.

I am sure there will be a shower of tweets some time later in the day, harassing people in the Cabinet, people in the White House, maybe even dismissing them. Maybe he will go after me

again. Be my guest. But the point I'm getting to, is that if you wonder why this reaction is taking place, it is because of what is happening in this country.

There are many of us who are concerned about the future of this country. And the future of democracy. And you are asking for a lifetime appointment to the highest court in the land, where you will make decisions, the deciding vote, on things that will decide the course of history and where we are headed.

The Senate has a constitutional responsibility to evaluate your nomination. We do know that before you became a judge, you were faithfully advancing the Republican Party agenda. I jokingly said in in of your previous appearances that you are like Forest Gump of Republican politics. You always show up in the picture. Whether is the Ken Starr investigation, Bush v. Gore, the Bush White House, you have been there. We also know that before even naming you, President Trump made it clear, that he would only appoint Justices to the Supreme Court only to overturn Roe v. Wade and the Affordable Care Act. Those were his litmus test. Now, He didn't ask you the question. What he did was delegate this responsibility to two special interest groups, The Federalist Society and the Heritage Foundation. And the other groups that are spending millions of dollars in support of your candidacy. They are confident that you will favor the interest of corporations over workers and give the President wide berth when it comes to executive authority. Your own law clerks, men and women you choose and wrote the words that had your signature at the bottom of the page, have told us what they think of you.

One wrote, in an article entitled, "Brett Kavanaugh said Obamacare was Unprecedented and Unlawful." That's from one of your Clerks. Another wrote that when it comes to, quote, "enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh."

Big Corporate interest are solidly behind your nomination. Chamber of Commerce, full support. And President Trump, whose lawyers say that they will fight any effort to subpoena or indict him all the way to the Supreme Court, that President seems personal eager to have you confirmed as quickly as possible.

Why are your supporters so confident that you will rule on these issues, as they wish?

Why do they think you are such a sure bet to take their side? In the words of one of your former clerks, "This is no time for a gamble".

Unfortunately, I don't think you are going to tell us much this week. It is interesting to me that people in your position write all these law review articles, make all these speeches, and come to this room and clam up. They do not want to talk about any issues. But that is what I expect. Instead, we will be asked to trust that if you are confirmed, you will have an open mind. That you will follow the law rather than move the law in the direction of your views. I would like to trust you, but I agree with President Ronald Reagan: "Trust, but verify."

I wanted to trust you the last time you testified before this committee in 2006. But, after you were confirmed at the D.C. circuit, reports surfaced that contradicted your sworn testimony

before this Committee. You said to me unambiguously under oath the following: "I was not involved and am not involved in the questions about the rules governing detention of combatants." But later, just a week or so ago, you acknowledged in my office that you were involved. For twelve years, you could have apologized and corrected this record, but you never did. Instead, you and your supporters have argued that we should ignore the simple declarative sentence which you spoke and somehow conclude your words means something far different. You are a committed textualist, Judge Kavanaugh. If you're going to hold others accountable for their words, you should be held accountable for your own words. So after my personal experience, I start these hearings with a question about your credibility as a witness. I know from my history with you that things you said need to be carefully verified.

That brings us to a major problem. I will not retread the ground about all the documents that are being withheld. But I will show you a little calendar here that's interesting. There is a thirty-five month black hole in your White House career where we have been denied access to any and all documents. Thirty-five months in the White House. And I asked you in my office, during that period of time, President Bush was considering same-sex marriage, an amendment to ban it, abortion, executive power, detainees, torture, Supreme Court nominees, warrantless wiretapping. One of these issues bears special mention, as we mourn the passing of John McCain. In 2004 and 2005, I joined John McCain when he led the effort to pass an amendment affirming that torture and cruel and inhumane and degrading treatment would be illegal in America. As a survivor of unspeakable torture, John McCain spoke with powerful moral authority about American values during the time of war. You were in the Bush White House when that McCain amendment passed. The Bush Administration did everything in its power to stop John McCain's torture amendment. Then after we pass it 90-9, a veto-proof margin, President Bush issued a signing statement asserting his right to ignore the law that John McCain had just passed in Congress. When we met in my office, you acknowledged that you worked on that signing statement. Yet we have been denied any documents disclosing your role or your advice to President Bush. I asked you if you wrote, edited, or approved documents about these and other issues while you were Staff Secretary. Time and again, you said, "I can't rule it out". Judge Kavanaugh, America needs to see those documents. We cannot carefully review, advice, and decide whether to consent to your nomination without clarity on the record.

The period of time when you worked in the Republican White House led to a change in position on an issue which we have to address directly. Your views on executive power and accountability have changed dramatically. When you worked for Special Counsel Ken Starr in the late 1990s, you called him, quote, an "American hero" for investigating President Bill Clinton, and you personally urged Starr to be aggressive, confrontational, and even graphic in his questions. We have seen your memo on that one. But a few years later, after working in a Republican White House, you totally reversed your position and argued the president should be above the law and granted a free pass from criminal investigation while in office.

What did you see in that Bush White House that dramatically changed your view? What are your views about presidential accountability today?

Judge Kavanaugh, at this moment in our nation's history, with authoritarian forces threatening our democracy, with the campaign and administration of this President under federal criminal

investigation, we need a direct credible answer from you: Is this president, or any president, above the law? Equally important: Can this president ignore the Constitution in the exercise of his authority?

You dissented in the *Severino* case when the D.C. circuit that upheld the Affordable Care Act's constitutionality. You criticized the law—the law which this President has said many times he wants to ignore and abolish—and you said, quote, “the President may decline to enforce a statute that regulates private individuals when the President deems—when the President deems—that statute unconstitutional even if a court has held or would hold the statute constitutional.” This statement by you flies in the face of *Marbury v. Madison*. Our North Star are the separation of powers. It gives license to this President, Donald John Trump, or any president who chooses to ignore the Constitution, to assert authority far beyond that envisioned by our Founding Fathers.

There are many people who are watching carefully. I am going to make a suggestion to you today and it won't be popular on the other side of the aisle. If you believe your public record is one you can stand behind and defend, I hope at the end of this you will ask this committee to suspend until we are given all the documents, until we have the time to review them. And then we resume this hearing. What I'm saying to use is basically this: if you will trust the American people, they will trust you. But if your effort today continues to conceal and hide documents, it raises a suspicion.

I'll close Mr. Chairman, I know you're anxious. When I was a practicing lawyer, a long time ago in trial, and the other side either destroyed or concealed evidence I knew that I was going to be able to have a convincing argument to close that case. What were they hiding? Why they won't let you see the speed tape on that train or the documents that they just can't find? You know that presumption now is against you because of all the documents they've held back. For the sake of this nation, for the sanctity of the constitution we both honor, step up. Ask this meeting, this gathering, to suspend until all the documents of your public career are there for the American people to see.

Senator Dianne Feinstein
Kavanaugh Confirmation Hearing Opening Statement
September 4, 2018

I think it's really important that people—as well as the judge, the nominee—understand how strongly we feel and why we feel that way.

I want to talk a little bit about one of the big decisions that we have the belief that although you told Senator Collins that you believe it was 'settled law,' the question is really do you believe that it's correct law, and that's *Roe v. Wade*.

I was, in the '50s and '60s, active first as a student at Stanford, I saw what happened to young women who became pregnant. And then subsequently I sat as an appointee of Governor Brown's on the term setting and paroling authority for women in California who had committed felonies.

And so I sentenced women who had committed abortions to state prison and granted them paroles, and so came to see both sides—the terrible side and the human and vulnerable side.

And when you look at the statistics during those days, those statistics that the Guttmacher Institute has put out, are really horrendous.

For you, the president that nominated you has said 'I will nominate someone who is anti-choice and pro-gun.' And we believe what he said—we cannot find the documents that absolve from that conclusion.

So what women have won through *Roe* and a host of privacy cases to be able to control their own reproductive system, to have basic privacy rights, really extraordinarily important to this side of the aisle, and I hope the other side of the aisle as well.

Last year, you drafted a dissent in *Garza v. Hagan*, and that's a case where a young woman in Texas, I believe, was seeking an abortion. In that dissent you argued that even though the young woman had complied with the Texas parental notification law and secured an approval from a judge, she should nonetheless be barred.

In making your argument, you ignored—and I believe mischaracterized—the Supreme Court precedent. You reasoned that Jane Doe should be unable to exercise her right to choose because she did not have family and friends to make her decision.

The argument rewrites Supreme Court precedent, and if adopted, we believe would require courts to determine whether a young woman had a sufficient support network when making her decision, even in cases where she has gone to court.

This reason, we believe—I believe—demonstrates that you are willing to disregard precedent. And if that's the case, because just saying something is settled law, it really is, is it correct law?

The impact of overturning Roe is much broader than a women's right to choose. It's about protecting the most personal decisions we all make from government intrusion.

Roe is one in a series of cases that upheld an individual's right to decide who to marry—it's not the government's right; where to send your children to school—the government can't get involved; what kind of medical care at the end of life; as well as whether and when to have a family.

And I deeply believe that all these cases serve as the bulwark of privacy rights that protect all Americans from the over-involvement of the government in their lives. And to me that's extraordinarily important.

Next, I'd like to address the president's promise to appoint a nominee blessed by the NRA.

In reviewing your judicial opinions and documents, it's pretty clear that your views go well beyond simply being "pro-gun." And I'd like to straighten that out.

It's my understanding that during a lecture at Notre Dame Law School, you said that you would be 'the first to acknowledge that most other lower-court judges have disagreed' with your views on the Second Amendment.

For example, in *District of Columbia v. Heller*, you wrote that unless guns were regulated either at the time the Constitution was written or traditionally throughout history, they cannot be regulated now.

In your own words, gun laws are unconstitutional unless they are 'traditional or common in the United States.' You concluded that banning assault weapons is unconstitutional because they have not historically been banned. This logic means that even as weapons become more advanced and more dangerous, they cannot be regulated.

Judge Easterbrook, as you know a conservative judge from the Seventh Circuit, concluded that that reasoning was "absurd." And he pointed out that "a law's existence can't be the source of its own constitutional validity."

In fact, I'm left with the fact that your reasoning is far outside the mainstream of legal thought and that it surpasses the views of Justice Scalia, who was clearly a pro-gun justice.

Even Scalia understood that weapons that are like M-16 rifles, or weapons that are most useful in military service, can in fact be regulated.

And there's no question that assault weapons like the AR-15 were specifically designed to be like the M-16.

The United States makes up 4 percent of the worldwide population but we own 42 percent of the world's guns.

Since 2012, when 20 first graders and six school employees were killed at Sandy Hook Elementary, there have been 273 school shootings. This is an average of five shootings every month, and a total of 462 children, teenagers, teachers and staff shot, and 152 killed.

I care a lot about this. I authored the assault weapons legislation that became law for 10 years and I've seen the destruction.

If the Supreme Court were to adopt your reasoning, I fear the number of victims would continue to grow and citizens would be rendered powerless in enacting sensible gun laws. So this is a big part of my very honest concern.

You're being nominated for a pivotal seat. It would likely be the deciding vote on fundamental issues.

During your time in the White House, when you were staff secretary—some people regard it as kind of a monitor, monitoring things going in and going out. But I think it's much more. And you yourself have said that that's the period of my greatest growth. And so we try to look at it. And the only way we can look at it is to understand the documents and it's very, very difficult.

I don't want to take too much time, but we've heard a lot of noise. Behind the noise is really a very sincere belief that it's so important to keep in this country, which is multi-ethnic, multi-religious, multi-economic—a court that really serves the people and serves this great democracy. And that's my worry. That's my worry.

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Judiciary Committee
Hearing on the Nomination of Judge Brett M. Kavanaugh to be an Associate Justice of the U.S.
Supreme Court
September 4, 2018**

One of the Senate's most solemn constitutional duties is to provide advice and consent to the President on his nominations of Supreme Court justices.

We are here this week to hear from Brett Kavanaugh, to hear about his exceptional qualifications, his record of dedication to the rule of law, and his demonstrated independence and his appreciation of the importance of the separation of powers.

Indeed, to protect individual liberty, the Framers designed a government of three co-equal branches, strictly separating the legislative, executive and judicial powers. The Framers intended for the Judiciary to be immune from the political pressures the other two branches face. That is so that judges would decide cases according to the law and not according to popular opinion.

Now, 230 years after ratification, our legal system is the envy of the world. It provides our people stability, predictability, protection of our rights and equal access to justice. But this is only possible when judges are committed to the rule of law.

Our legal system's success is built on judges accepting that their role is limited to deciding cases and controversies. A good judge exercises humility and makes decisions according to the specific facts of the case and according to the law.

A good judge never bases decisions on his preferred policy preferences.

A good judge also has courage, recognizing that we have an independent judiciary to restrain government when it exceeds its lawful authority.

As President Andrew Jackson said, "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary."

Confirmation hearings for Supreme Court nominees are an important opportunity to discuss the appropriate role of judges. As I see it, and I expect many of my colleagues will agree, the role of the judge is to apply the law as written, even if the legal result is not one the judge personally likes.

As Justice Scalia was fond of saying, if a judge always likes the outcomes of cases he decides, he is probably doing something wrong. I don't want judges who always reach a "liberal" result or a "conservative" result; I want a judge who rules the way the law requires.

Judges must leave the lawmaking to Congress.

Now, some have a very different view of what a judge's role should be. According to this view, judges should decide cases based on a particular outcome in order to advance their politics. But the American people don't want their judges to pick sides before they hear a case. They want a judge who rules based upon what the law commands.

This is the reason why all Supreme Court nominees since Ginsburg have declined to offer their personal opinions on the correctness of precedent. Seeking assurances from a nominee on how he will vote in certain cases or how he views certain precedent undermines judicial independence and essentially asks for a promise in exchange for a confirmation vote. It's unfair and unethical. Indeed, what litigant could expect a fair shake if the judge has already pre-judged the case before the litigant even enters the courtroom?

I expect Judge Kavanaugh will follow the example set by Ginsburg, and all the nominees that followed her, that a nominee should offer "no hints, no forecasts, no previews" on how they will vote.

Justice Kagan, when asked about *Roe v. Wade*, said the following: "I do not believe it would be appropriate for me to comment on the merits of *Roe v. Wade* other than to say that it is settled law entitled to precedential weight. The application of *Roe* to future cases, and even its continued validity, are issues likely to come before the Court in the future." Senators were satisfied with these answers on precedent. They should be satisfied if Judge Kavanaugh answers similarly.

This is my fifteenth Supreme Court confirmation hearing since I joined the Committee in 1981. Thirty-one years ago, during my fourth Supreme Court confirmation hearing, liberal outside groups and their Senate allies engaged in an unprecedented smear campaign against Judge Robert Bork.

As Mark Pulliam said in an op-ed over the weekend, "The borking of Robert Bork taught special-interest groups that they could demonize judicial nominees based solely on their worldview. Worse, character assassination proved an effective tactic, nearly sinking Justice Clarence Thomas's appointment four years later."

But he also said, "By confirming Judge Kavanaugh, the Senate can go some way toward atoning for its shameful treatment of Robert Bork 31 years ago."

Judge Kavanaugh is one of the most qualified nominees – if not the most qualified nominee – I have seen. Judge Kavanaugh is a graduate of Yale Law School. He clerked for three federal judges, including the man he is nominated to replace. He spent all but three years of his career in public service and has served as a judge for twelve years on the D.C. Circuit – the most influential federal circuit court. He has one of the most impressive records for a lower court judge in the

Supreme Court. In at least a dozen separate cases, the Supreme Court adopted positions advanced by Judge Kavanaugh.

The American Bar Association, whose assessment Democratic leaders have called the “gold standard” of judicial evaluations, rated Judge Kavanaugh unanimously well-qualified.

A review of Judge Kavanaugh’s extensive record demonstrates a deep commitment to the rule of law. He has written eloquently that both judges and federal agencies are bound by the laws Congress enacts. And he has criticized those who substitute their own judgments about what a statute *should* say for what the statute *actually* says.

After the President nominated Judge Kavanaugh, I said this would be the most thorough and transparent confirmation process in history. It has proven to be. Judge Kavanaugh has a twelve-year record on the D.C. Circuit, where he authored 307 opinions and joined hundreds more—amounting to more than 10,000 pages.

He submitted more than 17,000 pages of speeches, articles, and other material to the committee, along with his 120-page written response to the Senate Questionnaire—the most robust ever submitted to a Supreme Court nominee. These add up to more than 27,000 pages of Judge Kavanaugh’s record already available to the American people.

And we received just shy of half a million pages of emails and other documents from Judge Kavanaugh’s service as an executive branch lawyer—which is more than we received for the last five Supreme Court nominees combined. Every one of these more than 483,000 pages of Executive Branch records are available to any senator, anytime, 24/7.

And I pushed for federal officials to significantly expedite the public disclosure process under federal law, so that all Americans have online access to more than 290,000 pages of these records right now on the Judiciary Committee website.

In short, the American people have unprecedented access and more materials to review for Judge Kavanaugh than they ever had for a Supreme Court nominee. And to support the review of Judge Kavanaugh’s historic volume of material, I’ve worked to ensure that more Senators have more access to more material than ever.

Despite this unprecedented transparency, some of my colleagues on the other side have come up with every excuse for resisting this hearing. Indeed, some pledged to oppose Judge Kavanaugh from the moment of announcement.

The Minority Leader said that he would fight Judge Kavanaugh with everything he’s got. And for the most part, his side has tried tactic after tactic to delay and obstruct this process.

One of their tactics was to try to bury this Committee in millions of pages of irrelevant paperwork. Indeed, the Ranking Member even made the unprecedented demand for the search

of every email and every other document from every one of the hundreds of White House aides who came and went during the entire eight years of the Bush Administration. This would have taken months and months to complete. As I have repeatedly stated, I am not going to put the American taxpayers on the hook for the Democratic leaders' fishing expedition.

Democratic leaders made the unprecedented demand for documents from Judge Kavanaugh's time as the White House Staff Secretary, the presidential aide in charge of managing the paper flow to and from the President. These Staff Secretary documents are both the least revealing of Judge Kavanaugh's legal thinking and the most sensitive to the Executive Branch. They're not revealing of his legal thinking because the Staff Secretary's primary responsibility is making sure the President sees advice from *other* advisors, not sharing advice—let alone legal advice—of his own. These documents are the most sensitive to the Executive Branch because they contain advice transmitted directly to the President and are at the heart of executive privilege.

You will hear my Democratic colleagues argue that we are hiding documents—that we have only received 6 percent of Judge Kavanaugh's Executive Branch documents.

This is simply wrong.

They calculate their phony 6 percent figure with two inaccurate numbers. First, their 6 percent figure counts the *estimated* page count by the career archivists at the National Archives, based upon their historical practice, *before* the unprocessed emails and attachments are actually reviewed.

With Judge Kavanaugh's White House emails we have received, the *actual* number of pages ended up being significantly less than the number the National Archives estimated before its processing and review. One reason is because we were able to use technology and cull out the exact duplicate emails. Instead of having to read 13 times an email that Judge Kavanaugh sent to 12 White House colleagues, we only had to read the email once.

Second, the 6 percent figure counts millions and millions of pages of irrelevant Staff Secretary documents that we never even requested nor need.

More importantly, we requested 100 percent of the non-privileged documents from Judge Kavanaugh's time as an Executive Branch lawyer.

As I indicated in my document request, I did not expect to receive privileged documents. Just as we don't ask for staffers' communications with senators when Senate staffers are nominated—Justice Kagan, for example—we shouldn't expect similar communications with the President to be disclosed.

A significant portion of the privileged documents contain deliberations and advice regarding the nomination of judges, and it's critical that these deliberations remain confidential to guarantee that the current and *all future* presidents continue to receive candid advice.

Following the recommendation of former President George W. Bush, the White House claimed a reasonable number of documents as privileged, similar to the number of documents that were privileged during Chief Justice Roberts's confirmation. Then, the Department of Justice informed the Committee that it withheld as privileged roughly 1 in 10 documents sought from the Department.

My document request was modeled after the document request then-Chairman Leahy sent during Justice Kagan's nomination. At that time, he requested a large number, but not all, of her Executive Branch records. Despite Republican questions, he didn't request internal documents from her time as Solicitor General because both sides agreed the documents were too sensitive for disclosure.

If Solicitor General documents were too sensitive to request, then by the same logic, White House Staff Secretary documents are even more sensitive, because they contain candid advice sent directly to the President.

Complaints that the committee's review of an unprecedented volume of documents is somehow insufficient is simply an attempt to distract from Judge Kavanaugh's extensive and very impressive record.

In 2009, then-Chairman Leahy explained that Justice Sotomayor's judicial record "is the best indication of her judicial philosophy. We do not have to imagine what kind of a judge she will be because we see what kind of a judge she has been."

Similarly, we know what kind of judge Kavanaugh will be, because we know what kind of judge he has been for the last twelve years on the most influential circuit court.

Democratic leaders tried their best to stop today's hearing from happening. For all their talk about transparency, what they most feared was a chance for the American people to hear directly from Judge Kavanaugh.

Based on Judge Kavanaugh's extensive record, he is the kind of judge Americans want on the Supreme Court—committed to the rule of law, protective of our constitutional rights, and unfailingly independent.

Welcome, again, Judge Kavanaugh, and congratulations on your nomination.

Senator Kamala Harris
Kavanaugh Confirmation Hearing Opening Statement
September 4, 2018

So I thank you, Mr. Chairman. I'd like to restate my objection from earlier for the record, which is my motion to postpone this hearing. A number of comments have been made by my honored and respected colleagues. I'd like to address a few of them.

One, there was some mention of a concern about Elena Kagan's hearing and that the White House at the time, there was an agreement that those certain records are sensitive and should therefore not be disclosed. It's my understanding that as a point of distinction between that time and today, that those were active cases in the White House and for that reason there was an understanding and agreement that they were of a sensitive nature and should not be disclosed.

In terms of the point that has been made about playing politics and blaming the Supreme Court, I think that we have to give pause when those kinds of concerns are expressed to also think about the fact that there have been many a political campaign that has been run indicating an intention to use the United States Supreme Court as a political tool to end things like the Affordable Care Act, the Voting Rights Act, and campaign finance reform. Which makes this conversation a legitimate one in terms of a reasoned concern about whether this nominee has been nominated to fulfill a political agenda, as it relates to using that Court and the use of that Court.

As it relates to the 42,000 documents, or 42,000 pages of documents, I find it interesting that we get those documents less than 24 hours before this hearing is scheduled to begin, but it took 57 days for those documents to be vetted before we would even be given those documents. So there is some suggestion that we should be speed-readers, and read 42,000 pages of documents in about 15 hours, when it took the other side 57 days to review those same documents. So the logic at least on the math is not applying.

Now, the Chairman has requested 10% of the nominee's documents. That's 10% of 100% of his full record.

The nominee's personal lawyer has only given us 7% of his documents. 7% out of 100% of the full record.

Republicans have only given 4% of these records or made them public. That's 4% of 100% of a full record.

96% of his record is missing. 96% of his record is missing. It is reasonable, it is reasonable that we should want to review his entire record and then we can debate among us the relevance of what is in his record to his nomination, but it should not be the ability of the leadership of this committee to unilaterally make decisions about what we will and will not see in terms of its admissibility, instead of arguing about the weight of whatever is made admissible.

The late Senator Kennedy of Massachusetts called these hearings a Supreme Court nominee's "job interview with the American people."

And by that standard, the nominee before us is coming into his job interview with more than 90% of his background hidden.

I would think that anyone who wanted to sit on the nation's highest court would be proud of their record and would want the American people to see it.

I would think that anyone privileged to be nominated to the Supreme Court of the United States would want to be confirmed in a process that is not under a cloud, that respects due process.

I would think that anyone nominated to the Supreme Court of the United States would want to have a hearing that is characterized by transparency and fairness and integrity and not shrouded by uncertainty and suspicion, and concealment and doubt.

We should not be moving forward with this hearing. The American people deserve better than this.

So Judge Kavanaugh, as most of us know, and I will mention to you and you have young children and I know they are very proud of you and I know you are a great parent and I applaud all that you have done in the community. And so as you know and we all know, this is a week when most students in our country go back to school.

And it occurs to me that many years ago, right around this time, I was starting kindergarten and I was in a bus, a school bus, on my way to Thousand Oaks Elementary School as part of the second class of students as busing desegregated Berkeley, California, public schools.

This was decades after the Supreme Court ruled *Brown v. Board of Education* that separate was inherently unequal.

And as I've said many times, had Chief Justice Earl Warren not been on the Supreme Court of the United States, he could not have led a unanimous decision and the outcome then of that case may have been very different.

Had that decision not come down the way it did, I may not have had the opportunities that allowed me to become a lawyer or a prosecutor.

I likely would not have been elected District Attorney of San Francisco or the Attorney General of California.

And I most certainly would not be sitting here as a member of the United States Senate.

So for me, a Supreme Court seat is not only about academic issues of legal precedent or judicial philosophy. It is personal.

When we talk about our nation's highest court, and the men and women who sit on it, we're talking about the impact that one individual on that Court can have. Impact on people you will never meet and whose names you will never know.

Whether a person can exercise their Constitutional right to cast a ballot, that may be decided if Judge Kavanaugh sits on that Court.

Whether a woman with breast cancer can afford healthcare or is forced off lifesaving treatment.

Whether a gay or transgender worker is treated with dignity or may be treated as a second-class citizen.

Whether a young woman who got pregnant at 15 is forced to give birth or in desperation go to a back alley for an abortion.

Whether a President of the United States can be held accountable or whether he'll be above the law.

All of this may come down to Judge Kavanaugh's vote.

And that's what's at stake in this nomination.

And the stakes are even higher because of the moment we're in, and many of us have discussed this. These are unprecedented times.

As others have already observed, less than 2 weeks ago, the President's personal lawyer and campaign chairman were each found guilty or pleaded guilty to 8 felonies.

The President's personal lawyer, under oath, declared that the President directed him to commit a federal crime.

Yet that same President is racing to appoint to a lifetime position on the highest court in our land, a court that very well may decide his legal fate.

And yes, that's essentially what confirming Judge Kavanaugh could mean.

So it is important, more important I'd say than ever, that the American people have transparency and accountability with this nomination.

And that's why it is extremely disturbing that Senate Republicans have prevented this body, and most important, the American people from fully reviewing Judge Kavanaugh's record, and have disregarded just about every tradition and practice that I heard so much about before I arrived in this place.

Judge Kavanaugh, when you and I met in my office, you said with respect to judicial decisions, that rushed decisions are often bad decisions.

I agree with you. I agree with you.

And when we are talking about who will sit on the Supreme Court of the United States, I believe your point couldn't be more important.

Mr. Chairman, when Judge Kavanaugh was nominated in July, he expressed his belief that "A judge must be independent and must interpret the law, not make the law."

But in reviewing this nominee's background, I am deeply concerned that what guides him is not independence or impartiality. It's not even ideology. I would suggest it is not even ideology.

What I believe guides him and what his record that we've been able to see shows, is what guides this nominee is partisanship.

This nominee has devoted his entire career to a conservative Republican agenda.

Helping to spearhead a partisan investigation into President Clinton.

Helping George W. Bush's legal team ensure that every vote was not counted in *Bush v. Gore*.

Helping to confirm partisan judges and enact partisan laws as part of the Bush White House.

And in all of these efforts, he has shown that he seeks to win at all costs, even if that means pushing the envelope.

And if we look at his record on the D.C. Circuit, and in his recent writings and statements, it is clear that the nominee has brought his political bias to the bench.

He has carried out deeply conservative, partisan agenda as a judge, favoring big business over ordinary Americans, polluters over clean air and water, and the powerful over the vulnerable.

Just last year, Judge Kavanaugh praised the dissent in *Roe v. Wade* and ruled against a scared, 17-year-old girl seeking to end her pregnancy.

He has disregarded the Supreme Court precedent to argue that undocumented workers weren't really employees under our labor laws.

We have witnessed horrific mass shootings from Parkland to Las Vegas to Jacksonville, Florida.

Yet Judge Kavanaugh has gone further than the Supreme Court and has written that because assault weapons are in "common use," assault weapons and high-capacity magazines cannot be banned under the Second Amendment.

When he was part of an Independent Counsel investigation into the Democratic president, the nominee was dogged in demanding answers.

And yet, he has since changed his tune, arguing that presidents should not be investigated or held accountable, a position that I'm sure is not lost on this President.

These positions are not impartial, they are partisan.

Justice Neil Gorsuch, Judge Kavanaugh's classmate, insisted before this Committee that judges are not merely "politicians in robes." I fear that Judge Kavanaugh's record indicates that is exactly what he may very well be.

Now, I know members of this Committee and the nominee's friends and colleagues have assured us that he is devoted to his family, and supportive of his law clerks, and volunteers in his community. And I don't doubt that at all.

But that's not why we are here. I'd rather that we think about this hearing, in the context of the Supreme Court of the United States, and the impact it will have on generations of Americans to come. And do we want that Court to continue a legacy of being above politics and unbiased? Or are we prepared to participate in a process that is tainted and that leaves the American public questioning the integrity of this process?

And I'll close by saying this. We have a system of justice that is symbolized by a statue of a woman holding scales. And she wears a blindfold.

Justice wears a blindfold because we have said in the United States of America, under our judicial system, justice should be blind to a person's status.

We have said that in our system of justice, justice should be blind to how much money someone has, to what you look like or who you love, to who your parents are and the language they speak.

And every Supreme Court Justice must understand and uphold that ideal.

And sir, should those cases come before you, Judge Kavanaugh, I am concerned whether you would treat every American equally or instead show allegiance to the political party and the conservative agenda that has shaped and built your career.

I am concerned your loyalty would be to the President who appointed you and not to the Constitution of the United States.

These concerns I hope you will answer during the course of this hearing. I believe the American people have a right to have these concerns. I also believe the American public has a right to full and candid answers to the questions that are presented to you during the course of this hearing. I will be paying of course very close attention to your testimony and I think you know, the American public will be paying very close attention to your testimony.

Thank you.

**REMARKS OF SENATOR MAZIE K. HIRONO AT THE
CONFIRMATION HEARING OF JUDGE BRETT KAVANAUGH**

AS DELIVERED

Dana Sabraw.

Michael Baylson.

Ketanji Brown Jackson.

Colleen Kollar Kotelly.

Naomi Reice Buchwald.

John Bates.

Derrick Kahala Watson.

These are the names of some of the federal judges across this country who have vindicated my faith in the rule of law over the last year and a half.

These are the women and men, appointed by Republican and Democratic presidents

- Who ordered the government to reunite parents with the children ripped from their arms at the border;
- Who rejected attempts to deny federal funds to cities refusing to be drawn into the war on immigrants;
- Who stopped Executive Orders aimed at kneecapping public sector unions;
- Who stopped the implementation of an ugly ban on transgender Americans serving in our military;
- Who ruled that public officials cannot block citizens from their Twitter feeds; and,
- Who stopped the government from banning Muslims from entering the U.S.

These judges stood firm in defense of the Constitution, the American values it expresses, and the system of checks and balances it enshrines.

At this moment of peril for our democracy, it is these judges, and others like them, who have pushed back against the efforts of a President eager to wield unlimited and unchecked power.

In normal times we would be here today to determine the fitness of a nominee to the Supreme Court of the United States chosen for his or her legal talent and reputation for fairness.

But these are not normal times.

Instead, we are here to decide whether or not to rubber stamp Donald Trump's choice of a pre-selected political ideologue, nominated precisely because he believes a sitting president should be shielded from civil lawsuits, criminal investigation, and prosecution, no matter the facts.

Let's not forget. During his campaign, Donald Trump needed to shore up support from the Republican base who questioned whether he was sufficiently conservative.

To help, he turned to the Federalist Society and the Heritage Foundation to build a pre-approved list of names, and promised to pick from among them when selecting nominees for the Supreme Court.

These groups are long-standing right-wing organizations that advocate for conservative causes and legal positions.

The Heritage Foundation focuses on developing policy to, among other things, oppose climate change, repeal the Affordable Care Act, and reduce regulations for big business.

The Federalist Society focuses on changing the American legal system to align with an ultra-conservative interpretation of the Constitution, including the overturning of *Roe v. Wade*.

When given the opportunity to nominate a new Supreme Court Justice, Donald Trump did exactly as he promised.

He did not select someone who demonstrates independence and fidelity to the rule of law.

Instead, Donald Trump selected a pre-approved name in order to guarantee a 5th vote for his dangerous anti-worker, anti-consumer, anti-women, pro-corporate, and anti-environment agenda.

And Donald Trump selected Brett Kavanaugh from this list for an even more specific reason. The President is trying as hard as he can to protect himself from the independent, impartial, and dogged investigation of his abuse of power, before the walls close in on him entirely.

Because if there's one thing we know about Donald Trump, it is that he is committed to self-preservation every minute, every hour, every day.

Judge Kavanaugh's appointment should be considered in a broader context. The President has been packing our courts with ideologically-driven judges who come to the bench with firm positions and clear agendas, who then go on to rule in ways consistent with those agendas.

For example:

- Trump nominee James Ho – now a Judge on the 5th Circuit – has written in favor of unlimited campaign contributions and, in another case, publically aired his personal views in opposition to abortion.
- Trump nominee Don Willet – now a Judge on the 5th Circuit – has already voted to curtail the independence of a federal agency that helped rescue the economy after the mortgage crisis of 2008.
- Trump nominee Stephanos Bibas – now a Judge on the 3rd Circuit – wrote a dissent to explain that he does not believe Title IX requires school districts to provide transgender students appropriate changing facilities and bathrooms.
- Trump nominee Amy Coney Barret – now a Judge on the 7th Circuit – ruled to keep out of court employees trying to challenge an arbitration proceeding, and cast the deciding vote to allow a business to continue to segregate its workforce.
- And Trump nominee John K. Bush – now a Judge on the 6th Circuit – ruled to keep out of court a woman accusing her employer of age discrimination, despite a dissenting Judge's view that there was sufficient evidence to go forward.

When these Trump-nominated judges came before the Judiciary Committee as nominees, my Democratic colleagues and I tried to find out how they would go about deciding tough cases, what they would base their decisions on when the law did not give a clear enough direction as is often the case.

Time and again, we were told: Don't worry about my personal background or my history as a partisan, political advocate.

Don't worry about what I've done, written, or said until now. When I get on the bench, I'll just follow the law.

But clearly they haven't.

Why should we expect this Supreme Court nominee to be any different?

President Trump selected Brett Kavanaugh because of his fealty to the partisan political movement he has been a part of his entire professional life.

From his clerkship with Judge Alex Kozinski, to his apprenticeship with Ken Starr, to his work on George W. Bush's legal team during the Florida recount and in the White House, Judge Kavanaugh has been knee-deep in partisan politics.

The first reward for that service was his nomination to the D.C. Circuit. It was a tough fight, but Republican-aligned special interests fought for more than 3 years to get him confirmed.

And for the last 12 years as a judge, he has ruled, whether in dissent or majority, in ways in line with their political and ideological agenda.

Now, President Trump has selected Judge Kavanaugh to provide the decisive 5th vote in cases that will change some of the most basic assumptions Americans have about their lives and their government.

There are more than 730 federal judges working on thousands of cases across the country every day. Most of these cases end in trial courts. Some of them are appealed and heard in appellate courts. The closely-divided Supreme Court hears very few cases – many times fewer than 100 – every year.

Before Justice Kennedy retired, so many important Constitutional rights were hanging in the balance, decided on narrow grounds by 5-4 votes.

And now that Justice Kennedy has left the Court, the forces opposed to workers' rights, women's rights, LGBTQ rights, voting rights, civil rights of all kinds, and environmental protections are eager to secure a solid majority on the Court to support their right-wing views.

These ultra-right-wing forces have been working for decades to prepare for this moment because they know that a single vote from one justice is all it would take to radically change the direction of this country.

It could take just one vote on the Supreme Court to overturn *Roe v. Wade*, and deny women control over their own reproductive rights.

It could take just one vote to declare the ACA's preexisting condition protections unconstitutional.

It could take just one vote to dismantle environmental protections that keep our air safe to breathe and our water clean to drink.

It could take just one vote to dismantle common sense gun safety laws that keep our communities safe.

And it could take just one vote to further erode protections for working people and unions.

Since this nomination was announced, I have been asked many times why the Democrats would even bother going through the motions, when we know that our Republican colleagues will do anything to support this Administration's judicial nominees.

There are battles worth fighting regardless of the outcome. A lifetime appointment to the Supreme Court, of someone who will provide the 5th vote on issues impacting the lives of every working American is a battle worth fighting.

So, I intend to use this hearing to demonstrate to the American people precisely why who sits on the Supreme Court matters.

Why a 5th ideologically-driven conservative and political vote on the Court is dangerous for our country.

Why the Senate should reject this president's latest attempt to rig the system in his favor.

As Senators begin to ask their questions in the coming days, I ask the American people to listen carefully to what the nominee says, and compare it with what we heard only a short time ago from Neil Gorsuch at his confirmation hearing.

Just 18 months ago, Justice Gorsuch told us that, "[a]ll precedent of the United States Supreme Court deserves the respect of precedent, which is quite a lot. It's the anchor of the law."

Justice Gorsuch said, "It's not whether I agree or disagree with any particular precedent. That would be an act of hubris. Because a precedent, once it's decided, it carries far more weight than what I personally think."

Justice Gorsuch made these promises when he was asking for our votes. But earlier this year, he joined a majority of the Court to overturn precedent in a 41-year-old case that protected government workers and their ability to form a union in a 5-4 decision.

I expect Judge Kavanaugh to make similar promises over the next few days, only to do, sadly, the exact opposite if confirmed.

Our job here is important, because every American should be concerned about what our government and country would look like if Judge Kavanaugh is confirmed.

We owe it to the American people, and to all of the independent-minded judges I mentioned at the beginning of my remarks, to preserve the integrity of our Constitution, and the fairness and order of a system that has served us well for so long.

What may be going through your mind right now is to simply and stoically endure this hearing. But don't you think you owe it to the American people to disclose all the documents being requested because you have nothing to hide?

I agree with my colleague Senator Durbin. If you stand behind your full record in public life, fundamental fairness dictates that you join us in our call for this Committee to suspend until we receive all relevant documents and have a chance to review them.

Your failure to do so would reflect a fundamental mistrust of the American people.

Thank you Mr. Chairman.

**Senator Amy Klobuchar
Kavanaugh Confirmation Hearing Opening Statement
September 4, 2018**

Welcome, Judge Kavanaugh. We welcome your family as well.

On its face, this may look like a normal confirmation hearing. It has all the trappings. All of us up here. All of the cameras out there. The statements. The questions. All of it looks normal.

But this is not a normal confirmation hearing. First, as we have debated this morning, we are being asked to give advice and consent when the Administration has not consented to give us over 100,000 documents, all of which detail a critical part of the Judge's career – the time he spent in the White House.

And—in addition—the majority party has not consented to make 189,000 of the documents we do have public.

As a former prosecutor, I know that no lawyer goes to court without reviewing the evidence and record. I know—and I know you know Judge Kavanaugh—that a good judge would not decide a case with only 7 percent of the key documents. A good judge would not allow a case to move forward if one side dropped 42,000 pages of documents on the other side the night before a case started. And yet, that is where we are today.

This isn't normal. It's an abdication of the role of the Senate and a disservice to the American people. And it is our duty to speak out.

Secondly, this nomination comes before us at a time when we are witnessing seismic shifts in our democracy. Foundational elements of our government – including the rule of law – have been challenged and undermined. Today, our democracy faces threats that would have seemed unbelievable not long ago.

Our intelligence agencies agree that a foreign adversary attempted to interfere in our most recent election, and it's happening again. In the words of our Director of National Intelligence, "the lights are blinking red."

There is an extensive ongoing investigation by a special counsel. The President's private lawyer and campaign chairman have been found guilty of multiple federal crimes.

The man appointed as special counsel in this investigation – a man who has served with distinction under presidents from both parties – has been under siege. The dedicated public servants who work in our Justice Department, including the Attorney General and the FBI, have been subjected to repeated threats and have had their work politicized and their motives questioned.

In fact, just this past weekend, federal law enforcement was rebuked—was called out—by the President of the United States for simply doing their jobs—for prosecuting two white collar

defendants for two significant crimes—one, insider trading and one, campaign theft. Why? Because the defendants were friends and campaign supporters of the President.

As a former prosecutor, as someone who has seen federal law enforcement do their jobs, this is abhorrent to me.

And the last branch, the third branch of government – our courts and individual judges – have been under assault, not just by a solitary disappointed litigant, but by the President of the United States.

Our democracy is on trial. And for the pillars of our democracy and our Constitution to weather this storm, our nation’s highest Court must serve as a ballast in these turbulent times.

Our very institutions—and those nominated to protect these institutions—must be fair, impartial and unwavering in their commitment to truth and justice.

So today we will begin a hearing in which it is our duty to carry on the American constitutional tradition that John Adams stood up for many centuries ago—and that is to be, quote, “a government of laws and not of men.”

To me that means figuring out what your views are Judge on whether a President is above the law. It is a simple concept, something that we all learned in grade school, that no one is above the law. So I think it is a good place to start.

There were many highly credentialed nominees like yourself that could have been sitting before us today, but—to my colleagues—what concerns me is that during this critical juncture in history, the President has hand-picked a nominee to the Court with the most expansive view of Presidential power possible... a nominee who has actually written that a President—on his own—can declare laws unconstitutional.

Of course we are very pleased when a Judge submits an article to the University of Minnesota Law Review and even more so when that article receives so much national attention.

But the article you wrote that I’m referring to, Judge, raises so many troubling questions. Should a sitting President really never be the subject of an investigation? Should a sitting President never be questioned by a Special Counsel? Should a President really be given total authority to remove a special counsel?

In addition to the article, there are other pieces of this puzzle which demonstrate that the nominee before us has an incredibly broad view of a President’s executive power. Judge Kavanaugh you wrote, for instance, in *Seven Sky v. Holder* that a President can disregard a law passed by Congress if he deems it to be unconstitutional, even if a court has upheld it.

What would that mean when it comes to laws protecting the Special Counsel? What would that mean when it comes to women’s healthcare? The days of the divine right of kings ended with the

Magna Carta in 1215 and centuries later in the wake of the American Revolution, a check on the executive was a major foundation of our U.S. Constitution.

For it was James Madison—who may not have had a musical named after him but was a top scholar of his time—who wrote in Federalist 47: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny.”

So what does that warning mean in real life terms today?

Here’s one example: it means whether people like Kelly Gregory—an Air Force veteran, mother, and business owner who is here from Tennessee, and who is living with stage four breast cancer—can afford medical treatment. At a time when the Administration is arguing that protections to ensure people with pre-existing conditions can’t be kicked off their health insurance are unconstitutional, we cannot—and should not—confirm a Justice who believes the President’s views alone carry the day.

One opinion I plan to ask about? When Judges appointed by presidents of both parties joined in upholding the Consumer Financial Protection Bureau, you Judge dissented. Your dissent concluded that the Bureau – an agency which has served us well in bringing back over 12 billion dollars to consumers for fraud from credit cards and loans to mortgages – was unconstitutional.

Or in another case, you wrote a dissent against the rules that protect net neutrality – rules that help all citizens and small businesses have an even playing field when it comes to accessing the internet.

Another example that seems mired in legalese but is critical for Americans? Antitrust law. In recent years a conservative majority on the Supreme Court has made it harder and harder to enforce the nation’s antitrust laws ruling in favor of consolidation and market dominance. Yet two of Judge Kavanaugh’s major antitrust opinions suggest that he would push the Court even further down this pro-merger path. We should have more competition and not less.

Now to go from my specific concerns and end on a higher plane: All the attacks on the rule of law and our justice system over the past year have made me—and I would guess some of my other colleagues on this committee—pause and think many times about why I decided to come to the Senate and get on this committee and why, much further back, I even decided to go into law in the first place.

Now I will tell you that not many girls in my high school class said they dreamed of being a lawyer. We had no lawyers in our family and my parents were both the first in their families to go to college.

But somehow my dad convinced me to spend a morning sitting in a courtroom watching a state court district judge handle a routine calendar of criminal cases. The judge took pleas, listened to arguments, and handed out misdemeanor sentences. It was certainly nothing glamorous like the work for the job you are nominated for Judge, but it was important just the same.

I realized that morning that behind each and every case—no matter how small—there was a story, a person. Each and every decision that judge made that day affected someone's life. And I noticed how often he had to make gut decisions and try his best to take account of what his decisions would mean to that person.

This week I remembered that day and I remembered I had written an essay about it at the ripe old age of 17. I went back and looked at what I had said. It is something that I still believe today and....that is that "to be part of an imperfect system, to have a chance to better that system" was and is a cause worth fighting for...a job worth doing.

Our government is far from perfect Judge... nor is our legal system. But we are at a crossroads in our nation's history where we must make a choice: are we going to dedicate ourselves to improving our democracy, improving our justice system or not?

The question we are being asked to address in this hearing is whether this judge ...at this time in our history...will administer the law "with equal justice" as it applies to all citizens—regardless of if they live in a poor neighborhood or a rich one, in a small house or the White House.

Our Country needs a Supreme Court Justice who will better our legal system—a Justice who will serve as a check and balance against the other branches ... who will stand up for the rule of law without consideration of politics or partisanship ... who will uphold our Constitution without fear or favor ... and who will work for the betterment of the great American experiment of democracy.

That's what this hearing is about. Thank you.

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OPENING STATEMENT OF SENATOR PATRICK LEAHY (D-VT.)
U.S. SUPREME COURT NOMINATION HEARING OF JUDGE BRETT KAVANAUGH
SEPTEMBER 4, 2018

I have served in the Senate for 44 years, a span that includes 19 nominations to the Supreme Court. I have never seen so much at stake with a single seat. And I have never seen such a dangerous rush to fill it. President Trump promised that he would only nominate judges to the Supreme Court who would overturn *Roe v. Wade*. Judges who would dismantle the Affordable Care Act. Judges who would re-shape our judiciary. If that is not judicial activism, I do not know what is.

Judge Kavanaugh, with your nomination, the President appears to be following through on his promises. It also seems that you may have intrigued him for another reason: your expansive view of executive power — and executive immunity. You've taken the unorthodox position that presidents should not be burdened with a criminal or civil investigation while in office. I find it difficult to imagine that your views on this subject escaped the attention of President Trump, who seems increasingly fixated on his ballooning legal jeopardy.

When questioning you about these concerns, we will certainly look to your record on the bench. Indeed, your 12 years on the D.C. Circuit Court of Appeals will loom large during these hearings. But the unknown looms even larger. Before sitting on the bench, you were a political operative involved in the most partisan controversies of our times. During this time you shared your personal views on contentious issues without regard to restrictions imposed by precedent or *stare decisis*. And it is precisely those views that are being hidden from us today.

The Judiciary Committee's Supreme Court hearings are meant to be an unsparing examination of a nominee to our highest court. They are intended to give the American people a genuine opportunity to scrutinize a nominee's judicial philosophy, beliefs, and character. Because, if confirmed, with the stroke of a pen, a nominee may impact their lives for a generation or more.

How far we have fallen. Judge Kavanaugh, there are so many things wrong with this Committee's vetting of your record that it is hard to know where to begin. Indeed, you should not be sitting in front of us today. Your vetting is less than 10 percent complete. In critical ways, our Committee is abandoning its tradition of exhaustively vetting Supreme Court nominees.

First, inexplicably, my Republican friends refused to request records from your three years as White House Staff Secretary — a time you described as “the most formative” for you as a judge, when you provided advice “on any issue that may cross [the President's] desk.” We know those issues included abortion, same-sex marriage, and even torture. But six weeks ago Senate Republicans huddled in a private meeting with the White House Counsel, and hours later the American people were told those records would be off limits.

Second, in a stark departure from Committee precedent, Chairman Grassley sent a partisan records request to the National Archives. Not only did it omit all one million records from your three years as Staff Secretary, it did not even request a privilege log. That means this Committee

is in the dark as to what specific documents are being withheld and why. Such a move is simply incompatible with transparency.

Third, the Archives told us that it could not produce this partial records request until the end of October. Surely, I would think, the Senate could wait until then, even if that means a Supreme Court with eight justices for a short time. Senate Republicans' treatment of Chief Judge Merrick Garland would seem to attest to their patience with filling Supreme Court vacancies. But, alas, Republicans instead cast aside the Archives, swapping the nonpartisan review process used for every nominee since Watergate for a partisan one.

Every White House record that we have received was hand-picked by your deputy in the Bush White House. A hyper-conflicted lawyer who also represents a half-dozen Trump administration officials in the Russia investigation. This partisan lawyer has decided which of your records the Senate and the American people get to see.

Fourth, countless documents that have been provided to the Committee contain apparent alterations and omissions, with zero explanation. No court in the country would accept this as a legitimate document production. And the Senate should not either.

Fifth, more than 40 percent of the documents we have received — almost 190,000 pages — are considered “committee confidential” by Chairman Grassley. For the vast majority there is not even a conceivable argument to restrict them. Compare this to the mere 860 documents that were designated committee confidential for Justice Kagan, following the request of the nonpartisan Archives.

Sixth, on Friday we learned that President Trump is claiming executive privilege over an additional 102,000 pages of your records. Such a blanket assertion of executive privilege is simply unheard of — and it is outrageous. The last time a president attempted to hide a Supreme Court nominee's records by invoking executive privilege was President Reagan for Justice William Rehnquist. At the time, however, two Republicans joined with Democrats to demand the documents be released. And they were. How times have changed.

Seventh, to date we have received less than half of Chairman Grassley's partial records request. Meaning, we are moving forward even though we have received a fraction of the records that even Republicans claimed they needed in order to vet your nomination just six weeks ago.

Finally, we received an additional 42,000 pages from your record just hours ago. The notion that anyone here has properly reviewed them — or even seen them at all — is laughable. That alone would be reason to postpone during normal times. But nothing about this is normal.

All told, only four percent of your White House record has been shared with the public, and only seven percent has been made available to this Committee. The rest remains hidden from scrutiny. Compare this to the 99 percent of Justice Kagan's White House record that was available to all Americans, as a result of the bipartisan process I ran with then-Ranking Member Jeff Sessions.

If I have not been clear, I will be so now: Today the Senate is not simply ‘phoning in’ our vetting obligation – we are discarding it. It is not only shameful – it is a sham.

From the bits and pieces of your record we have received, it appears that you provided misleading testimony about your involvement in controversial issues at the Bush White House during your previous confirmation hearings. I asked you about these concerns during our meeting last month, and you should expect me to return to them this week. What I fear most is that the American people will not know the full truth until your full record is public. And, unfortunately, Republicans have done their best to ensure that will not happen.

We thus begin these hearings with gaping holes spanning multiple years of your career that deeply influenced your thinking as a judge. Any claim that this has been a thorough or transparent process would be downright Orwellian. This is the most incomplete, most partisan, and least transparent vetting for any Supreme Court nominee I have ever seen. And I’ve seen more than anyone else in the Senate.

Judge Kavanaugh, this hearing is premature, but I hope you will use it to answer our questions directly, clearly, and honestly. The American people have real concerns about how your confirmation would affect their lives.

The Supreme Court is the guarantor of liberties in our republic. Few, I would argue, are worthy of taking a seat. Only those with unimpeachable integrity. Only those who believe that truth is more important than party. Only those who are committed to upholding the rights of all Americans, not just those in power. As you know, inscribed in Vermont marble above the Court’s entrance are the words “Equal Justice Under Law.” For the millions of Americans fearful they are on the verge of losing hard-fought rights, that aspiration has never been more important than it is today, and it has never been more at risk.

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Prepared Opening Statement for Senator Thom Tillis
On
The nomination of Brett M. Kavanaugh to be
Associate Justice of the United States Supreme Court

I want to thank Chairman Grassley for holding today's hearing and for the countless hours of work he has dedicated to Judge Kavanaugh's nomination.

When Judge Kavanaugh was first nominated, Chairman Grassley committed to every member that we would have the most open, fair, and transparent nomination process ever. I believe he's kept that commitment.

Under Chairman Grassley's leadership this Committee has received the most comprehensive set of documents

provided by a nominee to the Supreme Court of the United States *ever*.

We've received more documents than the nominations of Justices Roberts, Alito, Sotomayor, Kagan, and Gorsuch.

In addition to the more than 300 opinions authored by Judge Kavanaugh, every member of this Committee received access to thousands of pages of documents from Judge Kavanaugh's tenure in the White House Counsel's office and his numerous speeches, law review articles, and interviews.

These documents have given us a complete and comprehensive review of his record and his insight into the most substantive legal issues facing this country.

I appreciate the great lengths the Chairman has gone to provide us these records and his many, *many* good faith efforts to engage with the Minority party on this issue. It's unfortunate they elected to create a faux-outrage over non-relevant documents instead of working with the Chairman in good faith. Regardless, we all should be thankful for the Chairman and his staffs' hard work.

Judge Kavanaugh, I'd now like to turn to you and offer my congratulations to you and your entire family. I know that your wife, children, family and friends are all proud of you.

If confirmed, you will become the 115th Justice of the Supreme Court and part of the long history of some of our nation's most distinguished and brilliant legal minds. That's an immense honor, and one which you and everyone who has helped you along the way should be proud.

As some of my colleagues have indicated today, many view your nomination as a critical juncture in the history of our constitutional republic.

I agree. However, I'd remind my colleagues that every single nomination to the Supreme Court is consequential and has a lasting impact on the history of our nation.

When a nominee to the Supreme Court is confirmed, they serve for life. Justices serve beyond the President who appointed them, and sometimes their appointments last beyond the Senators who vote for them. Every single Justice on the court plays a role in deciding cases that impact more than 320 million people.

These cases touch on some of the most important issues in our constitutional republic.

What are the limits of abusive and intrusive government power? What is the proper role of each branch of government—particularly Administrative agencies—in our constitutional republic? What are the basic fundamental protections that our Constitution grants all Americans?

These are all key and foundational questions the Supreme Court considers every single term. If confirmed you will be tasked with answering many of them.

Each Justice plays a major role in shaping the Court's jurisprudence, writing majority opinions, concurrences, and dissents which shape and inform the contours of the constitutional law.

Lawyers will rely on those writings for decades—if not longer—giving each individual Justice an opportunity to provide a stamp on the history of our republic.

That is why it is so critically important that we, the United States Senate, exercise our constitutional authority to confirm appointments wisely. Article 2, section 2 of the United States Constitution gives the Senate advise and consent authority over Presidential appointments.

This authority is critical to maintaining the founding fathers' vision of checks and balances and separation of powers.

I'd also like to take a moment and talk about the structural separation of powers embodied in our constitution and what the appropriate role of an Article III judge should be in that system. Our founders understood that our constitution's structural separation of powers was the key to individual liberty.

The founding generation believed so strongly in that principle that many of them didn't even think a Bill of Rights was necessary.

In their view, the federal government was so limited by the power of the States and by the separation of powers between three branches that it was impossible for it to ever pose a threat to individual liberty.

The late Justice Scalia, in his long study of the Constitution and our founding generation's desire for ordered liberty, had the same viewpoint. As he noted in his 2012 book *Reading Law: The Interpretation of Legal Texts*:

“Every...dictator in the world today, every president for life, has a Bill of Rights. “That’s not what makes us free; if it did, you would rather live in Zimbabwe. But you wouldn’t want to live in most countries in the world that have a Bill of Rights. What has made us free is our Constitution. Think of the word ‘constitution;’ it means structure.”

Justice Scalia went on to note that “the genius” of our founding generation is that they dispersed power across multiple departments. In his view, the real danger to our constitutional republic was the “centralization” of power in one part of government. When that happens, liberty dies and tyranny reigns.

Unfortunately, the very centralization of power our founding generation feared has occurred. But instead of centralization of power in one person, we now have it in 9.

Justice Kennedy leaves behind a great legacy.

If you look at the commentary made after his resignation, you'll find a robust discussion of his landmark rulings on gay rights, freedom of speech, and the proper relationship between federal and state governments. All appropriate commentary, all correct.

However, another common theme you heard upon his retirement is that the Court lost its "swing vote." You heard many commentators describing Justice Kennedy as the "decider," the one person on the Court who could and did change the outcome on many, many cases.

Some commentators viewed Justice Kennedy's influence so strong they described him as "Emperor" Kennedy.

That's disturbing, and highlights what I believe has become a major problem in our modern constitutional system: the concentration of power in an unelected Supreme Court.

Again, Justice Scalia recognized the inherent danger of the concentration of power in the Supreme Court. As he said in one of my favorite dissents:

“It is of overwhelming importance, however, who it is that rules me. Today ... my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even

imagine—of the Court’s claimed power to create “liberties” that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”

Article III judges cannot, and should not be common-law judges. Their role in our republic is not to read-in rights to the Constitution that go beyond the history and

tradition embodied in them at the time they were ratified.

They have a limited role of deciding the cases and controversies before them based on the law as written.

My review of Judge Kavanaugh's record convinces me that he is not only the most imminently qualified individual ever to be nominated, but that he also understands the appropriate and proper role of a Judge in our federal system.

In Judge Kavanaugh's over 300 opinions he has time and time again reached the conclusion dictated by the law, not by his personal policy preference.

Now several of my colleagues have engaged in hyperbole and described Judge Kavanaugh's nomination as the end to gay-rights, abortion rights, labor rights, and the list goes on and on and on. But they ignore a central fact. Judge Kavanaugh's rulings aren't meant to be for or against a particular policy outcome. They aren't meant to be a commentary on politics or public policy. They don't reflect his personal views or morality.

His opinions simply order the outcome the law—as passed by Congress—dictates. Nothing more, nothing less. He understands that a judge is supposed to be an umpire.

Someone who applies the rules of the road fairly and uniformly and doesn't change the rules mid-game.

My Democratic colleagues claim to care about the First Amendment, the Fifth Amendment, and the Fourteenth Amendment. If they care about our constitutional liberties then they should care about confirming a judge who understands the proper role of the Supreme Court.

Rights granted by 5 can be ended by 5. To quote Justice Ginsburg "real change, enduring change, happens one step at a time." It doesn't happen by judicial fiat.

Judge Kavanaugh understands that principle. He knows the role of a Supreme Court Justice. And he is the most qualified person for this job.

Judge, again, congratulations. I look forward to your testimony and to hearing you discuss your judicial philosophy over the next two days.

**Senator Sheldon Whitehouse
Kavanaugh Confirmation Hearing Opening Statement
September 4, 2018 – AS-PREPARED FOR DELIVERY**

When is a pattern evidence of bias?

In court, pattern is evidence of bias all the time; evidence on which juries and trial judges rely, to show discriminatory intent, to show a common scheme, to show bias.

When does a pattern prove bias?

That's no idle question. It's relevant to the pattern of the Roberts Court when its Republican majority goes off on its partisan excursions through the civil law; when all five Republican appointees — the Roberts Five, I'll call them — go raiding off together, and no Democratic appointee joins them.

Does this happen often? Yes, indeed.

The Roberts Five has gone on 80 of these partisan excursions since Roberts became chief.

There is a feature to these eighty cases. They almost all implicate interests important to the big funders and influencers of the Republican Party. When the Republican Justices go off on these partisan excursions, there's a big Republican corporate or partisan interest involved **92 percent** of the time.

A tiny handful of these cases don't implicate an interest of the big Republican influencers — so flukishly few we can set them aside. That leaves 73 cases that all implicate a major Republican Party interest. Seventy-three is a lot of cases at the Supreme Court.

Is there a pattern to those 73 cases? Oh, yes there is.

Every time a big Republican corporate or partisan interest is involved, the big Republican interest wins. Every. Time.

Let me repeat: In seventy-three partisan decisions where there's a big Republican interest at stake, the big Republican interest wins. Every. Damned. Time.

Hence the mad scramble of big Republican interest groups to protect a "Roberts Five" that will reliably give them wins — really big wins, sometimes.

When the Roberts Five saddles up, these so-called conservatives are anything but judicially conservative.

They readily overturn precedent, toss out statutes passed by wide bipartisan margins, and decide on broad constitutional issues they need not reach. Modesty, originalism, stare decisis, all these

supposedly conservative judicial principles, all have the hoof prints of the Roberts Five all across their backs, wherever those principles got in the way of wins for the Big Republican interests.

The litany of Roberts Five decisions explains why big Republican interests want Kavanaugh on the Court so badly that Republicans trampled so much Senate precedent to shove him through; so let's review the litany.

What do big Republican interests want? Well, first, they want to win elections.

What has the Roberts Five delivered?

Help Republicans gerrymander elections: *Vieth v. Jubelirer*, 5-4, license to gerrymander.

Help Republicans keep minority voters away from the polls: *Shelby County*, 5-4 and *Bartlett v. Strickland*, 5-4. And *Abbott v. Perez*, 5-4, despite the trial judge finding the Texas legislature actually intended to suppress minority voters.

And the big one: help corporate front-group money flood elections — if you're a big special interest you love unlimited power to buy elections and threaten and bully Congress. *McCutcheon*, 5-4 counting the concurrence; *Bullock*, 5-4; and the infamous, grotesque 5-4 *Citizens United* decision (which belongs beside *Lochner* on the Court's roll of shame).

What else do the big influencers want?

To get out of courtrooms. Big influencers hate courtrooms, because their lobbying and electioneering and threatening doesn't work. In a courtroom, big influencers used to getting their way have to suffer the indignity of equal treatment.

So the Roberts Five protects corporations from group "class action" lawsuits: *Walmart v. Dukes*, 5-4; *Comcast*, 5-4; and this past term, *Epic Systems*, 5-4.

The Roberts Five helps corporations steer customers and workers away from courtrooms and into mandatory arbitration: *Concepcion*, *Italian Colors*, and *Rent-a-Center*, all Roberts Five. *Epic Systems* does double duty here; now workers can't even *arbitrate* their claims as a group.

Hindering access to the courthouse for plaintiffs generally: *Iqbal*, 5-4.

Protecting corporations from being taken to court by employees harmed through pay discrimination, *Ledbetter*, 5-4; age discrimination, *Gross*, 5-4; harassment, *Vance* 5-4; and retaliation, *Nassar*, 5-4. Even insulating corporations from liability for international human rights violations: *Jesner*, 5-4.

Corporations aren't in the Constitution; juries are. Indeed, courtroom juries are the one element of American government designed to protect people against encroachments by private wealth

and power. So of course the Roberts Five rule for wealthy, powerful corporations over jury rights every time — with nary a mention of the Seventh Amendment.

What's another one? Oh, yes. A classic: helping big business bust unions. *Harris v. Quinn*, 5-4; and *Janus v. AFSCME* this year, 5-4, overturning a 40-year precedent.

Lots of big Republican influencers are polluters. They like to pollute for free.

So of course the Roberts Five delivers decisions that let corporate polluters pollute. To pick a few: *Rapanos*, weakening wetland protections, 5-4; *National Association of Home Builders*, weakening protections for endangered species, 5-4; *Michigan v. EPA*, helping air polluters, 5-4; and, in the face of emerging climate havoc, there's the procedurally aberrant 5-4 partisan decision to stop the EPA Clean Power Plan.

Then come Roberts Five bonus decisions advancing a far-right social agenda: *Gonzalez v. Carhart*, upholding restrictive abortion laws; *Hobby Lobby*, granting corporations religious rights over the health care rights of employees; *NIFLA*, letting states deny women truthful information about their reproductive choices—all 5-4, all the Republicans.

Add *Heller* and *McDonald*, which reanimated for the gun industry a theory a former Chief Justice once called a “fraud”; both decisions 5-4.

This year, *Trump v. Hawaii*, 5-4, rubber stamping President Trump's discriminatory Muslim travel ban.

And in case Wall Street was feeling left out, helping insulate investment bankers from fraud claims: *Janus Capital Group, Inc.*, 5-4.

No wonder the American people feel the game is rigged.

Here's how the rigged game works: big business and partisan groups fund the Federalist Society, which picked Gorsuch and now Kavanaugh. As White House Counsel admitted, they “insourced” the Federalist Society for this selection. Exactly how the nominees were picked, and who was in the room where it happened, and who had a vote or a veto, and what was said or promised, is all a deep dark secret.

Then big business and partisan groups fund the Judicial Crisis Network, which runs dark-money political campaigns to influence Senators in confirmation votes, as they've done for Gorsuch and now Kavanaugh. Who pays millions of dollars for that, and what their expectations are, is a deep dark secret.

These groups also fund Republican election campaigns with dark money. The identity of the big donors? A deep dark secret.

Once the nominee is on, the same business front groups, with ties to the Koch Brothers and other funders of the Republican political machine, file “friend of the court,” or amicus briefs, to signal

their wishes to the Roberts Five. Who is really behind those “friends” is another deep dark secret.

It has gotten so weird that Republican justices now even send hints back to big business interests about how they’d like to help them next, and then big business lawyers rush out to *lose* cases, just to get them up before the friendly Court, pronto. That’s what happened in *Friedrichs* and *Janus*.

The U.S. Chamber of Commerce is the biggest corporate lobby of them all. It’s the mouthpiece for Big Coal, Big Oil, Big Tobacco, Big Pharma, Big Guns, you name it—and this year, with Justice Gorsuch riding with the Roberts Five, the Chamber won nine of the 10 cases it weighed in on.

The Roberts Five since 2006 has given the Chamber more than three-quarters of their total votes. This year in civil cases they voted for the Chamber’s position nearly 90 percent of the time.

People are noticing. Veteran court-watchers like Jeffrey Toobin, Linda Greenhouse and Norm Ornstein describe the court as a delivery service for Republican interests:

Toobin has written that on the Supreme Court, “Roberts has served the interests . . . of the contemporary Republican Party.”

Greenhouse has said, “the Republican-appointed majority is committed to harnessing the Supreme Court to an ideological agenda.”

Ornstein described, “the new reality of today’s Supreme Court: It is polarized along partisan lines in a way that parallels other political institutions and the rest of society, in a fashion we have never seen.”

And the American public knows it, too. The American public thinks the Supreme Court treats corporations more favorably than individuals, compared to vice versa, by a 7-to-1 margin.

Now, let’s look at where Judge Kavanaugh fits in. A Republican political operative his whole career, who’s never tried a case. He made his political bones helping the salacious prosecution of President Clinton, and leaking prosecution information to the press.

As an operative in the second Bush White House, he cultivated relationships with political insiders like nomination guru Leonard Leo, the Federalist Society architect of Kavanaugh’s court nominations. On the D.C. Circuit, Kavanaugh gave more than 50 speeches to the Federalist Society. That’s some auditioning.

On the DC Circuit, Kavanaugh showed his readiness to join the Roberts Five with big political wins for Republican and corporate interests: unleashing special interest money into elections; protecting corporations from liability; helping polluters pollute; striking down commonsense gun regulations; keeping injured plaintiffs out of court; and perhaps most important for the current

occupant of the Oval Office, expounding a nearly limitless vision of presidential immunity from the law.

His alignment with right-wing groups who came before him as “friends of the court”? 91 percent.

When big business trade associations weighed in? 76 percent. This is what corporate capture of the courts looks like.

There are big expectations for you. The shadowy dark-money front group, the Judicial Crisis Network, is spending tens of millions in dark money to push for your confirmation. They clearly have big expectations about how you’ll rule on dark money.

The NRA has poured millions into your confirmation, promising their members that you’ll “break the tie.” They clearly have big expectations on how you’ll vote on guns.

White House Counsel Don McGahn said, “There is a coherent plan here where actually the judicial selection and the deregulatory effort are really the flip side of the same coin.” Big polluters clearly have big expectations for you on their deregulatory effort.

Finally, you come before us nominated by a President named in open court as directing criminal activity, and a subject of ongoing criminal investigation. You displayed expansive views on executive immunity from the law. If you are in that seat because the White House has big expectations that you will protect the President from the due process of law, that should give every Senator pause.

Tomorrow, we will hear a lot of “confirmation etiquette.” It’s a sham.

Kavanaugh knows the game. In the Bush White House, he coached judicial nominees to just tell Senators that they will adhere to statutory text, that they have no ideological agenda. Fairy tales.

At his hearing, Justice Roberts infamously said he’d just call “balls and strikes,” but the pattern – the 73-case pattern – of the Roberts Five qualifies him to have NASCAR-style corporate badges on his robes.

Alito said in his hearing what a “strong principle” stare decisis was, an important limitation on the Court. Then he told the Federalist Society stare decisis “means to leave things decided when it suits our purposes.”

Gorsuch delivered the key fifth vote in the precedent-busting, but also union-busting, *Janus* decision. He too had pledged in his hearing to “follow the law of judicial precedent,” assured us he was not a “philosopher king,” and promised to give equal concern to “every person, poor or rich, mighty or meek.”

How did that turn out? Great for the rich and mighty: Gorsuch is the single most corporate-friendly justice on a Court already full of them, ruling for big business interests in over 70 percent of cases, and in every single case where his vote was determinative.

The president early on assured evangelicals his Supreme Court picks would attack *Roe v. Wade*. Despite “confirmation etiquette” assurances about precedent, your own words make clear you don’t really believe *Roe v. Wade* is settled law.

We have seen this movie before. We know how it ends.

The sad fact is that there is no consequence for telling the Committee fairy tales about stare decisis, and then riding off with the Roberts Five, trampling across whatever precedent gets in the way of letting those Big Republican interests keep winning 5-4 partisan decisions.

Every. Damned. Time.

Testimony of Akhil Reed Amar—Text

Testimony Before the United States Senate Committee on the Judiciary
on the Nomination of Brett Kavanaugh to the United States Supreme Court

September 7, 2018
By Akhil Reed Amar

Thank you, Mr. Chair. My name is Akhil Reed Amar. I am the Sterling Professor of Law and Political Science at Yale University, where I specialize in constitutional law.¹ I have previously testified before this committee on seven occasions; it is always a high honor and a solemn responsibility to appear here.² Here are my top ten points:

1. Brett Kavanaugh is the best candidate on the horizon.

The Supreme Court’s biggest job is to interpret and apply the Constitution. Kavanaugh has studied the Constitution with more care, consistency, range, scholarliness, and thoughtfulness than any other sitting Republican federal judge under age 60. He is the best choice from the long list of 25 potential nominees publicly circulated by President Trump.³ I say this as a constitutional scholar who voted for Hillary Clinton and strongly supported every Supreme Court nomination by Democratic Presidents in my adult lifetime.

2. Originalism is wise and nonpartisan.

Studying the Constitution requires diligence and intelligence—especially for those, like Kavanaugh, who are “originalists,” paying special heed to what the Constitution’s words originally meant when adopted. I too am an originalist. In prioritizing the Constitution’s text, history, and structure to discern its principles and to distill its wisdom, we originalists are

Testimony of Akhil Reed Amar—Text

following in the footsteps of George Washington, Alexander Hamilton, James Madison, John Marshall, Joseph Story, and Abraham Lincoln, among others.

Originalism is neither partisan nor outlandish.⁴ The most important originalist of the last century was a towering liberal Democratic Senator-turned-Justice, Hugo Black, the driving intellectual force of the Warren Court, who insisted on taking seriously the Constitution's words and spirit guaranteeing free speech, racial equality, religious equality, the right to vote, the right to counsel, and much more. Among today's scholars, the originalist cited most often by the Supreme Court is also a self-described liberal and a registered Democrat—yours truly.⁵

The best originalists heed not just the Founders' vision but also the vision underlying its amendments—especially the transformative Reconstruction Amendments and Woman Suffrage Amendment. I believe that Justice Kavanaugh will be in this tradition.⁶ On various vital issues—voting rights, governmental immunities, congressional power to enforce the Reconstruction Amendments—Justice Kavanaugh's constitutional views may well be *better* for liberals than were Justice Kennedy's.

3. Kavanaugh's writings reflect proper respect for tradition and precedent.

Originalists start with the Constitution's text, history and structure, but almost always need to consult other constitutional sources such as tradition and precedent. Harmonizing these different constitutional sources requires great legal acumen. Kavanaugh's record shows that he is adept at harmonization.⁷

4. Kavanaugh's views on executive power have strong constitutional foundations.

Testimony of Akhil Reed Amar—Text

Many of Kavanaugh’s views about the executive branch are quite standard.⁸ On several other executive-branch topics, Kavanaugh’s views are not yet conventional wisdom but are nevertheless sound, and indeed, align well with testimony I offered to this Committee in 1998 and 2017.⁹

5. The best basis for assessing would-be Justice Kavanaugh is the track record of Judge Kavanaugh.

This judicial track record is more proximate and relevant than Kavanaugh’s pre-judicial life.¹⁰ As a judge, Kavanaugh has revealingly identified Justice Robert Jackson as a role model—a Justice who, once on the Court, famously repudiated some of his own earlier exuberant expressions of executive power as an executive official working closely with the president.¹¹

6. Kavanaugh would work well with his new colleagues.

Americans generally and with good reason view today’s Court more favorably than today’s Congress and Presidency. The current justices are outstanding lawyers who do loads of close reading, careful writing, and deep thinking; try hard to see other points of view; spend lots of time pondering constitutional law; and spend little time posturing for cameras, dialing for dollars, tweeting snark, or pandering to uninformed extremists or arrogant donors. Can today’s President and Congress say the same?¹²

Testimony of Akhil Reed Amar—Text

I predict that Kavanaugh—a studious and open-minded conservative who likes listening to and engaging with moderates and liberals—will be a pro-intellectual and anti-polarizing force on the Court.¹³

7. Judicial nominees should not make substantive promises about how they will rule on specific legal issues; nor should they make recusal promises that closely approximate substantive promises.

8. Senators may properly oppose a judicial nominee simply because they disagree with a nominee’s general constitutional philosophy or likely constitutional votes on the bench.

9. The current Senate confirmation process is flawed and should be changed for future vacancies.

For more on these three Advice and Consent process points, see Appendix D.

10. Back to Point 1: Responsible naysayers must become yaysayers of a sort; they must specifically name better nominees realistically on the horizon. If not Brett, who?

Distinguished Republicans: Kavanaugh is your team’s brightest judicial star. Rejoice!

Distinguished Democrats: Don’t be mad; be smart, and be careful what you wish for. Our party controls neither the White House nor the Senate. If you torpedo Kavanaugh, you’ll likely end up with someone worse—less brilliant, less constitutionally knowledgeable, less studious, less open-minded, less good for America.¹⁴

Thank you, Mr. Chair.

Appendix A: Akhil Reed Amar Bio

Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University, where he teaches constitutional law in both Yale College and Yale Law School. After graduating from Yale College, *summa cum laude*, in 1980 and from Yale Law School in 1984, and clerking for then Judge (now Justice) Stephen Breyer, Amar joined the Yale faculty in 1985 at the age of 26. His work has won awards from both the American Bar Association and the Federalist Society, and he has been cited by Supreme Court justices across the spectrum in more than three dozen cases—tops in his generation. He regularly testifies before Congress at the invitation of both parties; and in surveys of judicial citations and/or scholarly citations, he invariably ranks among America's five most-cited mid-career legal scholars. He is a member of the American Academy of Arts and Sciences and a recipient of the American Bar Foundation's Outstanding Scholar Award. In 2008 he received the DeVane Medal—Yale's highest award for teaching excellence. He has written widely for popular publications, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *Time*, and *The Atlantic*. He was an informal consultant to the popular TV show, *The West Wing*, and his constitutional scholarship has been showcased on *The Colbert Report*, *Tucker Carlson Tonight*, and *Constitution USA with Peter Sagal*. He is the author of dozens of law review articles and several books, including *The Constitution and Criminal Procedure* (1997), *The Bill of Rights* (1998—winner of the Yale University Press Governors' Award), *America's Constitution* (2005—winner of the ABA's Silver Gavel Award), *America's Unwritten Constitution* (2012—named one of the year's 100 best nonfiction books by *The Washington Post*), *The Law of the Land* (2015), and *The Constitution Today* (2016—named one of the year's top ten nonfiction books by *Time* magazine). In 2017 he received the Howard Lamar Award for outstanding service to Yale alumni. He is Yale's only currently active professor to have won the University's unofficial triple crown—the Sterling Chair for scholarship, the DeVane Medal for teaching, and the Lamar Award for alumni service.

Testimony of Akhil Reed Amar—Appendix B (More on Kavanaugh)

Appendix B—More (3 Items) on Kavanaugh

Item 1 (of 3): New York Times op-ed, July 9, 2018

A Liberal’s Case for Brett Kavanaugh

By Akhil Reed Amar

The nomination of Judge Brett Kavanaugh to be the next Supreme Court justice is President Trump’s finest hour, his classiest move. Last week the president promised to select “someone with impeccable credentials, great intellect, unbiased judgment, and deep reverence for the laws and Constitution of the United States.” In picking Judge Kavanaugh, he has done just that.

In 2016, I strongly supported Hillary Clinton for president as well as President Barack Obama’s nominee for the Supreme Court, Judge Merrick Garland. But today, with the exception of the current justices and Judge Garland, it is hard to name anyone with judicial credentials as strong as those of Judge Kavanaugh. He sits on the United States Court of Appeals for the District of Columbia Circuit (the most influential circuit court) and commands wide and deep respect among scholars, lawyers and jurists.

Judge Kavanaugh, who is 53, has already helped decide hundreds of cases concerning a broad range of difficult issues. Good appellate judges faithfully follow the Supreme Court; great ones influence and help steer it. Several of Judge Kavanaugh’s most important ideas and arguments — such as his powerful defense of presidential authority to oversee federal bureaucrats and his skepticism about newfangled attacks on the property rights of criminal defendants — have found their way into Supreme Court opinions.

Except for Judge Garland, no one has sent more of his law clerks to clerk for the justices of the Supreme Court than Judge Kavanaugh has. And his clerks have clerked for justices across the ideological spectrum.

Most judges are not scholars or even serious readers of scholarship. Judge Kavanaugh, by contrast, has taught courses at leading law schools and published notable law review articles. More important, he is an avid consumer of legal scholarship. He reads and learns. And he reads scholars from across the political spectrum. (Disclosure: I was one of Judge Kavanaugh’s professors when he was a student at Yale Law School.)

This studiousness is especially important for a jurist like Judge Kavanaugh, who prioritizes the Constitution’s original meaning. A judge who seeks merely to follow precedent can simply read previous judicial opinions. But an “originalist” judge — who also cares about what the Constitution meant when its words were ratified in 1788 or when amendments were enacted — cannot do all the historical and conceptual legwork on his or her own.

Testimony of Akhil Reed Amar—Appendix B (More on Kavanaugh)

Judge Kavanaugh seems to appreciate this fact, whereas Justice Antonin Scalia, a fellow originalist, did not read enough history and was especially weak on the history of the Reconstruction amendments and the 20th-century amendments.

A great judge also admits and learns from past mistakes. Here, too, Judge Kavanaugh has already shown flashes of greatness, admirably confessing that some of the views he held 20 years ago as a young lawyer — including his crabbed understandings of the presidency when he was working for the Whitewater independent counsel, Kenneth Starr — were erroneous.

Although Democrats are still fuming about Judge Garland's failed nomination, the hard truth is that they control neither the presidency nor the Senate; they have limited options. Still, they could try to sour the hearings by attacking Judge Kavanaugh and looking to complicate the proceedings whenever possible.

This would be a mistake. Judge Kavanaugh is, again, a superb nominee. So I propose that the Democrats offer the following compromise: Each Senate Democrat will pledge either to vote yes for Judge Kavanaugh's confirmation — or, if voting no, to first publicly name at least two clearly better candidates whom a Republican president might realistically have nominated instead (not an easy task). In exchange for this act of good will, Democrats will insist that Judge Kavanaugh answer all fair questions at his confirmation hearing.

Fair questions would include inquiries not just about Judge Kavanaugh's past writings and activities but also about how he believes various past notable judicial cases (such as *Roe v. Wade*) should have been decided — and even about what his current legal views are on any issue, general or specific.

Everyone would have to understand that in honestly answering, Judge Kavanaugh would not be making a pledge — a pledge would be a violation of judicial independence. In the future, he would of course be free to change his mind if confronted with new arguments or new facts, or even if he merely comes to see a matter differently with the weight of judgment on his shoulders. But honest discussions of one's current legal views are entirely proper, and without them confirmation hearings are largely pointless.

The compromise I'm proposing would depart from recent confirmation practice. But the current confirmation process is badly broken, alternating between rubber stamps and witch hunts. My proposal would enable each constitutional actor to once again play its proper constitutional role: The Senate could become a venue for serious constitutional conversation, and the nominee could demonstrate his or her consummate legal skill. And equally important: Judge Kavanaugh could be confirmed with the ninetysomething Senate votes he deserves, rather than the fiftysomething votes he is likely to get.

*Item 2 (of 3): Portland Press Herald op-ed, August 24, 2018***As Maine Goes, So May Go the Nation on Kavanaugh Confirmation**

By Akhil Reed Amar

If Senator Susan Collins supports Brett Kavanaugh, he will almost certainly win confirmation as America's next Supreme Court justice. If Collins opposes Kavanaugh, his pathway narrows. As Maine goes, so may go the nation.

Collins and Maine should go with Kavanaugh for the simplest of reasons: He is the best person for the job compared to all other realistically imaginable nominees. Anyone who says differently should name the supposedly better candidate and explain how that candidate would actually get nominated by President Trump and then confirmed.

Supreme Court justices must correctly interpret the Constitution. Kavanaugh has studied the document more carefully and has written more thoughtful things about it than anyone else on the list of approximately 25 potential nominees that Trump has been publicly circulating for the last year.

I myself voted against Trump and previously supported all of Bill Clinton's and Barack Obama's court nominees – Ruth Bader Ginsburg, Stephen Breyer (my former boss), Sonia Sotomayor, Elena Kagan and Merrick Garland.

Republicans stonewalled Garland in 2016 – wrongly, in my view – and many leftists now want Senate Democrats to stonewall Kavanaugh as payback. But the situations are not symmetric. Garland needed lots of Senate Republican votes because of filibuster rules then in place, but Kavanaugh does not need any Senate Democratic votes. Republicans controlled the Senate in 2016 and control it today. Elections have consequences, and math is math.

Suppose Democrats successfully block Kavanaugh, with help from Republican moderates like Collins. What then? Trump would still be president; the court vacancy would still exist; and – to repeat – the others on President Trump's long list are less constitutionally impressive.

Nor has anyone else on Trump's list shown as much willingness as Kavanaugh to respectfully engage thoughtful moderates and liberals. Kavanaugh, a stalwart Republican, has often hired Democrats and independents to assist him as law clerks. This is exactly the sort of jurist whom free-thinking Mainers from Collins on down should applaud.

Collins cares deeply about women's reproductive rights. (So do I; unborn human life is precious, but pregnancies and potential pregnancies can raise intricate medical and moral complexities,

Testimony of Akhil Reed Amar—Appendix B (More on Kavanaugh)

and in this domain I generally trust women more than I trust government officials.) On issues of reproductive choice, there are no guarantees that a future Justice Kavanaugh would rule the same way that Sen. Collins might prefer. But that is equally or more true of all the other would-be nominees on Trump's long list. If Collins were to sink Kavanaugh, Trump could easily nominate someone else who would likely be less open to Collins' vision of reproductive rights, but harder for senators to torpedo. Consider, for example, Judge Amy Coney Barrett, an earnest acolyte of Antonin Scalia with a compelling life story but less personal exposure to liberals and a less distinguished judicial track record. Moderates and liberals should be careful what we wish for.

Sen. Collins has repeatedly spoken of the importance of selecting jurists who respect precedent. Precedent is indeed important, but more so for lower-court judges, who must faithfully follow what the Supreme Court has decreed in past cases. As a lower-court judge, Brett Kavanaugh has generally been a dutiful deputy with an excellent record of affirmance by the Supreme Court.

But precedent operates differently on the Supreme Court itself. The justices can and at times must overrule or narrow their own previous rulings if it becomes clear that these rulings incorrectly interpreted the Constitution itself. The Constitution – and not the case law – is America's supreme law of the land. In the greatest judicial decision of the last century, the Supreme Court in *Brown v. Board of Education* buried the erroneous segregationist ruling of *Plessy v. Ferguson*, and instead faithfully followed the Constitution itself, which promises racial equality.

Aligning precedent with the true meaning of the Constitution's words and spirit requires consummate legal skill and judgment. Over many years and on many issues, Kavanaugh has shown just this sort of legal acumen. Other lower-court judges may call themselves "originalists" – jurists who pay special attention to the original meaning of the Constitution's words – but Kavanaugh has demonstrated in his decisions and other writings that he actually has studied the Constitution and its history in impressive detail. He has also shown that he is an originalist who understands the role of precedent.

No other would-be justice realistically on the horizon has shown comparable skill at harmonizing strong fidelity to original meaning with proper respect for precedent and tradition. Sen. Collins should say "yes" to Kavanaugh, and Mainers should say "amen."

Testimony of Akhil Reed Amar—Appendix B (More on Kavanaugh)

Item 3 (of 3): Washington Post mini- op-ed, August 31, 2018

A Careful and Subtle Opinion

By Akhil Reed Amar

I seldom assign my law students to read recently decided lower-court opinions, but last spring I made one exception: Brett Kavanaugh’s dissent in a case involving presidential control over the federal bureaucracy, *PHH Corporation v. Consumer Financial Protection Bureau*. The case is technical, but much of law is technical and far removed from hot-button social issues.

The Constitution does not expressly say the secretary of state serves at the pleasure of the president, but George Washington, James Madison and the first Congress all agreed in 1789 that this rule was implicit in the Constitution. The president is the chief executive, executive departments answer to him, and the heads of these departments must be removable at will. For the secretary of state, the president is the unfettered firer in chief.

But for certain “independent agencies,” the statutory rules are different: The president may remove agency commissioners only for “good cause.” But what’s the difference, and where to draw the line?

In *PHH Corporation*, Kavanaugh explains exactly how multimember commissions such as the Securities and Exchange Commission and the Federal Communications Commission are different from departments such as the State Department headed up by a single person. It’s a careful and subtle opinion, blending fidelity to the Founders’ original understanding of the Constitution with respect for modern developments such as the rise of the administrative state. It reflects a persuasive vision of the Constitution’s commitment to a “unitary executive.” The Constitution explicitly and emphatically vests the executive power in one president and all lower executive officials ultimately answer to him, in one way or another — albeit in slightly different ways, depending on the details of the lower office. Unlike extreme versions of “unitary executive theory” famously associated with the conservative legal scholar John Yoo, Kavanaugh’s is a modest version of the theory, respectful of modern independent agencies and noncommittal on contested issues of presidential war power.

Testimony of Akhil Reed Amar—Appendix C (More on Originalism)

Appendix C—More (1 Item) on Originalism

Item 1 (of 1): The Hill op-ed, August 21, 2018 (authored by The Federalist Society's Co-Founder and Chairman of the Board)

Neither Kavanaugh Nor Constitutional Originalism Are Scary

By Steven G. Calabresi

A continuing theme in the criticism of Judge Brett Kavanaugh's nomination to the Supreme Court has been that his references to constitutional originalism suggest he would reach a series of bad results in certain cases.

The standard indictment of originalism makes the following claims: 1) originalists think *Brown v. Board of Education* is wrongly decided and so they would resurrect segregation; 2) originalists oppose the incorporation of the Bill of Rights against the states and so they would let states violate fundamental individual rights; 3) originalists are opposed to equal civil rights for women and so they would uphold sexist laws and will overturn the recent Supreme Court ruling that legalized same sex marriage; 4) originalists would do away with the constitutional right to privacy; and, 5) originalists think that a constitutional provision means the same thing today as when it was adopted, which is unworkable because the world today is so different from what the world was like in 1791 or in 1868.

Every single one of these claims is demonstrably false. These claims overlook the fact that the great Warren court liberal Justice Hugo Black was an originalist; these claims overlook the votes cast by originalist Justices Antonin Scalia and Clarence Thomas on the Supreme Court; and these claims overlook 40 years of scholarship by originalist law professors. The law professors and law school deans who are making these claims are behaving in a sloppy fashion (or worse).

First, originalist Justice Hugo Black joined the Supreme Court's opinion in *Brown v. Board of Education* and neither Justices Scalia nor Thomas have ever criticized that case or failed to follow it. Originalist Stanford Law Professor Michael McConnell published a lengthy and scholarly law review article defending *Brown v. Board of Education* on originalist grounds, and I have published a lengthy originalist article that also defends the decision in *Brown* or originalist grounds, as well as an article defending the decision in *Loving v. Virginia* on originalist grounds, which struck down state bans on racial inter-marriage.

Second, originalist Justice Hugo Black led the charge to incorporate the federal Bill of Rights to apply against the State on the Warren Court. Justices Scalia and Thomas supported incorporation of the Bill of Rights in *McDonald v. Chicago*, and Justice Thomas wrote a separate

Testimony of Akhil Reed Amar—Appendix C (More on Originalism)

conurrence making the best case yet made in any Supreme Court opinion in favor of incorporation. Originalist Yale Law Professor Akhil Reed Amar wrote a whole book defending incorporation on originalist grounds entitled: *The Bill of Rights: Creation and Reconstruction* (1998).

Third, originalist Yale Law Professor Akhil Reed Amar and I have both published originalist law review articles arguing that sex discrimination and sexual orientation discrimination are forbidden by the Fourteenth Amendment as read in light of the Nineteenth Amendment. We believe that once women got the political right to vote in 1920, they also got equal civil rights to those of men as well. Supreme Court Justice George Sutherland actually ruled in 1923 that the meaning of the Fourteenth Amendment was altered by the adoption of the Nineteenth Amendment. Moreover, there is settled Supreme Court precedent that establishes that sex and sexual orientation discrimination are forbidden.

From all that I know of Judge Kavanaugh and of Chief Justice Roberts, I would be astonished if those correct Supreme Court precedents on sex and sexual orientation discrimination were overridden. Judge Kavanaugh has hired more women law clerks than almost any other federal Court of Appeals judge, and he is obviously very sympathetic to the rights of women.

Fourth, the constitutional right to privacy is part of a larger originalist, unenumerated right, which provides that: “All human beings are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.” This right can be trumped by “just laws enacted for the general good of the whole people.” A law that forbids the use of contraceptives prevents an individual from enjoying liberty and is not a just law enacted for the general good of the whole people, so it is unconstitutional.

Fifth, and finally, originalists do believe that the meaning of the words of the constitution do not change over time, but their application may change in huge ways because of new technologies and changed circumstance. As the great originalist Judge Robert H. Bork wrote in *The Tempting of America* (1990), “The world changes in which unchanging values find their application.” What this means is that today the Necessary and Proper Clause empowers Congress to set up an Air Force and a “Space Force” even though no one imagined these things in 1787. It also means that the First Amendment freedom of the press applies to freedom of expression via broadcasting and the internet and not just to freedom of expression via printing presses.

The attacks on a crude caricature of originalism reveal more about the sloppiness (or worse) of those who make these attacks than they do about originalism.

Testimony of Akhil Reed Amar—Appendix D (More on the Advice and Consent Process)

Appendix D—More (2 Items) on the Advice and Consent Process

Item 1 (of 2): Excerpt from Akhil Reed Amar, America's Constitution: A Biography (Random House 2005), 192-95, 219-20

... In appointments, as with treaties, the Senate could say no to what the president proposed but could not compel the president to say yes to the Senate's first choice. Just as a president could refuse to formally ratify a treaty after it won the Senate's consent, so he might decline to commission an officer who survived the confirmation ordeal. . . .

Textually, Article II treated high-level executive and judicial appointments alike, yet Senate practice quickly distinguished between them, giving the president more leeway in choosing his executive deputies. By 1830, the Senate had defeated three Supreme Court nominations—the first in 1795, when it rejected John Rutledge, whom Washington had named to replace John Jay as chief justice—but had yet to turn down any of the much larger number of cabinet candidates. This pattern made structural sense. Cabinet officials were part of the president's branch—secretaries who existed largely to help him carry out his responsibilities and answered directly to him under the opinions clause. A president could closely monitor these men and remove them at will; and no newly elected president would be saddled with his predecessor's picks unless he so chose. Article III judges would be independent officers in a separate branch that emphatically did not answer to the president. Nor could they be removed by him or by a new administration. For these lifetime posts, more Senate scrutiny was appropriate. . . .

Although senators would have broad discretion to say no in the confirmation process, the president would enjoy several structural advantages in the foreseeable give and take. A presidential nomination would define the agenda, forcing the Senate to consider not merely an abstract ideology but a flesh-and-blood person, with friends and feelings. Even if senators preferred someone else, they could not guarantee that the president would ever propose that person; indeed, senators who sank the president's first choice might face a worse (to them) candidate the next time around. Different senators might be at cross-purposes, making it difficult for the body to speak with one voice, as could the president. (Partially counterbalancing this dynamic, the Senate from its earliest days has tended to give special deference to the views of the two senators from the nominee's home state.) When senators left for home, the president would stay put and could make interim recess appointments ensconcing his men in office, temporarily. The president's sweeping right to remove executive subordinates enabled him to expand various appointment opportunities at will, while the Senate lacked symmetric removal power. . . .

The Constitution allowed the president and the Senate to consider political and ideological factors in selecting Supreme Court justices and lower court judges, and such variables did in fact figure prominently in early appointments. Every one of the eight men to sit on the Supreme Court before 1796 had been a highly visible Federalist in 1787-88. The first

Testimony of Akhil Reed Amar—Appendix D (More on the Advice and Consent Process)

former Anti-Federalist whom Washington named to the Court, Samuel Chase, did not win the president's favor until Chase had shown himself to be a strong post-ratification supporter of the president's administration. Of Washington's sixteen initial nominees to the district bench—all of whom the Senate confirmed but three of whom declined to serve—nine had publicly supported the Constitution in their respective ratifying conventions, and several others had demonstrated their commitment to the Federalist cause in other ways. Conversely, none had voted against the Constitution in state convention.

After Washington's departure, as openly partisan competition heated up in federal legislative and executive races, so too did federal judicial politics. John Adams sought to stuff the bench with fellow Federalists; Jefferson, with fellow Republicans. In 1810, ex-President Jefferson counseled his incumbent friend James Madison not to appoint Joseph Story to the Court because Story was, in Jefferson's view, "unquestionably a tory" who as a congressman had "deserted" Jefferson on the administration's embargo policies. In the end (after three failed attempts to appoint other men) Madison named Story, who described himself as "a decided member of what was called the republican party, and of course a supporter of the administration of Mr. Jefferson and Mr. Madison," albeit a republican of "independent judgment" and not a "mere slave to the opinions of either [president]." Not until Republican Abraham Lincoln named Democrat Stephen Field would a president openly reach across party lines in a Supreme Court nomination—and when Lincoln did so in 1863, the deepest ideological divide ran not between Republicans and Democrats but between Unionists and Secessionists. (In 1864, Lincoln would run under a "Union Party" banner alongside a War Democrat, Andrew Johnson.)

From its earliest days, the Senate in its confirmation process felt free to consider the same broad range of factors that a president might permissibly consider in his nomination decisions. For example, senators in 1795 voted down John Rutledge for the chief justiceship largely because they doubted his political judgment. The Judicial Article thus provided for an openly political and ideological process of initial appointment. Presidents and senators could not properly extract promises from a judicial nominee but were free to indulge in predictions about how that nominee might rule, and to factor such predictions into their appointments calculus.*

* On the promise/prediction distinction and the Senate's general role in judicial appointments, see Vikram D. Amar, Note, "The Senate and the Constitution," *Yale LJ* 97 (1988): 1111

Testimony of Akhil Reed Amar—Appendix D (More on the Advice and Consent Process)

Item 2 (of 2): Online op-ed, Findlaw.com, July 8, 2005 (updated version of online op-ed originally posted in January, 2002)

What are the Rules and Standards in the Judicial Appointments Game?

By Akhil Reed Amar and Vikram David Amar

Citizens need to understand the basic ground rules of the appointments game. (By calling appointments a “game,” we seek not to trivialize the principals and principles involved, but rather to highlight the range of permissible moves and countermoves that give the appointments process a coherent structure.)

These ground rules--deduced from the Constitution’s letter and spirit, and from the institutional practices that have emerged over the years—define what is fair play and what is out of bounds.

Rule One: Appointments Are Not the Only Game in Town

The basic constitutional text governing appointments appears in Article II, Section 2 of the Constitution, which provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint” various high-level executive and judicial officers.

This basic text does not exist in a vacuum. Rather, it is nested in a Constitution that has much to say about Presidents and Senators in other contexts, including legislation, treaty-making, and constitutional amendment.

The appointments game is thus one of many interrelated games governed by the Constitution. Just as a team that overuses its ace reliever in game 1 of the World Series might end up losing later games as a result, so too an overly aggressive President might end up winning an appointments game only to lose more important legislative games down the road.

For example, if President Bush heeds the advice of many and nominates someone many Democratic Senators can support, then there may be no need to test the contours of the cease-fire concerning the use of the filibuster . . . reached in the Senate this spring.

In addition, a moderate appointment now may help build a spirit of bipartisanship and increase Republican majorities in the Congress after the 2006 election. And that, in turn, may give the President more leverage not only in subsequent Supreme Court appointments he is likely to make, but also on his domestic legislative agenda concerning things like energy policy and even social security reform.

Rule Two: Executive and Judicial Appointments are Very Different Ballgames

The language of Article II, read in isolation, might seem to suggest that all major appointments are identical, governed by a uniform “advice and consent” standard. But here too, it makes sense to construe the clause in light of the rest of the Constitution, and traditional institutional practice.

The rest of the Constitution identifies key differences between executive officers serving the President in Article II, and judicial officers independent of the President in Article III: Executive officers answer to the President (quite literally, in the Article II, section 2 Opinions Clause) and will typically leave when he leaves. A President is generally entitled to have his

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branch filled with his people, whom he directly oversees. If these underlings misbehave, voters can hold the President responsible.

Federal judges (especially Supreme Court Justices) are different. They do not answer directly to the President. They are not part of his Administration. When he leaves his office, they will stay in theirs.

Because of these differences, the Senate has always given a President more leeway in picking his Cabinet than in picking Justices. The pattern began in 1795 when the Senate rejected George Washington's pick for Chief Justice, John Rutledge. By 1830, the Senate had stymied three Supreme Court nominees, but had yet to nix any Cabinet nominees.

Since 1960, although Presidents have nominated roughly ten times as many persons to the Cabinet as to the Supreme Court, there have actually been fewer failed Cabinet nominations than failed Court nominations. (Compare John Tower, Zoe Baird, and Linda Chavez on the Cabinet side with Abe Fortas, Clement Haynsworth, G. Harrold Carswell, Robert Bork, and Douglas Ginsburg on the Court side.)

Rule Three: The Foul Lines are the Same for Both Sides

If, as we argue below, the President may properly consider a judicial candidate's overall ideology and predicted performance in office in deciding whom to nominate, the Senate may likewise properly consider these factors in deciding whether to confirm.

Nothing in the Constitution's text or structure says that the President may consider judicial ideology, while the Senate may consider only personal character and professional competence. In general, the Appointment Clause text envisions a partnership in which the President goes first and the Senate goes second, but both may consider the same general factors. Elsewhere in the Constitution, the actor who goes second is generally entitled to consider the same things as the one who went first. In treaty-making, the Senate may weigh the same things as the President who proposed the treaty; in lawmaking, the President is free to veto a bill based on the same broad range of policy factors that the Congress considered when enacting it; and in the constitutional amendment process, the states acting at the end have the same broad discretion as the Congress acting at the beginning.

Institutional practice supports this reading of text and structure: Senators have often (sometimes openly, sometimes quietly) gone beyond nominees' character and credentials to consider judicial ideology and likely judicial voting patterns.

Rule Four: He Who Goes First Often Laughs Last

As with chess and tennis, the appointments game gives the first mover an advantage. The President defines the appointments agenda by going first, forcing the Senate to confront not merely an abstract ideology but an actual person who embodies that ideology. Voting down a real person may be harder than voting down an abstract idea or bill, especially if the person is exceptionally articulate or charming, or has a compelling biography.

Even if the Senate succeeds in defeating a nominee, there is no guarantee that next nominee will be better (from its perspective). The President may threaten to send up a second nominee who may be worse but harder to oppose, politically. (The President might be bluffing, but Senators cannot always be sure.)

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If a President has a slight preference for Smith over Jones, that slight preference may suffice to give Smith the nomination. But if the Senate has a slight preference for Jones over Smith, they should hesitate before rejecting Smith; there is no guarantee that they will end up with Jones.

Rule Five: One Head Is Better than Two (or One Hundred)

The unity of the President—he is both a single person, and the unitary head of an entire branch of government—gives him additional advantages.

Even if a single Senator resolves to vote against all nominees falling below the mark of excellence, she cannot be sure that her colleagues will be similarly resolute, or will share her rankings.

Indeed, while the President will typically choose a nominee that he considers best overall, there may be no single nominee that the Senate as a group considers superior to all rivals. Each Senator may have her favorite candidate, but the Senate as a whole may be unable to identify a clear favorite.

In addition, the President is the only actor with his eye on the entire package of appointments, involving nominees from every region and on every subject matter. He and his staff may easily meet with potential nominees behind closed doors; it is harder for the Senators as a group to do this.

Rule Six: Judicial Promises are Out of Bounds

Appointments—even to the judiciary—are part of a political process. In some European countries, judges are picked and promoted by fellow judges. In America, they are picked and promoted by politicians.

But once confirmed, federal judges are to be shielded from further dependence on the political branches. Thus, it is generally impermissible for politicians to seek promises from judicial nominees about how they will vote once confirmed. Such promises impermissibly leverage politics past the Article II appointments process into the actual Article III adjudication process, where it has no proper place.

Conversely, those who suggest that judicial ideology should play no role in appointments impermissibly seek to bleach politics out of a place where it does, indeed, constitutionally belong. Unlike the European model, the American model allows political leaders and voters to weigh more than technical legal competence and personal character in deciding who shall be our judges.

The proper line is one dividing predictions from promises. Presidents and Senators are free to base (and often have based) their decisions on the likely voting patterns of nominees, but may not extract (and typically have not tried to extract) pledges or promises. During the nomination and confirmation process, the Senate may question candidates about their past and current legal views—using specific examples to nail points down—and the nominee should try to answer candidly; but once confirmed, judges must be free to change their minds when presented with sound legal arguments.

Though the line between prediction and promise is sound in theory, it may be difficult to honor in practice. Is the Senate really capable of having candid conversations about judicial ideology? How might such conversations best unfold? In the balance of this column, we offer some specific guidelines for Senators vetting judicial nominees.

The Need for Nuance: Different Questions and Judgments for Different Judicial Positions

Just as executive branch appointments differ from judicial ones, not all judicial appointments are the same. The qualities that make for a good trial judge, for example, often differ from the qualities needed on the Supreme Court.

The attributes most needed on a given court will also depend in part on who is already sitting on that court at the time a vacancy happens to open up. As Senator Charles Schumer has argued, Senators may properly consider not merely the credentials and ideology of the nominee before them, but also the desirable overall balance on the court in question.

Considerations like these may explain why many Senators who voted against Robert Bork's 1987 nomination to the Supreme Court had voted to support his nomination to the Court of Appeals of the District of Columbia Circuit some five years before. They also explain why, we suspect, these Senators likely would have been happy to confirm Bork again to this lower court had he stepped down and been renominated.

These Senators may have believed that Bork's brand of conservative strict construction would provide a good counterweight to the more freewheeling philosophy of some other D.C. Court of Appeals judges. But they may also have believed that it would, alongside the promotion of William Rehnquist to the position of Chief Justice and the appointment of Antonin Scalia, overrepresent one methodological approach on the Supreme Court at the expense of other legitimate judicial philosophies, thereby tilting the Court too far in one direction.

Nor is ideological balance the only kind to consider. Throughout American history, the Supreme Court and many lower courts have benefited from having judges drawn from diverse parts of the legal world—the bench, the private bar, the government and the academy. How, precisely, should the Senate canvass these varied legal experiences to assess what impact a nominee might have if confirmed? In a word, carefully—with due understanding of the way in which lawyers in today's world are often asked to play roles.

How Senators Should Evaluate Sitting Judges

Consider, first, nominees who are sitting judges. It might initially seem that the Senate's task here is easy: simply read a jurist's past decisions to glean her approach to judging and compare that approach to the Senate's own vision(s). But in fact, past decisions may not tell us much, and may indeed be misleading in what they do suggest.

For one thing, *stare decisis*—the principle that precedent should generally be followed, and that precedent from higher courts is binding on judges lower down in the pyramid—limits all lower courts, federal and state. This principle may force individual judges to reach decisions and embrace reasoning deeply in conflict with the judge's own views.

Ironically, the willingness to reach such a decision, or employ such reasoning, based on precedent despite the judge's personal views may in fact illustrate a virtue, even as it is condemned during the confirmation process as a flaw. . . .

How Senators Should Evaluate Nominees from Private Practice

How about nominees who are drawn from private practice? Positions a lawyer has taken in court representing clients may not always tell us everything about the lawyer's own views of the law,

because a lawyer ordinarily has an ethical duty to make all plausible legal arguments (whether he personally embraces them or not) on behalf of a client. But a nominee's conduct as a private lawyer can tell us what kinds of legal positions she thinks are plausible under the law as it now exists, or is likely to exist.

Also, a lawyer's decision to take a case that she knows will involve the making of certain kinds of arguments may be quite informative. There is no requirement that a private lawyer accept every client, and in many situations an attorney could, if she so chose, agree to represent a client only on the condition that certain kinds of arguments not be made.

Some courts may be unwilling to enforce some limitations on representation that an attorney imposes (seeing these limitations as in conflict with, for instance, the attorney's duty to represent her client zealously). Moreover, Senators should tread carefully here, since asking, for example, what arguments a client requested that the attorney make might reveal attorney-client communications. But there is at least some room for questioning here—particularly about the decision to take a particular case.

For example, consider the case of a nominee who is a private lawyer who has represented the tobacco industry and, in the course of that representation, makes First Amendment arguments against tobacco advertising restrictions. It is fair to ask whether the voluntary decision to accept the case says something about the nominee's vision of free speech, and about his ethical vision more generally.

Of course, even here, Senators must be aware of nuances in roles. A young associate at a law firm may not have much say about the cases to which he is assigned, and no say at all with respect to the ones his firm accepts.

Just as a lower court judge can sometimes point to clear Supreme Court guidance as an explanation for an otherwise troubling opinion, so too a junior lawyer may be able to point to a senior partner who is calling the shots. But this is not always true. A young associate who joins a firm known for its tobacco defense work should be able to be held accountable for it by those Senators who disapprove of such work. Similarly, an associate who joins a firm that does some tobacco defense work, but has the choice to opt out, even at a cost to his own career, should be held accountable for doing the work.

How Senators Should Evaluate Nominees from Government Practice

Nuanced distinctions like these also apply when we look at nominees who have been government attorneys. Unlike private lawyers, government attorneys do not choose their clients, but they do often have discretion to define their client's interests, and are also ethically bound to do justice.

The discretion enjoyed by government attorneys, though, may vary because different departments within government play different roles. An attorney prosecuting crimes for the Criminal Division of Department of Justice, for instance, has less leeway to stake out his own views of the law than does an attorney in the Office of Legal Counsel, whose job is not so much to win cases but rather to figure out what the law is or should be.

And even within a department, some lawyers will have much more power to dictate positions and set agendas—and thus will more properly be required to explain those positions and agendas—than others. For example, arguments a Solicitor General advances before the Supreme Court are rarely dictated by anything other than the SG's sense of what makes the most

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legal sense for the United States, whereas deputy SGs have much less decisionmaking authority, and assistant SGs, less still.

Again, in each case, Senators may question a nominee about a past position, but sometimes the sincere answer will be “it was my job to make that argument.” Even then, though, a Senator can follow up by asking whether the nominee now believes the past argument he made was correct or not.

This question is not too hypothetical or abstract to yield a helpful answer. Nor will a candid response—so long as it does not take the form of a guarantee—create an impression of prejudice should the issue recur in a case down the road.

How Senators Should Evaluate Nominees from the Academy

In contrast, legal academics can rarely defend their past positions by pointing to someone else like a client or a superior. Academic freedom means that scholars are able, and encouraged, to say what they really believe.

Still, even here, Senators should be sensitive to the nuanced roles academics play. Professors are taught to be, and rewarded for being, provocative. Thus, an academic will sometimes float an argument to generate discussion and dialogue, even when he is not yet convinced that he is right. (Some of Robert Bork’s controversial scholarship may belong in this category.)

Moreover, and relatedly, good academics, like good judges, are open-minded and sometimes abandon even deeply-held views when new arguments and evidence emerge. Again, this is an instance where what may really be a virtue—an ability to be persuaded and not to be rigid in one’s thinking—can wrongly be painted as a vice during the confirmation process: a hypocrisy or a weakness of the mind.

The Costs of Senate Error

Although we believe that the Senate capable of a meaningful and productive dialogue with nominees, we admit that there is always a chance the Senate will misplay the game, with unfortunate consequences.

We focus less on the injustice to nominees whose past may be mischaracterized, because the constitutional process is not about fairness to individual nominees so much as it is about safeguarding the federal judiciary. No one has a vested property right to a federal judgeship, so very little “due process” to nominees is required.

But above and beyond possible unfairness to individual nominees, are larger systemic concerns. First, those who want to be judges may avoid taking positions that may be distorted later, with the result that much good speech and lawyering will be chilled and lost.

Second, and relatedly, the only people who make it through the Senatorial gauntlet will be “stealth” candidates who have scrupulously avoided talking (and perhaps thinking) about the great issues of the day.

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¹ For more biographical information, see Appendix A.

² My previous testimony has addressed issues of presidential succession (Feb. 2, 1994 and Sept. 16, 2003); exclusionary-rule reform (March 7, 1995); anti-hate-speech legislation (May 11, 1999); a proposed constitutional amendment to broaden presidential eligibility to certain naturalized citizens (Oct. 5, 2004); questions concerning the immunity of sitting presidents from criminal prosecution (Sept. 9, 1998—Subcommittee on the Constitution, Federalism, and Property Rights); and most recently, statutory proposals to restructure the law governing special counsels, including Robert Mueller (September 26, 2017).

³ For the list of twenty-five potential nominees made public by the White House nearly a year ago, see <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/>

⁴ A great deal of journalistic nonsense has been published of late by some critics of originalism. One prominent scholar has recently purported to illustrate how honest originalism would create a parade of absurd and unthinkable results, see Erwin Chemerinsky, “Originalism is Bad for Justice. And Kavanaugh is a Big Believer,” *Sacramento Bee*, Aug. 15, 2018. For pointed refutations of this and related canards, see Akhil Reed Amar, “Foreword: The Document and the Doctrine,” 14 *Harv. L. Rev.* 27 (2000); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012); Steven G. Calabresi, “Neither Kavanaugh Nor Constitutional Originalism Are Scary,” *The Hill*, Aug. 21, 2018 (reprinted in Appendix C).

⁵ According to a recent survey of scholarly (as distinct from judicial) citations, the two most cited originalist scholars in recent years are Professor Jack Balkin and yours truly—both self-described liberals and registered Democrats. See <http://originalismblog.typepad.com/the-originalism-blog/2018/08/most-cited-originalist-scholars-2012-2017-michael-ramsev.html>

⁶ Some modern conservative originalists—Justice Scalia most egregiously—failed to pay sufficient heed to the Reconstruction and Woman Suffrage Amendment. By contrast, Kavanaugh has taken pains to highlight the constitutional amends made by post-Founding amendments, in language more reminiscent of Thurgood Marshall than Antonin Scalia:

We revere the Constitution in this country, and we should. We also, however, must remember its flaws. And its greatest flaw was the tolerance of slavery. That flaw cannot be airbrushed out of the picture when we celebrate the Constitution. It was not until the 1860s, after the Civil War, that this original sin was corrected in part, at least on paper, by ratification of the 13th, 14th, and 15th Amendments to the Constitution.

But that example illustrates a broader point as well. When we think about the Constitution and we focus on the specific words of the Constitution, we ought to not be seduced into thinking that it was perfect and that it remains perfect. The Framers did not think that the Constitution was perfect. And they knew, moreover, that it might need to be changed as times and circumstances and policy views changed.

And so they provided for a very specific amendment process in Article V of the Constitution. The first 10 amendments, as we all know, came very quickly after the new Congress met in 1789. And those amendments were ratified in 1791. The 11th and 12th Amendments followed soon thereafter, and that process has continued. Indeed, the amendments have altered fundamental details of our constitutional structure. The 12th Amendment changed how presidents and vice presidents are elected. The 22nd Amendment changed how long presidents can serve. The 17th Amendment altered how the Senate is selected, changing it from a body selected by state legislatures to a body directly elected by the people. The 13th, 14th, and 15th Amendments altered the autonomy of the states and created new constitutional rights and protections for individuals against states.

Brett M. Kavanaugh, “From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist,” AEI (2017), pp. 2-3.

⁷ For an excellent example of this harmonization, see Judge Kavanaugh’s *PHH* decision, discussed in more detail in Appendix B, Item 3. For a closely analogous effort, see AMAR, *supra* note 4, at 319-24, 381-86.

⁸ This may come as a surprise to persons—perhaps including some Senators and staffers—who have not done their constitutional homework. See e.g. Manuela Tobias, “Bernie Sanders’ Claim that Brett Kavanaugh Defies Supreme Court Precedent a Stretch,” *Politifact*, July 16, 2018:

Sanders said Kavanaugh’s belief that a president “may decline to enforce a statute . . . when the president deems the statute unconstitutional” is “contrary to 200 years of Supreme Court precedent.”

In practical terms, presidents have indeed declined to enforce statutes they deemed unconstitutional. The question has never come before the Court, however. *Marbury vs. Madison* held that the Supreme Court could declare statutes unconstitutional, but did not deny that presidents could also enforce constitutional principles.

We rate this [Sanders] statement Mostly False.

Politifact was if anything too generous to Senator Sanders, whose statement was plainly false, even though it was, I presume, an honest mistake. I suspect that Judge Kavanaugh got it right and Senator Sanders got it wrong because, unlike Senator Sanders, Judge Kavanaugh is familiar with the relevant scholarship on this topic. See, e.g., Frank H. Easterbrook, “Presidential Review,” 40 *Case Western Reserve L. Rev.* 905 (1980); AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* (2005), 60-61, 179-80; AMAR, *supra* note , at 428-29.

⁹ On whether sitting presidents can be criminally prosecuted against their will, see my testimony of Sept. 9, 1998 before this Committee’s Subcommittee on the Constitution, Federalism, and Property Rights. On issues related to independent counsels and the Mueller investigation, see my testimony of Sept. 26, 2017. By a 14-7 vote on April 26, 2018, this Committee apparently disregarded my claim that the proposed Mueller bills were flatly unconstitutional. For a very recent ruling by a Federal District Judge here in D.C. squarely agreeing with my analysis—and indeed, expressly citing my Sept. 26, 2017 testimony and sources cited therein with strong approval in the case, directly involving one of Mueller’s investigations—see *United States v.*

Concord Mgmt. & Consulting LLC, 2018 U.S. Dist. LEXIS 135826, __ F.SUPP.3D __, 2018 WL 3827021 (Aug. 13, 2018).

¹⁰ See generally Appendix D, Item 2.

¹¹ For details see Brett M. Kavanaugh, “One Government, Three Branches, Five Controversies: Separation of Powers Under Presidents Bush and Obama,” *Marquette Lawyer* (Fall 2016), 8, 10:

Prior White House experience also helps, I think, when judges need to show some backbone and fortitude, in those cases when the independent judiciary must stand up to the president and not be intimidated by the mystique of the presidency. I think of Justice Robert Jackson, of course, as the role model for all of us executive branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

For my elaboration of the significance of this passage, see my response essay, “Walking in the Long Shadow of Justice Jackson,” *id.* at 20:

Jackson took pains to stress that he was not bound as a justice to endorse all the things he might have previously argued as the president’s lawyer. “A judge cannot accept self-serving press statements of the attorney for one of the interested parties [i.e., the president] as authority in answering a constitutional question, even if the advocate was himself.” Once a pol (or a pol’s mouthpiece), but now a judge. Black robes and life tenure freed Jackson to act in a judicial fashion even though he had not been entirely free to do so in some of his earlier assignments. In all these openly autobiographical musings by Jackson, we see that one of the most canonical decisions of all time was greatly and self-consciously enriched by the non-judicial experience that one of its notable members brought to the bench.

¹² Here is what a towering constitutional scholar and former federal appellate judge wrote in an op-ed written last week for and about the current Senate: “Senators today live in fear of the extreme wings of their party and cannot do the responsible thing even when they know it is for the good of the country.” Michael McConnell, “Brett Kavanaugh will Bring Middle Principles to our Polarized Nation,” *The Hill*, Sept. 1, 2018.

¹³ “With Kavanaugh on the Supreme Court and Justices Breyer and Kagan showing signs of willingness to break with their more leftward brethren or sistren, the new Supreme Court could have a serious principled middle for the first time in decades. That would be therapeutic for our obsessively polarized country.” McConnell, *supra* note 12. On Kavanaugh’s intellectual openness to moderates and conservatives, see Appendix B, Items 1 and 2.

¹⁴ For the structural and game-theoretic reasons that this is so, see Appendix D.

TESTIMONY OF ALICIA WILSON BAKER
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ON THE NOMINATION OF BRETT KAVANAUGH TO
BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT
September 7, 2018

My name is Alicia Wilson Baker. I am a pro-life Christian and an ordained minister from Indiana. I am honored to be invited here today to share with the Committee my story about being denied insurance coverage of birth control and to express my concerns about the nomination of Judge Brett Kavanaugh to the United States Supreme Court. I believe that now more than ever it is essential for those in public office to hear the voices of ordinary people like me, and I am grateful for this opportunity. I testify today not just for myself, but for the countless others whose health and ability to make personal decisions are at stake with this nomination, and who do not have the same opportunity to have their voices heard.

I. I am a Pro-Life Christian Who Strongly Believes that for People Who Decide to Use it, Birth Control is Critical to Living Our Fullest Lives.

I grew up in a devout evangelical Christian family in California. My parents were leaders in our church congregation, and I was also deeply involved with my church from a young age. My childhood was filled with happy memories of attending Sunday School and Christian primary and secondary schools, going on mission trips, and serving in our local community. My parents are amazing people who taught my sister and me to put our faith into action at a very young age. They demonstrated their love for Christ through loving others, and they encouraged us to do the same.

One such way that my parents demonstrated their passion and commitment to putting faith in action was by serving others together as a family. I went on my first mission trip when I was 5 years old. Our church was a “sister church” with a church in Mexico that we visited at least once a year. During those trips, we worked alongside the local church to serve their community. My eyes were opened to the reality that not every child has the same privileges I had. I loved meeting and learning from people who were different than me—a passion that propelled me forward as I grew older.

In 2015, I graduated with a master's degree from Fuller Theological Seminary. In May 2018, after a 6-year-long process, I was ordained as a minister in the Free Methodist Church. I decided to attend seminary and become ordained because I recognized that I had the passion to serve others but not necessarily the tools and education to do it well. Seminary and the ordination process have allowed me to grow in my relationship with Christ, my understanding of my calling as a Christian, and my understanding of the world we are called to love and serve.

My faith and relationship with Jesus is the foundation of who I am. Everything I do, every interaction with others, every decision I make; it's all rooted in what I believe. I work to create a world of justice and love according to the teachings of Jesus. Without my faith, I am not the same.

Because of my faith, I am called to "act justly, love mercy, and walk humbly with God." (Micah 6:8). My faith calls me to love God and love others without exception. (Matthew 22:37-40). At the end of my life, I hope I will have accomplished that well. To live the principle of faith in action instilled in me by my parents, I currently work at a neighborhood center in urban Indianapolis, where I collaborate with local agencies and neighbors to improve the quality of life in our community. I believe that if we are all able to become more loving, more compassionate, and more aware of others, and if we are able to learn from each other instead of being afraid of one another as we grow in our relationship with Christ, then we will all be stronger.

Jesus directs us to advocate for a just society that allows people to live their lives to the fullest. In John 10:10, Jesus says, "I have come that you might have life, and have it to the full." In this passage, Jesus is not referring merely to personal salvation; He also intends for us to seek justice for the poor and the oppressed here on Earth. One such way of accomplishing this is by supporting policies to assist mothers, single parents, and low-income families both before and after babies are born. And this means supporting access to affordable birth control, because by permitting individuals to plan if, whether, and when to become pregnant, birth control allows us to live our fullest lives.

II. I Was Denied Insurance Coverage of Birth Control Because of My Insurance Company's Religious Beliefs.

In 2015, I moved to Indiana to start my dream job doing international development work for a church-affiliated organization in Indianapolis.

Spring 2016 was one of the happiest and most exciting times of my life. I was about six months into my new job, and I was engaged to be married to my best friend, Josh. Like me, Josh is a Christian and steadfast in his convictions. Josh and I bonded over the importance of faith in our lives. For both of us, faith is so much more than just a belief system; faith is a verb: it is about how we live our lives. We love being able to serve together and consider it an honor to be able to walk on our faith journey together.

Josh and I had both separately decided to abstain from sex until marriage. As our wedding approached, we began to prepare for the consummation of our marriage. We did not feel we were ready to have children immediately after getting married; instead, we wanted to prioritize buying a home and paying off our hefty student loan debt on our limited budget. So, I began to research birth control options.

I researched the Affordable Care Act's birth control benefit and learned that it requires health plans to cover the full range of FDA-approved birth control methods without any out-of-pocket costs to the individual.

I had taken birth control in the past for medical reasons, and I knew that my body responded negatively to hormonal birth control. So I researched the various birth control methods and decided that the non-hormonal IUD was right for me. It is a safe, highly effective, and reversible birth control option.

I reviewed the insurance coverage I had through GuideStone Financial Resources. The plan document said it would cover contraceptives. So, I had the IUD inserted a few months prior to my wedding, to allow my body to become accustomed to it.

I was shocked when, a few weeks before my wedding, I received an explanation of benefits in the mail telling me that my IUD was not covered by my insurance, and that I would have to pay \$1,200 out of pocket. I was charged for the IUD, for the insertion of the IUD, and for the mandatory pregnancy test that is required prior to IUD insertion. GuideStone pointed to an exception in the plan document specifying that "GuideStone does not provide coverage for abortions or abortion-causing drugs, as this violates our Biblical convictions on sanctity of life." But an IUD is a form of birth control that prevents pregnancy; it does not terminate pregnancy.

In all my studies, I have yet to find a scripture or evangelical doctrine that says that contraceptives are against God's will. My husband and I believe that nothing in Christianity opposes use of birth control. We were making prudent and responsible decisions for our family. But our beliefs and our decisions were overridden by the religious beliefs of an insurance company.

For the days leading up to my wedding and for months thereafter, I was busy fighting with my insurance company. The anxiety was overwhelming. This bill was a huge strain on our strapped budget, at a time when we were just starting our new life together.

I sent appeal after appeal to my insurer. I explained to GuideStone that their refusal to cover this FDA-approved form of contraception puts ordinary women's well-being on the line. My doctor wrote an appeal to my insurer, explaining that my IUD was a "necessary, preventative treatment." I raised the issue with the human resources department at my church-affiliated employer, which was surprised by the insurance company's denial and supportive of my efforts, but ultimately unable to help.

In the end Josh and I were forced to figure out a way to pay the bill, since we did not want it to get sent to collections. To cover the cost, we paid less towards our student loans for a few months, and we used some of the money we had set aside for a down payment.

The experience was as frustrating as it was emotionally taxing. I felt like I had done everything “right.” I waited to have sex until marriage, and I was proactive about getting birth control before my wedding date. But I still felt like I was being punished for attempting to be responsible and waiting to have children until Josh and I were financially secure.

I know that I am fortunate. Even though it was a financial hardship, I ultimately could pay that \$1200 bill. But many people cannot. For many, \$1200 would mean having to choose between getting the health care they need and having food on the table. It could mean losing the ability to protect their bodies and determine their own futures.

These concerns are not just hypothetical. Studies show that cost is a major determinant of whether people obtain the health care they need across the income spectrum, but particularly for people with lower incomes.ⁱ When finances are scarce, people stop using birth control altogether, use it improperly or inconsistently, or use methods that are medically inappropriate or less effective.ⁱⁱ As a result, those people may be denied the many benefits of birth control for their health, self-determination, economic security, and equality. For those who already face increased obstacles to health care, including people of color, LGBT people, young people, and people with lower incomes, a \$1200 bill would only exacerbate existing disparities.

III. Judge Kavanaugh’s Confirmation Will Make It Harder for Individuals and Families to Access Birth Control.

I share my story today because the nomination of Judge Kavanaugh jeopardizes access to affordable birth control for countless individuals nationwide.

Judge Kavanaugh has shown his willingness to prioritize the religious beliefs of employers, universities, and insurance companies over the beliefs and personal decisions of individuals. In 2015, Judge Kavanaugh split with other judges on his court and wrote a dissenting opinion in the case *Priests for Life* that would have allowed employers and universities to use religion to deny birth control coverage to individuals.ⁱⁱⁱ His reasoning showed that he thinks courts must give nearly unrestricted deference to organizations’ claims that they do not have to follow a law because it “substantially burdens” religion. And he even refused to say whether he thinks there is a compelling government interest in ensuring women’s access to contraception.

His refusal to affirm that interest is especially troubling given that these issues are in the courts right now. For example, there are multiple court challenges to Trump Administration rules allowing nearly any employer or university to deny birth control coverage for religious or moral

reasons. The Supreme Court could hear those cases—or others about birth control access—in the near future.

Based on his opinion in *Priests for Life*, I am concerned that Judge Kavanaugh on the U.S. Supreme Court would allow religion to override not only access to birth control, but other patient health care. And the reasoning he put forward would not have to stop with health care. His reasoning could allow some to claim “religious freedom” not as a way to protect religion but as a way to discriminate. As a Christian, I worry about this incredibly broad interpretation of “religious freedom.” I worry what this means for real people, for the communities I work with every day.

I have experienced firsthand what it is like to struggle to afford birth control when someone else’s religious beliefs deny it to you. My faith dictates that I must speak out on behalf of the millions of women who stand to lose access to affordable birth control if Judge Kavanaugh is confirmed. Proverbs 31:8-9 says: “Speak out for those who cannot speak, for the rights of all the destitute. Speak out, judge righteously, defend the rights of the poor and needy.”

As a person of deep faith, I would never impose my religious beliefs on anyone—and no one else should either. My religious beliefs are separate from the law. Judge Kavanaugh’s record shows he does not respect this critical separation.

As a Christian and a woman, I urge this Committee and this Senate to weigh heavily the detrimental impact that confirmation of Judge Kavanaugh would have on the health and well-being of ordinary individuals and families, particularly those who already face oppression and discrimination in our society. I urge this Committee to block the nomination of Brett Kavanaugh to the Supreme Court of the United States.

ⁱ Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 *Guttmacher Pol’y Rev.* 7, 10 (2011), https://www.guttmacher.org/sites/default/files/article_files/gpr140107.pdf; Inst. of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* 109 (2011).

ⁱⁱ Guttmacher Inst., *A Real-Time Look at the Impact of the Recession on Women’s Family Planning and Pregnancy Decisions* 5 (2009), https://www.guttmacher.org/sites/default/files/report_pdf/recessionfp_1.pdf; Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 *Contraception* 360, 360, 363 (2007) (finding decrease in out-of-pocket costs of contraception increased use of more effective methods); *Insurance Coverage of Contraception*, Guttmacher Inst. (Dec. 2016), <https://www.guttmacher.org/evidence-you-can-use/insurance-coveragecontraception>.

ⁱⁱⁱ *Priests for Life v. U.S. Dep’t of Health & Human Servs.*, 808 F.3d 1, 14 (D.C. Cir. 2015) (Kavanaugh, J., dissenting).

Statement of Kenneth C. Christmas, Jr. before the Senate Committee on the Judiciary in support of the Nomination of Judge Brett Kavanaugh to the Supreme Court

September 7, 2018

Chairman Grassley, Ranking Member Feinstein, and other distinguished Members of this Committee:

I am honored, grateful, and humbled to appear before you and endorse the nomination of Judge Brett Kavanaugh to sit as an Associate Justice of the United States Supreme Court.

I have known this nominee for three decades. He is a close personal friend. I hope my testimony today will illuminate a side of Judge Kavanaugh that is not often seen in media accounts.

I met Judge Kavanaugh in 1988 during my first year at Yale Law School, when he was a second-year law student. In addition to both of us pursuing our love of the law, we both enjoyed watching SportsCenter, playing pick-up basketball and going to Yale football games. We became fast friends. The following year, we roomed together along with six other law school students in a house behind the Yale gym.

I have always admired Judge Kavanaugh's ability to create deep relationships with people from all walks of life--conservative, liberal, athlete, academic, male, female, White, Black. I think one reason for that is he never assumes he's the smartest person in the room. Judge Kavanaugh deeply believes he can learn something from everyone. A wonderful confidant, Judge Kavanaugh has always made me feel comfortable speaking to him about basically anything because he genuinely cares how others feel and authentically tries to understand how they think.

During law school, I often sought out Judge Kavanaugh's advice. He would implore me to first understand the issues from the points of view of all involved. "Put yourself in their shoes," I recall him advising me. "How would that make you feel?" Then, he would challenge me to "demand of [myself] that which you ask from others". Should he be fortunate enough to be confirmed, I believe Judge Kavanaugh will bring that same humility and compassion to the Supreme Court.

It's who Judge Kavanaugh is.

Since graduation, the same eight law school roommates have spent a long weekend together every year, with an astonishingly minimal absentee rate. And, Judge Kavanaugh has been no exception. These 26 annual reunions have kept all of us close, even as our families and careers demanded more time from each of us.

I will never forget a long drive we took to Bucks County, Pennsylvania, for one of our early annual reunions. Judge Kavanaugh listened and asked questions for the whole ride as I

explained my bewilderment over those who deny the continuing effects of slavery and Jim Crow laws. While I was raised in California, I have deep family roots in Mississippi. I believed then, as I still do now, that the laws of our country must remain responsive to historical prejudice, discrimination, oppression and mistreatment of African-Americans. There was no doubt left in my mind following that ride that Judge Kavanaugh deeply cared—and still cares—about truly understanding my Black experience and point of view.

Over the years, Judge Kavanaugh and I have traveled together many times in and outside the country. I drove with Judge Kavanaugh to Boston to watch him run his first Boston Marathon. Judge Kavanaugh made the trip to California for my wedding and I flew back to Washington, D.C., for his. While our age is no longer conducive to pick-up basketball games, we have been able to commiserate over coaching our children and learning that the first rule of being a good youth basketball coach is understanding you are no longer a player.

Our support for one another has been a steady and reliable force as we move through life's ups and downs. Earlier this year, Judge Kavanaugh and I, along with our other law school roommates and friends, gathered over a weekend for the funeral of the son of another roommate. I witnessed Judge Kavanaugh's love, care and support of our friend during this most difficult of times. He attended dinners, participated in fellowship well into the night and spent the day at the funeral service in support of the family. In a time of personal crisis, I won't need to look far for my friend because Judge Kavanaugh will already be there.

So, you may ask what does coaching basketball, showing up at each other's wedding, listening to my experiences as a Black man living in America or attending a funeral have to do with determining whether Judge Kavanaugh should become a Supreme Court Justice? The answer is it speaks directly to his humanity. Judge Kavanaugh cares. He is far from being an ideologue. He does naturally what a good judge should do: Seek to understand before offering an opinion. Judge Kavanaugh is a tremendous son, friend, husband and father. He's honest, empathetic and intellectually curious.

That's the person I know.

Over the course of my life, I have found that the true test of a friendship is when support for a friend is inconvenient. For me, from the perspective of a lifelong Democrat, it is inconvenient to support Judge Kavanaugh, especially during this time of an unprecedented partisan divide and polarization among Americans.

But I know it is the right thing to do.

As an American, I am quite concerned about the attacks on our esteemed institutions, like the judiciary. My expectation of any judicial nominee I support, especially when it is for the Supreme Court, is that he or she possess a powerful sense of fairness and impartiality. As an African-American, I expect a nominee I support to have a deep sense of obligation to protect the

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interests of the disempowered, particularly those whose voices are too often drowned out of our political discourse and cannot be heard. Again, all this requires a judge who is compassionate, humble and principled.

Judge Kavanaugh is such a nominee.

Everyone here today is well aware of Judge Kavanaugh's extraordinary qualifications, both educationally and professionally. However, it is Judge Kavanaugh's humanity that compelled me to come here today to testify on his behalf. For this reason, without equivocation or reservation, I respectfully urge this Committee and the Senate to confirm Judge Brett Kavanaugh as an Associate Justice for the United States Supreme Court.

Thank you.

**Written Testimony of Paul D. Clement, former Solicitor General of
the United States, in Support of the Confirmation of
Judge Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States**

Chairman Grassley, Ranking Member Feinstein, and members of the Committee. It is a great pleasure and honor to return to the Senate Judiciary Committee where I served as a staffer two decades ago. It is an even greater pleasure and honor to be here to testify in support of the confirmation of Judge Brett M. Kavanaugh of the United States Court of Appeals for the District of Columbia Circuit to serve as an Associate Justice of the Supreme Court of the United States.

Judge Kavanaugh and I first met 25 years ago when we clerked at the Supreme Court during the same Term for different Justices. Although the law clerks were an impressive bunch, Brett immediately stood out. Unlike most of the rest of us whose legal experience consisted of a single appellate clerkship, Brett came to his Supreme Court clerkship with the equivalent of three clerkships already under his belt. He had not only clerked on the Third and Ninth Circuits, but he also had served

as a Bristow Fellow in the Office of the Solicitor General, where he spent a year following the Court closely and working on briefs in opposition and other Supreme Court filings. As a result, while the rest of us were feeling our way, rather blindly, through the process of preparing our first pool memos and sorting through our first briefs, Brett was already fully versed in the Court's certiorari criteria, rules, and even stood ready to handicap the likely quality of upcoming oral arguments by members of the Supreme Court bar. Brett quickly came to be seen by his fellow clerks as a resource on everything from the minutia of Supreme Court practice to matters of high constitutional doctrine.

But what really stood out about Brett was not just his knowledge of the Court and the law, but the undeniable fact that he was a well-rounded, likable, and unpretentious person. You expect a Supreme Court law clerk to have a first-rate legal mind. You do not necessarily expect a Supreme Court law clerk to have a sweet jump shot. I can tell you from first-hand experience that Brett had – and has – both. He was as comfortable talking about how to break a full-court press as he was discussing the *Rooker-*

Feldman doctrine. For all these reasons, Brett was admired by fellow clerks from all chambers and across ideological lines. None of us was the least surprised to see him become the first of our ranks to argue a Supreme Court case and the first to become a federal appellate judge, beating out Justice Gorsuch by a nose.

Judge Kavanaugh and I became friends during our clerkship year and have remained friends ever since. But I am not here testifying today out of friendship. Rather, I am testifying today because of what I have seen in observing Judge Kavanaugh in his over twelve years of service on the federal appellate bench. By happenstance, I was in the courtroom to witness one of Judge Kavanaugh's first oral arguments as an appellate judge. He was incredibly well-prepared. He demonstrated a mastery of the record and asked penetrating questions of both sides. He carefully listened to the arguing attorneys' answers as well as the questions emanating from his more seasoned colleagues.

None of this surprised me, but I was struck by the fact that he was expressing a mastery of the record and a profound interest in the legal arguments in the context of a petition for review

from a decision of the Federal Energy Regulatory Commission or FERC. At least in my days as a law clerk on the D.C. Circuit, FERC cases were not among the most coveted by the law clerks or judges. FERC cases were notoriously complex, with long administrative records filled with strange acronyms and doctrines unknown in other areas of the law. I feared for Judge Kavanaugh that he would be saddled with the assignment of the FERC case while his more senior colleagues authored opinions in higher profile cases addressing more accessible legal questions. While my fears were realized, I am quite sure that Judge Kavanaugh did not mind. As I have seen in the ensuing twelve years, he applies the same thorough approach to every appeal that comes before him without regard to the amount in controversy, the degree of notoriety or the agency involved. He recognizes that each case is the most important case for the clients and lawyers involved and treats each case accordingly.

Judge Kavanaugh's written opinions reflect the same careful attention to detail and thoroughness as his approach to oral argument. His majority opinions reflect a search for consensus and a willingness to address each side's argument. His separate

writings reflect scholarly and thorough assessments of difficult areas of the law. Judge Kavanaugh does not dissent lightly, but when he does dissent he offers a complete and clear explanation for his separate views. And in an unusual number of important cases, his dissenting views later shaped the views of a majority of the Supreme Court. In all of his writings, Judge Kavanaugh gives the reader a plain sense of not just what Judge Kavanaugh has concluded but why. One may disagree with his reasoning, but his clear prose and willingness to “show his work” gives the reader a clear target to criticize or praise.

Let me close with a few words about judicial temperament. That concept has been much discussed in the course of other judicial confirmation hearings, but the topic has received less attention in the course of these particular hearings, because Judge Kavanaugh has so plainly demonstrated the requisite judicial temperament over his years on the Court of Appeals. That said, I believe it is a mistake to think of judicial temperament as a binary characteristic — something a judicial candidate either possesses or lacks. Instead, there are degrees of judicial temperament. And I am here to tell you that based on

my own personal experience arguing in front of Judge Kavanaugh and observing other arguments before him, Judge Kavanaugh has judicial temperament in spades. He is respectful of counsel in both his demeanor and in his level of preparation and engagement. Nothing is more discouraging to litigants and attorneys than a cold or underprepared bench. There is no fear of that with Judge Kavanaugh. He understands that appellate cases are serious business for the parties involved and prepares accordingly. But at the same time he recognizes that they need not be dour affairs. He brings a light and deft touch to his questions and his interactions with counsel and judicial colleagues. I think it is largely for these reasons that I was joined by 40 colleagues in the Supreme Court bar across ideological lines in support of Judge Kavanaugh's confirmation. By any conventional measure, Judge Kavanaugh is enormously qualified to serve on the Nation's highest court. I am confident he will serve with distinction. I urge you to vote for his confirmation.

**United States Senate Judiciary Committee Hearing:
The Nomination of Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States**

September 7, 2018

**Prepared Statement of
Jackson Corbin**

Chairman Grassley, Ranking Member Feinstein, and distinguished members of the Senate Judiciary Committee,

I am privileged to represent 130 million people with pre-existing conditions today, and I am grateful for the invitation to testify before you.

My name is Jackson Corbin, and I am thirteen years old. I am a lot like other teenagers. I love comic books, Marvel movies, and playing Minecraft and Fortnite with my friends.

Ten years ago, my brother, mother, and I were all diagnosed with Noonan Syndrome, a genetic condition that affects various systems of the body. As a result of my Noonan Syndrome, I have a lot of pre-existing conditions. Noonan Syndrome affects my growth, so I will never be as tall or as strong as other people my age. I have stomach issues, reflux, and I get really bad headaches.

My most severe condition is my Von Willebrand Disease, a form of hemophilia. This means that I cannot play contact sports, or do things like rough house, roller skate, or jump on trampolines.

I take medication to control my reflux and to clot my blood if I get hurt. Having my clotting medicine at home means that I don't have to go to the emergency room every time I lose a tooth or get a bad bruise or cut.

My brother, Henry, is my best friend. He is ten and a half, and he has Noonan Syndrome, too. We do everything together, including going to all of our specialist visits. My mom always says that the greatest thing she ever did was to give the two of us to each other.

Noonan Syndrome affects everyone differently, so in addition to having all of the same conditions as me, including Von Willebrand Disease, Henry has even more special health care needs than I do.

When Henry was a baby, he had to have life-saving stomach surgery and a blood transfusion. Now he has what's called gastroparesis, which means he vomits almost every day, sometimes even in his sleep. The medicine he takes helps, but not all the time.

We share a room, and at first it was scary to see Henry vomit in his sleep, but now I am used to it. When I hear him gagging, I roll him over so he doesn't choke and I run to get my parents. Henry also has heart problems and asthma.

I worry about Henry, a lot.

I have heard my mom and dad say that they are grateful for our insurance because the cost of our care is more than my family makes in a year. That means that if the Affordable Care Act is repealed, and Henry and I lose insurance, my parents will not be able to afford to pay for our care.

I have been fighting for health care for nearly two years. Last year, in the first speech I ever gave on the lawn of the Capitol, I compared myself to Dr. Seuss' The Lorax. The Lorax says, "I am the Lorax and I speak for the trees," and so I said, "I am Jackson, and I speak for the children." I said that because I had met so many children with special health care needs who are unable to speak for themselves. I wanted to be their voice.

But as my journey continued, I met even more children – and adults – who have pre-existing conditions, and who – like me and Henry – are scared for their future. I realize that I don't only speak for the children anymore.

Today, especially, I speak for everyone.

I speak for myself, Henry, and all the other children across the country with special health care needs.

I speak for the parents who struggle with their own health issues while caring for their children - including my own mom, who has Noonan Syndrome, too.

I speak for every person with disabilities who high fives me in the Senate hallways as they fight for our care.

I speak for every person with disabilities who will never be able to live independently.

I even speak for the man who has Lupus who altered the suit that I'm wearing today.

Most importantly, I speak for every American whose life could change tomorrow with a new diagnosis.

My Noonan Syndrome is a part of who I am. It's been a part of me since the day I was born, and will be a part of me for the rest of my life. If you destroy protections for pre-existing conditions, you will leave me and all the kids and adults like me without care or without the ability to afford our care – all because of who we are.

We deserve better than that.

I might be a kid, but I am still an American. The decisions you are making today will affect my generation's ability to have access to affordable health care. Adults talk about investing in their future. Well, we *are* your future. Invest in us.

Protections for pre-existing conditions will continue to be challenged in the Supreme Court as long as people disagree with the ACA. We must have justices on the Supreme Court who will save the Affordable Care Act, safeguard pre-existing conditions, and protect our care. Please give us the chance to be healthy, to grow up, and to lead this country one day.

I know I want that chance.

Thank you.

STATEMENT OF JOHN W. DEAN BEFORE THE SENATE JUDICIARY COMMITTEE
HEARINGS ON THE NOMINATION OF JUDGE BRETT KAVANAUGH TO BE
AN ASSOCIATE JUSTICE ON THE U.S. SUPREME COURT

SEPTEMBER 7, 2018

Mr. Chairman, Ranking Member, and Members of the committee, thank you for the invitation to appear. I've accepted the invitation for the same reason I accepted the invitation to testify at the September 2005, hearings on Judge John Roberts nomination to be Chief Justice. I represent no organization or group or cause. My only interest is in good government, and more specifically, the operations of the institutions of government where I once served, which I have continued to study and write about – namely the Congress and the Presidency.

In nominating Judge Brett Kavanaugh President Trump like many of his Republican predecessors has selected, as he did with his prior nominee Justice Neil Gorsuch, a sitting federal appellate judge with something of a shrink-wrapped judicial philosophy making it rather predictive of how his nominee will respond to most issues that come before the Court. While no president can be certain how a nominee will decide cases once seated on the Court, knowingly or unknowingly, it can almost be guaranteed that Judge Kavanaugh (like Gorsuch and other conservatives selected by Republican Presidents on the Court) will not drift to the center or the left, which I will explain in a moment.

President Trump, like several of his Republican predecessors, selected a judge with high-level Executive Branch experience. One of the most distinctive features of Judge Kavanaugh's background is his extensive Executive Branch experience. From 1992-93, Kavanaugh was an attorney in the Office of the Solicitor General at the Justice Department. From 1994 to 1997, and during a period in 1998, Kavanaugh was an Associate Counsel in the Office of Independent Counsel Kenneth Starr. Finally, he served in the Bush II White House for some five years. From 2001 to 2003, he was an Associate Counsel and later Senior Associate Counsel in the White House Counsel's office; and from July 2003 to May 2006 he was an Assistant to the President, and Staff Secretary to the President.¹

¹ With his extensive executive experience, Judge Kavanaugh will be joining a Court that is already top-heavy with justices sharing significant Executive Branch experiences. For example (and listed by seniority), Chief Justice John Roberts served for two years at the Justice Department as a Special Assistant to the Attorney General (1981-82), then four years in the Reagan White House Counsel's office (1982-86); and another four years at the Justice Department as the Principal Deputy Solicitor General (1989-93) – some ten-years total. Justice Clarence Thomas served two years as Assistant Secretary for Civil Rights at the U.S. Department of Education (1981-82), and then almost eight years as Chairman of the U.S. Equal Employment Opportunity Commission (1982-90). Justice Stephen Breyer spent two years as a Special Assistant to the Assistant U.S. Attorney General for Antitrust (1965-67), he spent a year as an Assistant Watergate Special Prosecutor (1973) and he is something of an exception in having some Legislative Branch experience as a special counsel (1974-75) and chief counsel (1979-80) to this committee. Justice Samuel Alito spent four years as an Assistant U.S. Attorney in New Jersey (1977-81), two years as a Deputy Assistant Attorney General at the Justice Department (1985-87) and three years as U.S. Attorney in New Jersey (1987-90) – almost a decade with the U.S. Department of Justice. Justice Elena Kagan served for four years at the Clinton White House as an Associate Counsel (1995-96) and Deputy Assistant to the President for Domestic Policy

If Judge Kavanaugh is confirmed, I submit we will have the most pro-presidential powers Supreme Court in the modern era. I am old enough to remember when conservative orthodoxy fought the expansion of presidential and executive powers. The so-called Imperial Presidency was considered undemocratic. But conservatives have slowly done a one-hundred and eighty degree turn and concocted from whole-cloth what they call “a unitary executive theory,” using the sparse language of Article II of the Constitution to give presidents authority over the entirety of the Executive Branch, including supposedly independent regulatory agencies created by Congress and placed with the Executive Branch. With Judge Kavanaugh on the Court, we should anticipate a majority that will find it increasingly difficult to discover any presidential actions which they do not approve.

A Supreme Court that is decidedly pro-presidential power is deeply troubling with the contemporary Republican controlled Congress, which has shown no interest in oversight of a Republican president, Republicans are now creating a Supreme Court that will be a weak check, at best, on presidential powers. There is much to fear from an unchecked president who is inclined to abuse his powers. That is a fact I can attest to from personal experience. For example, the executive branch has been created by thousands of acts of Congress, many of which have been tested in the federal courts. Yet President Nixon planned to totally reorganize the executive branch in a manner which would have insulated the president and his staff, though the use (better stated as the abuse) of executive privilege, which would be used to block Congressional oversight. Nixon, leaning on his Justice Department, was getting legal opinions to support his radical changes in the executive branch. Needless to say, this is only one example, but I believe it is one of the reasons Congress sought to control Nixon with the Watergate investigations, which of course revealed even more abuses.

Justices with extensive executive experience are important for another reason. Republican appointed justices – and apparently only Republican High Court appointees – with such executive experience do not grow more moderate on the Court, rather just the opposite. Cornell Law Professor Michael Dorf, a former U.S. Supreme Court law clerk, and a serious scholar of the Court, discovered that executive experience is predictive of performance on the Court. Professor Dorf, originally writing in 2007 for the *Harvard Law & Policy Review*, reported: “For nearly four decades, one single factor has proven an especially reliable predictor of whether a Republican nominee will be a steadfast conservative or evolve into a moderate or liberal: experience in the executive branch of the federal government.” Dorf found that between 1969 and 2007, the Senate had confirmed twelve Supreme Court nominees from Republican presidents. The six justices with executive experience remained solid conservatives (Burger, Rehnquist, Scalia, Thomas, Roberts and Alito); while the six without such backgrounds became moderates and even liberal (Blackmun, Powell, Stevens, O’Connor, Kennedy and Souter).² In short, it is more likely than not that if Judge Kavanaugh is confirmed, he will remain every bit as conservative as he is today, as will his brethren with executive experience.

(1997-99). And Justice Neil Gorsuch who served as a Principal Deputy Associate Attorney General at the Justice Department (2005-06).

² Michael C. Dorf, “Does Federal Executive Branch Experience Explain Why Some Republican Supreme Court Justices ‘Evolve’ and others Don’t?” Legal Studies Research Paper Series, at <http://ssrn.com/abstract=2240505>.

Because I am submitting this written statement several days before I testify, I am hopeful that by the time I appear before the committee we all will have a better understanding of Judge Kavanaugh's positions on executive and presidential powers, for he has taken inconsistent positions in the past. For example, Judge Kavanaugh set forth his thinking in a 2009 law journal article in *Minnesota Law Review* – innocuously titled “Separation of Powers During the Forty-fourth Presidency and Beyond.” More accurately, much of this article is a repudiation of the hyper-aggressive tactics that Kavanaugh launched against the presidency of Bill Clinton in his role as an assistant to Independent Counsel Kenneth Starr from 1994 to 1998, an undertaking that is as close to a real “witch hunt” as anything in American politics since Senator Joe McCarthy roamed the country with his bogus lists of communist traitors in our midst. Kavanaugh writes he believed in the 1980s and 1990s “that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake.”³ The judge is not claiming he and others were over-zealous, or that the Supreme Court got it wrong in accepting Starr's argument in *Clinton vs. Jones*, 520 US 681 (1997), that a sitting president has no immunity from civil litigation for acts done before taking office and unrelated to the office. Rather Judge Kavanaugh tellingly blames it all on the Independent Counsel Act, under which they were operating. Accordingly, he merely hints *Clinton vs. Jones* in the *Minnesota Law Review* that the case may have been wrongly decided, saying it was “beyond the scope of [his] inquiry.” As has been discussed before this committee, he goes on to recommend that Congress immunize sitting presidents from both civil and criminal liability. In short, under Judge Kavanaugh's view, even if a president shot someone in cold-blood on 5th Avenue, that president could not be prosecuted while in office. And based on Judge Kavanaugh's thinking at the time, he would give a president plenty of time to destroy the evidence.

Earlier, in a 1999 roundtable discussion with other lawyers, before arriving on the bench Judge Kavanaugh suggested that *U.S. vs. Nixon* may have also been wrongly decided. More specifically, he stated:

But maybe Nixon was wrongly decided – heresy though it is to say so. Nixon took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implication to this day that most people do not appreciate sufficiently.... Maybe the tension of the time led to an erroneous decision....

This is from a transcript of the discussion published in the January-February 1999 issue of the *Washington Lawyer*.⁴

³ Brett M. Kavanaugh, “Separation of Powers During the Forty-Fourth Presidency and Beyond,” *Minn. Law Review* (2009) 1460.

⁴ Mark Sherman, “Kavanaugh: Watergate tapes decision may have been wrong,” AP (July 18, 2018) at https://apnews.com/amp/3ea406469d344dd8b2527aed92da6365?_twitter_impression=true

By 2016 Judge Kavanaugh, however, was praising *U.S. v. Nixon*, placing it in the company of several of the Court's most cherished landmark holdings,⁵ and asserting (much as he has during these hearings, though falling short of agreeing that the case was correctly decided):

As a judge, you must, when appropriate, stand up to the political branches and say some action is unconstitutional or otherwise unlawful. Some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law. That takes a backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.⁶

If Judge Kavanaugh has not sorted out his positions on these key matters of executive power by the time I appear before the committee, I am happy to share with the committee what I believe would have happened during Watergate had the Supreme Court ruled for the President in *U.S. vs. Nixon* – for history would have been very different. I am also happy to share with the committee my understanding of why the Office of Legal Counsel of the Department of Justice issued its opinion in 1973 that a sitting president could not be indicted, and if Judge Kavanaugh's position has not been resolved on the Constitutional issues on indicting a sitting President. Indeed, I believe it has been resolved by two scholars: former Deputy Solicitor General Philip Lacovara, and the Constitutional scholar that Independent Counsel turned to on this issue the late Professor Ronald Rotunda – these scholars represent political philosophies from left to right.

I would like to close with a very important process matter. It is my understanding that the Trump White House is withholding a massive collection of documents relating to Judge Kavanaugh's work at the Bush II White House, and who knows what else they are hiding. The Ranking Member, California Senator Dianne Feinstein, stated on the morning of September 4, 2018 – just before the Kavanaugh hearings began – that after participating in nine Supreme Court confirmation hearings, it had never been so difficult to get access to the background documents relating to a nominee. Senator Feinstein stated that some ninety-three percent of Kavanaugh's records from his years at the Bush II White House remained "hidden," including over one-hundred thousand documents from his work in the White House Counsel's office. Senator Feinstein further noted that never has executive privilege been invoked by a White House for a candidate nominated to the Supreme Court, although the Reagan White House wanted to do so when elevating Justice Rehnquist to be Chief Justice.

These hearings began on September 4, 2018 with an effort by the minority to postpone the hearings until all the requested documents were provided. The chairman declined to consider a motion that would make such a review of the Kavanaugh documents possible. In short, notwithstanding the number of documents that have been provided, Judge Kavanaugh has, in fact, not truly been fully vetted given the fact vast numbers of documents have been withheld, estimated at only ten percent of the relevant material, yet it appears highly likely he will be

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); and *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

⁶ Brett M. Kavanaugh, "The Judge as Umpire: Ten Principles," *Catholic University Law Review* (Spring 2016) 683.

confirmed to take a seat on the Court. Based on personal experience with the confirmation of William Rehnquist, and studying the confirmation of Clarence Thomas, I can state that the failure to fully vet a nominee can haunt that person's career on the Court, damage the notion of justice, hurt the Court, and harm the American people. Because of the potential negative impact of a failure to fully vet Judge Kavanaugh, a man who knows the history of High Court confirmations, he should follow the request of Senator Durbin and demand that the hearings remain open until every piece of paper he has generated, or handled, has been reviewed carefully and fully by both the majority and minority of this committee. Let me explain why, using the examples of William Rehnquist and Clarence Thomas, both of whom went to the Court with clouds questioning their honesty and integrity hanging over them.

When writing *The Rehnquist Choice*, I explained how Rehnquist was selected by President Nixon for one of the two openings on the Court in 1971. I also reported discovering that Rehnquist had dissembled during his confirmation proceeding to become an associate justice when first claiming he was not a poll-watcher in Arizona during the 1964 presidential election and later when sending a letter to the then chairman of the Senate Judiciary Committee James Eastland to deny additional reports relating to his poll watching activities which had arisen after his confirmation hearing ended. Rehnquist was charged with employing Jim Crow like tactics in his native Arizona during the 1964 election. Eastland used Rehnquist's false statements in his letter to end the floor debate and get him confirmed successfully. When President Ronald Reagan nominated Rehnquist in 1986, again he was not vetted, and he was confronted not only with the charge he had falsely explained his conduct during the 1964 election but in addition that he had made false statements about his role in writing a memorandum as a law clerk to Justice Robert Jackson, and falsely claiming that Justice Jackson was opposed to *Brown vs. Board of Education*. As I note in the book, all the Court scholars who have looked at this situation have found clear and convincing evidence that Rehnquist was untruthful in his two confirmation proceedings, and that he hurt himself and the Court with these actions.

Because Justice Clarence Thomas was not fully vetted his career on the Court has been under a cloud that has had a conspicuous impact on him and the Court. Thomas's truthfulness vis-à-vis Professor Anita Hill's claims of sexual harassment have never been fully resolved, nor has the controversy ended. A definitive study of this controversy was undertaken in 1994 by journalists Jane Mayer and Jill Abramson, *Strange Justice: The Selling of Clarence Thomas* (Graymalkin Media, 2017 edition). Mayer and Abramson found that the preponderance of evidence supported Anita Hill's claims. This controversy has received renewed attention with the Me Too Movement (or #MeToo Movement), which is growing stronger and it is not going to disappear. In fact, it is a current issue for Justice Thomas because this year's mid-term election congressional candidate Barbara L'Italien, a Massachusetts Democrat, has made the impeachment of Justice Thomas for his false statements during his confirmation one of the planks of her campaign.⁷

⁷ Stephanie Murray, "Massachusetts Democrat calls for Clarence Thomas impeachment," *Politico* (Aug. 29, 2018) at <https://www.politico.com/story/2018/08/29/barbara-litalien-clarence-thomas-impeachment-801680>

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Judge Kavanaugh's nomination to the Supreme Court, is in one regard like the Rehnquist nomination to be Chief Justice, for he arrives with a question about his truthfulness during his confirmation hearings to the D.C. Circuit Court of Appeals. It is doubtful his answers have resolved doubts. If these hearings do nothing else they should establish beyond a reasonable doubt, if possible, that another cloud regarding truthfulness of another justice does not cast doubt on the Court. This is the reason Judge Kavanaugh should want every document he has ever touched reviewed by the committee, unless he has some he wants hidden.

Thank you, I am available to answer your questions.

Written Testimony of Aalayah Eastmond
United States Senate Judiciary Committee
September 7, 2018

Chairman Grassley, Ranking Member Feinstein, and other members of the committee, thank you for the opportunity to be here today to share my experience, and perspectives on gun violence in America. It needs to be a critical part of your consideration for any judge, particularly for the highest court in the land. My view is significantly impacted by my experience as a survivor of gun violence at Marjory Stoneman Douglas High School in Parkland, Florida just 6 months ago, and losing my uncle Patrick Edwards 15 years ago in Brooklyn, New York.

My name is Aalayah Eastmond, a senior at Marjory Stoneman Douglas High School in Parkland, Florida. I work across the country to help amplify the voices of young people and particularly young people in communities of color whose day-to-day experience with gun violence is always ignored, mischaracterized, marginalized, and minimized by the press, the public, and the corporate gun lobby.

February 14th, Valentine's day, a day of love and joy. Over 3,000 students and staff members went to Stoneman Douglas on the regular Wednesday, like any other day. Had our random practice fire drill in 2nd period not thinking anything of it. Hearing teachers go over the safety procedures every class because of a safety meeting they attended. Establishing the "safe spot" in their classrooms just in case a shooting were to take place "but it would absolutely never happen here" was always said by some teachers. Teachers informed us about an active shooter drill that would be taking place in a few days, where the swat team would come to school to handle the drill as if it were real.

1:02

4th period, the last period of the day. My Holocaust history teacher Ivy Schamis went over the procedures again. The classroom door was locked today because of the new rules. In the beginning of the period we began presenting our hate group projects that we've been working on. My teacher, Mrs. Ivy Schamis wanted us to be educated on hate groups around the country. Nicholas Dworet was in my group, little did I know, 79 minutes from then he'd be saving my life.

2:21

We heard a round of extremely loud pops. We had no idea what it was or where it was coming from. The class was in complete silence and we all stared at each other in immediate fear. Within a second we heard it again. We all **immediately ran. The class split in half. Half of my class ran to the "safe spot"** which was out of view from the window in the classroom door. The other half was **diagonally across from the window, in complete view. I wasn't in the "safe spot"**. As I sat down I remember telling myself, if I were to get shot anywhere I wouldn't make it. I needed to get behind something. The only thing in front of me was Nicholas Dworet. Helena Ramsay began passing books down so we could shield ourselves from the bullets. but yet everyone thought it was a drill.

2:22

I clenched the book from Helena and then looked down at my phone to call my mom. As I raised my finger to hit the green call button the loud pops were now **in my class. I thought to myself, "what kind of senior prank is this?"** as I began to see red on the floor. I assumed it was just a paintball gun. I looked up and saw Helena Ramsay slump over with her back against the wall, I began smelling and inhaling the smoke and gun powder. Then Nicholas Dworet rapidly fell over in front of me. I followed every movement of his body.

When he fell over I fell over with him. I then placed myself underneath his lifeless body. Placing his arm across my body and my head underneath his back. Bullets continued flying. I kept my eyes on the ground so I knew when to hold my breath and close my eye when the shooter got near. I began talking to God. I told God that I knew I was going to die. I asked to please make it fast. **I didn't want to feel anything. I asked for the bullet to go through my head so I wouldn't endure any pain.** I laid there for about 30 seconds still protected by his lifeless body. waiting for the shooter to move onto the next class. After the shooting stopped in my class. his body began to be very heavy. I couldn't breathe anymore. I rolled him off of me. and placed his head on his arm so he wouldn't be touching the cold ground. I sat up and looked over. Helena was still in the same exact position I last saw her. I froze. still in absolute view of the window the shooter shot into. Two of

my classmates then pulled me behind a filing cabinet. We were all crammed. Some on the phone with 911, some on the phone with their parents.

I immediately called my mom. I told her my last goodbye, and I told her how much I loved her. I apologized for all the things I might've done in my lifetime to upset her, and the phone hung up. I then called my father. I told him how much I loved him. I told him to tell my brothers I love them, and I said my last goodbyes. I couldn't hear anything they were saying to me but I made sure they could hear me. Not knowing whether it was one shooter or multiple, and not knowing whether they were coming back or not was an unimaginable amount of fear. Sitting behind the filing cabinet waiting to die. I then gave my phone to one of my classmates, Samantha Fuentes, who was shot several times. She took my phone to call her mom and saw her reflection in my phone she began crying. I texted her mom tried to keep her calm. Then I completely panicked. I began hyperventilating, my classmates began breathing with me and trying to keep me calm and quiet. It didn't work, they then covered my face, I felt like I was suffocating but it was to keep me quiet.

Several minutes have passed. "Broward County Police Department" was heard from outside the shattered glass. I thought it was the shooter playing a trick. The classroom door opened "Any injured" I still didn't believe it wasn't the shooter. I looked at my classmate Samantha Grady and said "I am not getting from behind this filing cabinet until you prove to me it's help" she shook her head yes then a swat team member came to check the pulse of Helena and Nicholas. He then looked at me with compassion and said "I know". We all ran out passing bodies in the hallway on the way out.

When I got outside I was completely disoriented. Extremely confused not knowing what to do or where to go. The police then said "He's still on the loose guys, we need you to work with us." I was petrified. I then spotted Samantha Grady, we snuck through bushes to get away from the crowd. We then realize she was shot. I dropped her off at the corner of the sidewalk where the ambulance was stationed. After 2 hours of walking in circles trying to find somewhere for my mom to pick me up I finally saw someone I knew and trusted. My friend and her mother noticed blood on my dress.

Then, they noticed the unimaginable. They called the police over, and they began picking body matter from my hair. I completely broke down. The police took me back on campus to gather photos of me and collect my bloodied dress. They placed me in a chemical suit meant for chemical and biological exposure, then recorded my statement. After, I was transferred to where students and staff members were allowed to be picked up. It was now 8:00 at night. Finally allowed to physically touch my mother. It was absolutely horrific, surreal and mind-numbing. I will never forget what I saw, what I did, and what I experienced that day. I will never forget Nicholas Dworet who, even in death, helped protect and save my life. Days later we received news that my mother would be having a miscarriage because of what the shock of the shooting did to her body. The shooting didn't only impact me on February 14th, it impacts me every day of my life.

I've also lost a family member to gun violence. I lost my uncle Patrick Edwards, shot in the streets of Brooklyn New York. He was shot in the back, the bullet then pierced his heart. He was only 18. With his whole life ahead of him, and evidently that's the same story of thousands of black and brown families across the country. Gun violence disproportionately impacts black and brown youth. Whether that being Police Brutality, Homicides, or Domestic Violence. As for people of color law enforcement is the "shooter" in most cases. History of bias, brutality and racism in so many communities. Like many of brothers and sisters of color. I am not comforted by deputies with handguns, let alone assault rifles. I am very concerned since learning Brett Kavanaugh's views on guns, and how he would strike down any assault weapons ban. Too many dangerous and prohibited people continue to be able to readily access and use dangerous weapons to terrorize Americans at home, work, church, school, concerts, clubs, restaurants, movie theaters, on our streets, and anywhere we go on our day to day life.

Thousands of people across the country are impacted by gun violence. Each of us, different stories but same variable, guns, causing violence everywhere we go. This committee has held many hearings for decades on anti-government, white nationalists, Second Amendment extremists groups, and other domestic terrorists. We all witnessed the hate-mongering displayed in the name of patriotism and

individual rights in Charlottesville Virginia. Charleston South Carolina. Orlando Florida, and several other places in recent years with the surge of hate crimes in America. What is typically their favorite weapon of terrorism? A firearm.

As you consider what to do and who to appoint to make and keep us safer from gun violence, remember my story, remember my classmates who died, remember the communities of color that face mass shootings everyday, remember all victims of gun violence from Parkland, Brooklyn, Chicago, Detroit, New Orleans Birmingham, Miami, Baltimore, Milwaukee, Oakland, and all over America.

As you make your final decision, think about it as if you had to justify and defend your choice to those who we lost to gun violence. **If Kavanaugh doesn't even have the decency to shake hands with a father of a victim, he definitely won't have the decency to make life changing decisions that affect real people.**

The youth is urging our society to recognize the depth and seriousness of our gun violence epidemic in America. We are all here today with an urgent message for you: if the youth across the country can fight to eradicate gun violence, why **can't judges, lawmakers, and Donald Trump** understand that young people are dying from this senseless violence?

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▲ KATZ, MARSHALL & BANKS, LLP

Debra S. Katz, Partner
Lisa J. Banks, Partner

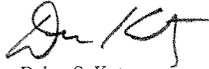
By Electronic Mail
September 26, 2018

Mike Davis, Esquire
Chief Counsel for Nominations
United States Senate Committee on the Judiciary
Senator Chuck Grassley (R-IA), Chairman
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Davis:

We are resubmitting the written testimony of Dr. Christine Blasey Ford to correct a scrivener's error on page five.

Sincerely,



Debra S. Katz



Lisa J. Banks

Attorneys for Dr. Christine Blasey Ford

Encl.

cc: Heather Sawyer, Esquire
Michael R. Bromwich, Esquire

**Written Testimony of Dr. Christine Blasey Ford
United States Senate Judiciary Committee
September 26, 2018**

Chairman Grassley, Ranking Member Feinstein, Members of the Committee. My name is Christine Blasey Ford. I am a Professor of Psychology at Palo Alto University and a Research Psychologist at the Stanford University School of Medicine.

I was an undergraduate at the University of North Carolina and earned my degree in Experimental Psychology in 1988. I received a Master's degree in 1991 in Clinical Psychology from Pepperdine University. In 1996, I received a PhD in Educational Psychology from the University of Southern California. I earned a Master's degree in Epidemiology from the Stanford University School of Medicine in 2009.

I have been married to Russell Ford since 2002 and we have two children.

I am here today not because I want to be. I am terrified. I am here because I believe it is my civic duty to tell you what happened to me while Brett Kavanaugh and I were in high school. I have described the events publicly before. I summarized them in my letter to Ranking Member Feinstein, and again in my letter to Chairman Grassley. I understand and appreciate the importance of your hearing from me directly about what happened to me and the impact it has had on my life and on my family.

I grew up in the suburbs of Washington, D.C. I attended the Holton-Arms School in Bethesda, Maryland, from 1980 to 1984. Holton-Arms is an all-girls school that opened in 1901. During my time at the school, girls at Holton-Arms frequently met and became friendly with boys from all-boys schools in the area, including Landon School, Georgetown Prep, Gonzaga High

School, country clubs, and other places where kids and their families socialized. This is how I met Brett Kavanaugh, the boy who sexually assaulted me.

In my freshman and sophomore school years, when I was 14 and 15 years old, my group of friends intersected with Brett and his friends for a short period of time. I had been friendly with a classmate of Brett's for a short time during my freshman year, and it was through that connection that I attended a number of parties that Brett also attended. We did not know each other well, but I knew him and he knew me. In the summer of 1982, like most summers, I spent almost every day at the Columbia Country Club in Chevy Chase, Maryland swimming and practicing diving.

One evening that summer, after a day of swimming at the club, I attended a small gathering at a house in the Chevy Chase/Bethesda area. There were four boys I remember being there: Brett Kavanaugh, Mark Judge, P.J. Smyth, and one other boy whose name I cannot recall. I remember my friend Leland Ingham attending. I do not remember all of the details of how that gathering came together, but like many that summer, it was almost surely a spur of the moment gathering. I truly wish I could provide detailed answers to all of the questions that have been and will be asked about how I got to the party, where it took place, and so forth. I don't have all the answers, and I don't remember as much as I would like to. But the details about that night that bring me here today are ones I will never forget. They have been seared into my memory and have haunted me episodically as an adult.

When I got to the small gathering, people were drinking beer in a small living room on the first floor of the house. I drank one beer that evening. Brett and Mark were visibly drunk. Early in the evening, I went up a narrow set of stairs leading from the living room to a second floor to use the bathroom. When I got to the top of the stairs, I was pushed from behind into a bedroom. I couldn't see who pushed me. Brett and Mark came into the bedroom and locked the door behind

them. There was music already playing in the bedroom. It was turned up louder by either Brett or Mark once we were in the room. I was pushed onto the bed and Brett got on top of me. He began running his hands over my body and grinding his hips into me. I yelled, hoping someone downstairs might hear me, and tried to get away from him, but his weight was heavy. Brett groped me and tried to take off my clothes. He had a hard time because he was so drunk, and because I was wearing a one-piece bathing suit under my clothes. I believed he was going to rape me. I tried to yell for help. When I did, Brett put his hand over my mouth to stop me from screaming. This was what terrified me the most, and has had the most lasting impact on my life. It was hard for me to breathe, and I thought that Brett was accidentally going to kill me. Both Brett and Mark were drunkenly laughing during the attack. They both seemed to be having a good time. Mark was urging Brett on, although at times he told Brett to stop. A couple of times I made eye contact with Mark and thought he might try to help me, but he did not.

During this assault, Mark came over and jumped on the bed twice while Brett was on top of me. The last time he did this, we toppled over and Brett was no longer on top of me. I was able to get up and run out of the room. Directly across from the bedroom was a small bathroom. I ran inside the bathroom and locked the door. I heard Brett and Mark leave the bedroom laughing and loudly walk down the narrow stairs, pin-balling off the walls on the way down. I waited and when I did not hear them come back up the stairs, I left the bathroom, ran down the stairs, through the living room, and left the house. I remember being on the street and feeling an enormous sense of relief that I had escaped from the house and that Brett and Mark were not coming after me.

Brett's assault on me drastically altered my life. For a very long time, I was too afraid and ashamed to tell anyone the details. I did not want to tell my parents that I, at age 15, was in a house without any parents present, drinking beer with boys. I tried to convince myself that because Brett

did not rape me, I should be able to move on and just pretend that it had never happened. Over the years, I told very few friends that I had this traumatic experience. I told my husband before we were married that I had experienced a sexual assault. I had never told the details to anyone until May 2012, during a couples counseling session. The reason this came up in counseling is that my husband and I had completed an extensive remodel of our home, and I insisted on a second front door, an idea that he and others disagreed with and could not understand. In explaining why I wanted to have a second front door, I described the assault in detail. I recall saying that the boy who assaulted me could someday be on the U.S. Supreme Court and spoke a bit about his background. My husband recalls that I named my attacker as Brett Kavanaugh.

After that May 2012 therapy session, I did my best to suppress memories of the assault because recounting the details caused me to relive the experience, and caused panic attacks and anxiety. Occasionally I would discuss the assault in individual therapy, but talking about it caused me to relive the trauma, so I tried not to think about it or discuss it. But over the years, I went through periods where I thought about Brett's attack. I confided in some close friends that I had an experience with sexual assault. Occasionally I stated that my assailant was a prominent lawyer or judge but I did not use his name. I do not recall each person I spoke to about Brett's assault, and some friends have reminded me of these conversations since the publication of *The Washington Post* story on September 16, 2018. But until July 2018, I had never named Mr. Kavanaugh as my attacker outside of therapy.

This all changed in early July 2018. I saw press reports stating that Brett Kavanaugh was on the "short list" of potential Supreme Court nominees. I thought it was my civic duty to relay the information I had about Mr. Kavanaugh's conduct so that those considering his potential nomination would know about the assault.

On July 6, 2018, I had a sense of urgency to relay the information to the Senate and the President as soon as possible before a nominee was selected. I called my congressional representative and let her receptionist know that someone on the President's shortlist had attacked me. I also sent a message to *The Washington Post's* confidential tip line. I did not use my name, but I provided the names of Brett Kavanaugh and Mark Judge. I stated that Mr. Kavanaugh had assaulted me in the 1980s in Maryland. This was an extremely hard thing for me to do, but I felt I couldn't NOT do it. Over the next two days, I told a couple of close friends on the beach in California that Mr. Kavanaugh had sexually assaulted me. I was conflicted about whether to speak out.

On July 9, 2018, I received a call from the office of Congresswoman Anna Eshoo after Mr. Kavanaugh had become the nominee. I met with her staff on July 18 and with her on July 20, describing the assault and discussing my fear about coming forward. Later, we discussed the possibility of sending a letter to Ranking Member Feinstein, who is one of my state's Senators, describing what occurred. My understanding is that Representative Eshoo's office delivered a copy of my letter to Senator Feinstein's office on July 30, 2018. The letter included my name, but requested that the letter be kept confidential.

My hope was that providing the information confidentially would be sufficient to allow the Senate to consider Mr. Kavanaugh's serious misconduct without having to make myself, my family, or anyone's family vulnerable to the personal attacks and invasions of privacy we have faced since my name became public. In a letter on August 31, 2018, Senator Feinstein wrote that she would not share the letter without my consent. I greatly appreciated this commitment. All sexual assault victims should be able to decide for themselves whether their private experience is made public.

As the hearing date got closer, I struggled with a terrible choice: Do I share the facts with the Senate and put myself and my family in the public spotlight? Or do I preserve our privacy and allow the Senate to make its decision on Mr. Kavanaugh's nomination without knowing the full truth about his past behavior?

I agonized daily with this decision throughout August and early September 2018. The sense of duty that motivated me to reach out confidentially to *The Washington Post*, Representative Eshoo's office, and Senator Feinstein's office was always there, but my fears of the consequences of speaking out started to increase.

During August 2018, the press reported that Mr. Kavanaugh's confirmation was virtually certain. His allies painted him as a champion of women's rights and empowerment. I believed that if I came forward, my voice would be drowned out by a chorus of powerful supporters. By the time of the confirmation hearings, I had resigned myself to remaining quiet and letting the Committee and the Senate make their decision without knowing what Mr. Kavanaugh had done to me.

Once the press started reporting on the existence of the letter I had sent to Senator Feinstein, I faced mounting pressure. Reporters appeared at my home and at my job demanding information about this letter, including in the presence of my graduate students. They called my boss and co-workers and left me many messages, making it clear that my name would inevitably be released to the media. I decided to speak out publicly to a journalist who had responded to the tip I had sent to *The Washington Post* and who had gained my trust. It was important to me to describe the details of the assault in my own words.

Since September 16, the date of *The Washington Post* story, I have experienced an outpouring of support from people in every state of this country. Thousands of people who have had their lives dramatically altered by sexual violence have reached out to share their own experiences with me and have thanked me for coming forward. We have received tremendous support from friends and our community.

At the same time, my greatest fears have been realized – and the reality has been far worse than what I expected. My family and I have been the target of constant harassment and death threats. I have been called the most vile and hateful names imaginable. These messages, while far fewer than the expressions of support, have been terrifying to receive and have rocked me to my core. People have posted my personal information on the internet. This has resulted in additional emails, calls, and threats. My family and I were forced to move out of our home. Since September 16, my family and I have been living in various secure locales, with guards. This past Tuesday evening, my work email account was hacked and messages were sent out supposedly recanting my description of the sexual assault.

Apart from the assault itself, these last couple of weeks have been the hardest of my life. I have had to relive my trauma in front of the entire world, and have seen my life picked apart by people on television, in the media, and in this body who have never met me or spoken with me. I have been accused of acting out of partisan political motives. Those who say that do not know me. I am a fiercely independent person and I am no one's pawn. My motivation in coming forward was to provide the facts about how Mr. Kavanaugh's actions have damaged my life, so that you can take that into serious consideration as you make your decision about how to proceed. It is not my responsibility to determine whether Mr. Kavanaugh deserves to sit on the Supreme Court. My responsibility is to tell the truth.

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I understand that the Majority has hired a professional prosecutor to ask me some questions, and I am committed to doing my very best to answer them. At the same time, because the Committee Members will be judging my credibility, I hope to be able to engage directly with each of you.

At this point, I will do my best to answer your questions.

September 3, 2018

Chairman Grassley and Ranking Member Feinstein:

My name is Louisa Garry. I am a high school teacher and coach so it is unusual for me to not be in the classroom on the first Friday after Labor Day. But I am honored to be here to voice my support of my college classmate and longtime friend.

I met Brett Kavanaugh in 1983, almost exactly 35 years ago today. We were both incoming freshmen at Yale. Brett was standing under a tent with his parents, waiting to depart for the freshman outdoor orientation. I grew up in a small town in Ohio and was accustomed to saying hello to everyone, so I walked up and introduced myself. Brett warmly received my greeting and thus began a friendship that continues to this day. Our enduring friendship might surprise some because in certain ways, we are quite different. I have been teaching and coaching high school students for the last 30 years while Brett pursued a high-profile career in law. Brett comes from a Catholic upbringing in a big city and tends to have a conservative outlook, while I would describe myself as a moderate Quaker who seeks out running trails and ocean beaches. Our differences have allowed us to learn from each other and see things from a different perspective. We have maintained a close friendship based on our mutual respect, support, and trust.

One of the things Brett and I do have in common is an appreciation for competitive sports. We both have daughters and we often talk about the benefits of youth sports in raising strong, independent, girls and women with confident voices. Brett and I not only watch a lot of sports, we also run together. We first started running together while Brett was in his first year of Yale Law School and I was working at Yale and training to compete in the 1988 U.S. Olympic Trials for track. Brett was not much of a runner, but he could keep up with me on an easy warm-up. After he ran his first 3 mile race, Brett announced that he wanted to run the Boston Marathon in his 3rd year of law school. He asked me to promise to train and run it with him and I agreed. Even though I was a competitive runner, I had never run anything close to a marathon in distance, but Brett's faith in my ability as a runner and coach gave me the confidence to take on this challenge. During the marathon, Brett waited for me through water stops and bathroom breaks just as I waited for him through leg cramps and blisters. We ran together, step for step for 26.2 miles and crossed the finish line at exactly the same time. We ran the Boston Marathon together, again step for step, two more times: in 2010, and most recently in 2015 in celebration of our 50th birthdays. Four hours is a long time to spend with someone as you physically and mentally struggle through the miles, but I was lucky to go through it with Brett, whose good humor, fortitude, and idealism elevates those around him.

Brett and I share an interest in the growth and development of young people. Many people have heard about Brett's basketball coaching expertise, but I believe even more students have benefitted from taking a class with Brett at Harvard, Yale or Georgetown. Brett is a bright, articulate and engaging educator and he is generous with the time and attention he devotes to mentoring others. In November, 2016, Brett welcomed juniors from my school to the Federal Court for a field trip to learn about the judicial system. As we prepared for the visit, my students wanted to know "Is Judge Kavanaugh conservative or liberal?" I responded that they should

wait and determine the answer on their own. Brett spent over an hour with my class explaining his role as judge, discussing current issues facing the Federal Court of Appeals, answering the students' questions and listening to their voices. He spoke passionately about his belief in the judicial system and the importance of the separation of powers in government. As we left the Federal Court, a couple of students immediately remarked, "We couldn't tell -is he conservative or liberal? Can you tell us?" I responded "That's how it's supposed to be. The judiciary is supposed to be independent."

Brett has a wide circle of friends of diverse political viewpoints and often shows a willingness to step into potentially uncomfortable forums with a spirit of collegiality. At our 30th Yale College reunion, Brett joined a panel on free speech. The panel broadly represented the diverse perspectives of our classmates and each of the panel members spoke respectfully about the challenges faced by universities in addressing issues of free speech. When discussing how to balance a wide range of opinions, Brett quoted the character Atticus Finch from the book "To Kill a Mockingbird" and emphasized how important it is to "stand in a person's shoes." Brett doesn't just speak words of empathy and tolerance; he listens and acts upon these words. His friends and colleagues describe him as a kind, thoughtful person and a good listener.

I leave it to others to speak to Brett's judicial record; I am here to speak to his outstanding personal qualities as a life-long friend. Brett Kavanaugh will be a voice of fairness and integrity as a Justice of the Supreme Court.

Thank you.

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**Testimony of Rochelle M. Garza
Managing Attorney, Garza & Garza Law, PLLC**

**Before the Committee on the Judiciary
United States Senate**

Hearing on the Nomination of Brett Kavanaugh to the Supreme Court of the United States

September 7, 2018

I. Introduction and Personal Background

Thank you for the opportunity to testify in this hearing on the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. Until recently, south Texas, specifically the Texas border cities to Mexico, have not garnered much national attention. Over the last year, however, that has changed dramatically. We saw the Trump administration deny a teen girl access to reproductive healthcare solely because she was an immigrant in a detention facility for children—the subject of my testimony today. We also saw the Trump administration take babies, toddlers, and young children away from their mothers and fathers, never knowing if and when they'd ever see each other again. We've seen the Trump administration deny asylum-seekers fleeing extreme violence entry at our international bridges. And we've seen U.S. born citizens being denied their passports or having them taken from them altogether. All of this has occurred in my community, in the Rio Grande Valley, in Brownsville, Texas.

There is no other way to describe the borderlands than a place where absolutely everything converges, and everything coexists. The reality is that our communities sit at the intersection of local, state, national and international policy, and as a result, our communities are complex. Our families are complex. It's perfectly normal to find a U.S. Border Patrol Agent with a non-citizen grandmother that he or she visits over the weekend in Matamoros, our sister-city in Mexico, or even siblings that aren't all U.S. citizens and fear being separated from each other should an immigration official happen to learn about their status. But we are a community, regardless of immigration status or political ideologies, and we believe in the United States as a place where every single one of us has the opportunity to be who we are meant to be. The justices who sit on the Supreme Court will have an enormous impact on the rights of those in our community, determining the course of policies that have the potential to harm, divide and violate the constitutional rights of our community members.

I was born and raised in south Texas and it has shaped who I am as an American and the practice that I have developed as an attorney. I became licensed to practice law in the state of Texas in December 2013, and was admitted into the United States District Court of the Southern District of Texas in August 2014. I am fluent in two languages, English and Spanish. I am currently in private practice at Garza & Garza Law, PLLC in Brownsville, Texas with my brother and law partner, Myles R. Garza. I have chosen to focus my practice on working with some of the most vulnerable members of our community – children, immigrants, and victims of violence – through the areas of immigration, family and criminal law.

Prior to entering private practice, I worked exclusively with unaccompanied minors (or Unaccompanied Alien Minors or “UACs”) at a legal services provider that assisted nearly 2,000 children in immigration facilities at any given point in time throughout the Rio Grande Valley. I worked with hundreds of children fleeing violence and persecution in their home countries, children that had been brutalized, raped, tortured, and abandoned. I have represented numerous children in state court proceedings, immigration removal proceedings, and before U.S. Citizenship and Immigration Services. I am well versed in various forms of legal relief available to immigrant children, including T Nonimmigrant Status for victims of human trafficking, U Nonimmigrant Status for victims of crimes, Special Immigrant Juvenile Status for children that have been abused, abandoned or neglected by their parents, and Asylum. I am also very knowledgeable of the experience UACs go through in trying to find a sponsor and navigating their detention in the federally-funded facilities contracted by the Office of Refugee Resettlement (ORR), a division of the Department of Health and Human Services (HHS).

Since entering private practice, I have expanded my work into other areas of Texas family law, including Ad Litem work. In this work, I am appointed by state court judges to represent children in state court proceedings, either as an attorney ad litem to represent their *express interests* or as a guardian ad litem to represent their *best interests*, and work entirely at the discretion of the court, or until the appointing court releases me of these duties. Ad Litem work can revolve around a variety of situations, such as divorce, custody, personal injury, and judicial bypass, but all involve providing representation to children because our state legal system recognizes their vulnerability. This is in sharp contrast to how children are treated in immigration proceedings, where often the stakes are higher for children seeking protection from extreme, violent situations, and is where Jane Doe’s story begins.

II. Jane Doe

Jane said it best: “My name is not Jane Doe, but I am a Jane Doe.”

Jane was 17 when she left her home in Central America, where she was physically abused by her parents, and traveled thousands of miles to seek safety in the United States. She crossed through Mexico, a dangerous journey for anyone but particularly for a young woman, given the high rates of sexual assault women and girls commonly face during this journey. She did not speak English. In early September 2017, she arrived in the United States, with the hope of a better life. As she later said in her own words, “[m]y journey wasn’t easy, but I came here with hope in my heart to build a life I can be proud of.” She came to this country with the dream that it would give her the opportunity to be who she was meant to be.

Because she was a minor arriving in the United States without a parent or legal guardian, she was designated a UAC and transferred into the custody of ORR pursuant to the regulations under the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). It was when she was placed at a facility for immigrant children in the Rio Grande Valley that she learned she was pregnant. Jane immediately knew she did not wish to proceed with the pregnancy and expressed her wish to terminate her pregnancy to the facility staff.

ORR and its grantees are legally required to provide UACs with access to the full range of medical care. While facilities are responsible for day-to-day needs, they do so under the direction of ORR and must report to ORR when a UAC seeks certain types of health care, such as an abortion. While ORR had legal custody of Jane, the facility had physical custody of her and was responsible for transporting her to court and health care services. Because Jane expressed a desire to terminate her pregnancy, her request was elevated up the chain at ORR, and Jane was singled out for different treatment.

Under a new policy developed by ORR Director Scott Lloyd, ORR directed the facility to force Jane to undergo so-called “life affirming” pregnancy counseling at a “crisis pregnancy center,” in direct opposition to her expressed wishes. Crisis pregnancy centers are religiously-affiliated, oppose abortion and often provide inaccurate medical information to patients seeking abortion. The center Jane was forced to go to at ORR’s direction not only conducted a medically unnecessary sonogram that she was forced to look at, but also imposed their own religious beliefs on her, as she described “they prayed for me” at the clinic. As Jane later said, “People I don’t even know are trying to make me change my mind. I made my decision and that is between me and God.”

In Texas, minors seeking to terminate their pregnancies must obtain parental consent or a “judicial bypass,” which is an order from a state court allowing the minor to consent to the procedure on her own. When a judicial bypass case is filed, the court appoints the minor a guardian ad litem to investigate and report whether it is in the minor’s best interest to consent to the procedure on their own and without the involvement of their parent or legal guardian, and an attorney ad litem to represent the minor’s express interests in seeking the bypass order. Courts tend to appoint attorneys that have a family law background and are well-versed in working with children because Ad Litem work is so specialized. That is why I was appointed Jane’s guardian ad litem and, a fellow local attorney, Christine Cortez was appointed Jane’s attorney ad litem.

After I was appointed, I was contacted by Susan Hays, the legal counsel for Jane’s Due Process, a nonprofit organization that works with a state-wide network of attorneys to ensure that pregnant minors in Texas have legal representation to help exercise their decisions. Ms. Hays informed me that Jane’s Due Process had been assisting this Jane with gaining access to the Texas courts to pursue a judicial bypass. What followed over the next month was a surprising twist of events that I would never have imagined.

I will never forget meeting Jane for the first time. It was a Saturday. I was with Christine Cortez, Jane’s attorney ad litem. We had been notified of our appointments late the day before, but had just enough time to arrange a visit with Jane to prepare for her judicial bypass hearing the following Monday, September 25. Ms. Cortez and I checked in with the security guard at the facility. When we walked into the main office I saw a teen girl sitting and waiting. She looked younger than 17, in part because she was so very tiny. It didn’t even enter my mind that she was our client, Jane, but she was. I soon learned that her real name was not Jane, and neither her voice nor resolve were tiny. She was very clear about her decision to terminate her pregnancy and in spite of the coercion tactics used against her that morning at the crisis pregnancy center. We explained the law around judicial bypass, our roles, and the process for enacting her choice in Texas.

I saw Jane again on the morning of September 25 at her judicial bypass hearing. She looked well. While escorting her, I was shocked to be confronted by an ORR representative who attempted to disrupt and enter the proceedings. The ORR representative explained that she was Jane's legal guardian and insisted she had a right to be present during the hearing. This was untrue—judicial bypass proceedings are completely confidential and *ex parte* by nature. They are initiated by a minor with the express purpose of not involving their parents or legal guardian in their abortion decision. I told the ORR representative that she absolutely did not have a right to be present for this hearing. This interaction would foreshadow what was to come and how Jane was to be treated in the facility at ORR's direction.

Jane received her bypass order that same day, allowing her to proceed with enacting her abortion decision confidentially, without the involvement of her parents or ORR. Because Texas also requires anyone seeking an abortion to receive counseling and a mandatory ultrasound at least 24 hours before the procedure, we then needed to schedule two appointments: one for the counseling and the other for the abortion. So, we arranged her appointments for September 28 and 29 and, because Jane was indigent and in detention, we confirmed the medical costs would be paid for through a private, non-governmental source. At this point, Jane was about 11-12 weeks pregnant. When I tried to arrange for the facility to transport Jane to the clinic, however, I was surprised to find that the Department of Justice had stepped in, taking over communications for ORR and the facility. The DOJ made it clear: their client, ORR, would not allow the facility to transport Jane for her medical appointments or allow Christine and I, as Jane's Ad Litem, to transport her. The facility staff confirmed this on the morning of September 28, when Christine and I met with them to see if this Texas-licensed child-care facility would comply with Texas state court orders. To my surprise, at ORR's direction, their answer was no.

Jane was a *Jane*—a pseudonym used for a pregnant minor in need of an abortion who cannot obtain parental consent. She had all the rights and deserved all the protections of any Jane in the state of Texas—but what followed was treatment that would be considered child abuse under any other circumstance. Completely at the mercy of the facility and ORR, Jane was explicitly prevented from accessing abortion. Against Jane's objections and in violation of the Texas court's judicial bypass order, workers at the facility told Jane's mother that she was pregnant and wanted an abortion. They harassed Jane daily, sometimes multiple times per day, pressuring her to call her mother and tell her what was happening. This was despite Jane's disclosure that when her older sister had become pregnant, her parents had beaten her with firewood and cables to the point that her sister miscarried, and Jane was also beaten when she tried to intervene. The staff also forced her to undergo and view additional unnecessary sonograms in order to shame her and pressure her to change her mind. They asked what she was going to name her child, knowing she didn't want to carry the pregnancy to term. The facility placed Jane on one-to-one constant surveillance, following her at all times. She was no longer allowed to exercise or to leave the facility on outings with her peers.

III. Fighting Back in Court

Despite this unbearable treatment, Jane was strong. She wanted to stand up for her rights, and she was determined not to be forced to carry the pregnancy to term against her will. And we were not going to allow a young woman to be abused this way.

So we fought back on her behalf. The American Civil Liberties Union (“ACLU”) and Jane’s Ad Litem filed separate suits to end the abuse inflicted on Jane. The ACLU pursued a lawsuit in the federal court in D.C. on my behalf as Jane’s guardian ad litem, and myself, Ms. Cortez, and later my law partner, Myles R. Garza, filed and pursued relief in Texas through the Texas Family Code. While I am represented by the ACLU in the litigation on Jane’s behalf, including those similarly situated, I submit this testimony on my own behalf and it should not be construed as ACLU endorsing or opposing Judge Kavanaugh as a Supreme Court nominee.

The ACLU raised the constitutional issues in federal district court, and sought an emergency temporary restraining order to allow Jane to have the abortion. The ACLU also sought a class action, and a preliminary injunction to prevent ORR from banning abortion for all other pregnant minors like Jane. The district court granted the temporary restraining order, and the government appealed. Judge Kavanaugh was on the three-judge panel on the U.S. Court of Appeals for the D.C. Circuit that considered the appeal.

Despite the fact that the Supreme Court has been clear for 45 years, since *Roe v. Wade*, that banning abortion is blatantly unconstitutional, Judge Kavanaugh did not affirm the district court’s order. Instead, he issued an order that would have allowed the government 11 more days to find a sponsor for Jane. However, the government had already tried and failed to find a sponsor for Jane for the previous six weeks, so there was no reason to think they could find one in the next 11 days. A sponsor, usually a family member, is someone in the United States who agrees to take care of a minor. The vetting process is strict, and includes a background check, fingerprints, and often a home visit to assess the sponsor’s suitability. And the process, including the length of time and whether the sponsor is approved, is entirely controlled by ORR. Short of filing a federal lawsuit, there isn’t even an appeals process for sponsors who are denied by ORR. Several sponsors had already been identified for Jane by the time the case reached Judge Kavanaugh, and each of those sponsors were denied or determined to be unsuitable by ORR.

Further, at the end of those 11 days, Judge Kavanaugh’s order wouldn’t guarantee that Jane could access abortion. Rather, it said that Jane would have to start her case all over again, and that the government could appeal. This could have taken weeks, and would have pushed Jane even further into her pregnancy. And because Texas bans abortion at 20 weeks, it presented a real danger that Jane may be forced to carry the pregnancy to term against her will.

The pain that this caused Jane is something I can’t even describe – knowing that her life’s path, whether she would be forced to carry a pregnancy to term, was completely in the hands of people she would never know made her feel desperate, hopeless, and alone. But we were still going to fight for her, and we still had legal options. Following Judge Kavanaugh’s order, the

ACLU asked the full appeals court to overturn Judge Kavanaugh's decision, and it did. Jane obtained the abortion on October 25 when she was 15 weeks pregnant.

Because of ORR's policy, Jane was forced to remain pregnant against her will for a full month from the time she obtained the judicial bypass required under Texas law. If the full appeals court had not overturned Judge Kavanaugh's decision, Jane would have been forced to delay her abortion even longer. In dissenting from the full court's decision, Judge Kavanaugh justified the delay that his order would have caused by claiming that Jane needed a "support network" in order to make "a major life decision." But Jane had already made her decision long before. She had already satisfied all of the requirements for any minor in Texas and a state court judge in Texas had issued an order that made clear that she could consent to the abortion on her own. Judge Kavanaugh also wrote that the full court majority would allow "immediate abortion on demand" for "unlawful immigrant minors." He ignored the many hurdles Jane had already overcome and the many weeks she had already waited to exercise her constitutional right—a right that does not depend on her immigration status. There were so many barriers placed in front of Jane; the additional hurdle Judge Kavanaugh placed in front of her was unjustifiable. If being completely at the mercy of the federal government and being denied the ability to access abortion isn't an undue burden, then I'd be hard pressed to imagine what might pass for one.

I was with Jane when she had the abortion. I saw the agony she went through while waiting to have the procedure, and the relief she experienced when she finally got the care she needed. As she said later, "[i]t has been very difficult to wait in the shelter for news that the judges in Washington, D.C. have given me permission to proceed with my decision." The relief I saw in her was anything but political or controversial; rather, it was a young woman relieved to have been able to make a decision that she knew was right for her at that moment in her life. Jane knew that this decision would enable her to be the person she wants to be and live the life she hopes to live. And she believed that no other girl in her situation should have to go through what she went through. As she said, "[n]o one should be shamed for making the right decision for themselves. I would not tell any other girl in my situation what they should do. That decision is hers and hers alone." In March 2018, because of Jane's perseverance and strength, the district court preliminarily enjoined ORR from engaging in the same tactics they used against her and protecting all young women in her position.

IV. Conclusion

Jane endured what no human being should have to, much less a young woman in detention. She was alone and completely under the physical control of the federal government and at the mercy of decision-makers that knew nothing of what it was like to be her. They did not see her face, as I did, every time I had to tell her that her care was being delayed again. They did not see her suffering and desperation. This suffering was only compounded by Judge Kavanaugh's decision to delay her abortion decision even further—a decision that could have resulted in her being forced to carry her pregnancy to term. It showed no real consideration for Jane or her circumstances.

I am and will always be in awe of Jane. She was put through an unimaginably difficult situation and one that would have broken almost any other person. But she possessed a profound

strength of character that saw her through it all. It was an honor to represent her, to be by her side, to be able to witness true perseverance, and to share that today with the Senate Judiciary Committee. I can think of nothing more human or more American than what I saw in Jane. Jane was ultimately released to a family member in January 2018, shortly before turning 18 years old. Knowing that she is living in the United States and pursuing the life she hoped for makes me feel a great sense of pride and hope, not only for her as an individual but also because of the impact her resolve is having and will have on young women in her situation. She was tiny but she ignited change, and just like she said: "This is my life, my decision. I want a better future. I want justice."

**United States Senate Judiciary Committee Hearing:
The Nomination of Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States**

September 7, 2018

**Prepared Statement of
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Justice William J. Brennan, Jr., Professor of Law
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Mr. Chairman, Ranking Member Feinstein, and members of the Committee, thank you for giving me the opportunity to testify before you today. I have been asked to testify about the law governing administrative agencies. I will discuss Judge Kavanaugh's views on the independence of administrative agencies, agencies' discretion to interpret the laws they implement, and the purposes agencies are bound to serve.

The opinions that Judge Kavanaugh has written in his twelve years as a judge make clear that, as a justice, he would unsettle the independence, legal authority, and protective missions of administrative agencies. He would do so by discarding legal precedents that have long allowed Congress to structure our government and to address the pressing problems of the day without undue interference from unelected judges. He would work in the name of a cramped and skewed "liberty" that, in his hands, amounts to a freedom to harm other people with minimal government constraint. In Judge Kavanaugh's ideal world, we would witness a massive reallocation of power from Congress to the president and from Congress to the courts, with the president exercising dominion over the administrative agencies that do much of the work of government today and with the courts presiding over this transfer of power. In each of the legal contexts I discuss here, Judge Kavanaugh has staked out a more extreme position than Justice Kennedy, whom he would replace, and thus would change the balance of power on the Supreme Court.

These legal issues can sound quite abstract; they might even seem unconnected to people's daily lives. But the Supreme Court's approach to these questions has a profound effect on our everyday lives. One can name any problem that matters – environmental destruction, workplace hazards, sexual harassment, inadequate health care, financial fraud, food safety, and on down the line – and one will find that the day-to-day work of addressing that problem is done by an administrative agency. In each case, Congress will have made a judgment about the degree of independence the agency needs to do the job. Congress will also have given the agency instructions, some clear and some unclear, about how the agency should go about its work. Subjecting these agencies to more political meddling from the president, as Judge Kavanaugh thinks we should, would make these agencies more likely to work in the service of the privileged few rather than in the service of the broad public. Stripping them of legal authority to address the major

issues we face, such as climate change and governance of the Internet, would leave us unprotected against new threats and new problems. The legal issues may seem abstract, but the tangible consequences are profound.

Independence

Judge Kavanaugh believes that the basic problem with the structure of government today is that the president has too little power. His theory of the "unitary executive" holds that the president alone is entitled to wield all of the executive power that the federal government has. His theory would give courts free rein to force a reallocation of the power that has long belonged to Congress – power, through legislation, to define the scope, mission, and configuration of administrative agencies – and hand much of that power over to the president. The result would be a super-powerful president, a diminished Congress, and a corrosion of the checking and balancing that the Constitution contemplates.

Judge Kavanaugh believes that one of the constitutionally guaranteed powers of the president is to fire agency officials without cause, even where Congress has made a different choice. Yet longstanding Supreme Court precedent confirms Congress's constitutional power to create agencies that are relatively independent from the president. Judge Kavanaugh's approach to this precedent has been to treat it grudgingly, read it narrowly, and ultimately rewrite it altogether. Once on the Supreme Court, Judge Kavanaugh would be able to join his new, likeminded colleagues in casting this precedent aside, and, in doing so, restructure modern government.

In *Humphrey's Executor v. United States*,¹ the Supreme Court held that Congress had acted within its constitutional power in providing that the president could fire members of the Federal Trade Commission only for "inefficiency, neglect of duty, or malfeasance in office." The president could not, in other words, fire a commissioner simply because the commissioner disagreed with the president on a point of policy.

Humphrey's Executor is the bête noire of the unitary executives. They believe it has empowered what they call a "headless fourth branch of government" that unconstitutionally drains power from the president. They argue that Congress has no power to decide that certain agencies, faced with certain kinds of problems, require a buffer from the capricious demands of presidential politics.

Judge Kavanaugh has addressed this settled law by inveighing against it and refusing to condone new agency structures that are not identical to the structures of traditional independent agencies like the Federal Trade Commission. In a case challenging the structure of the Consumer Financial Protection Bureau (CFPB), Judge Kavanaugh worked hard to distinguish *Humphrey's Executor*.² He asserted that the CFPB was different from all other independent agencies because it was headed by a single official rather than by multiple officials. He thought that the director of the CFPB was,

¹ 295 U.S. 602 (1935).

² PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016).

for purposes of the separation of powers, simply too powerful; indeed, he claimed, the CFPB's director was, within the domain of consumer finance, "the single most powerful official in the entire U.S. government."

Judge Kavanaugh concluded that Congress had violated the Constitution by creating an independent agency headed by just one person. Yet in choosing the single-director form of leadership for the CFPB, Congress had made a judgment about the degree of political independence necessary for an agency charged with addressing the ever-shifting misconduct of the supremely well-heeled and well-connected consumer finance industry. In casting aside Congress's judgment, Judge Kavanaugh not only rolled his eyes at longstanding legal precedent, but also favored his own judgment about the appropriate limits of the CFPB director's power over Congress's judgment about these limits. The D.C. Circuit as a whole has rejected Judge Kavanaugh's legal theory,³ but challenges to the constitutionality of the CFPB's structure continue to make their way through the lower courts and may eventually land on the Supreme Court's doorstep.⁴

Judge Kavanaugh also came up with a new legal theory in arguing that the structure of the Public Company Accounting Oversight Board (PCAOB) was unconstitutional.⁵ The members of this Board were removable only for cause by the members of the Securities and Exchange Commission, who in turn were removable only for cause by the president. Judge Kavanaugh concluded that this "double for-cause removal restriction" went further than *Humphrey's Executor* and other relevant precedent had gone and therefore was unlawful. Judge Kavanaugh claimed that, given the uniqueness of the PCAOB structure, "a judicial holding invalidating it would be uniquely limited to the PCAOB." The Supreme Court ultimately embraced Judge Kavanaugh's theory and invalidated the structure of the PCAOB.⁶ In dissent, Justice Breyer warned that administrative law judges, and even ordinary civil servants, also enjoyed a double layer of job protection. He worried that the Court's theory of the case could come to cover these employees as well.⁷ The majority brushed past these concerns,⁸ as had Judge Kavanaugh in propounding this theory in the D.C. Circuit.⁹

Predictably, Judge Kavanaugh's theory challenging double layers of job security has not remained confined to the rather obscure PCAOB. On the contrary, his idea has encouraged a stream of litigation with a surprising central claim: that the administrative

³ PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

⁴ In *CFPB v. All American Check Cashing, Inc.*, the Fifth Circuit has accepted for interlocutory review a district court decision rejecting a constitutional challenge to the independence of the CFPB. The district court's decision is reported at 2018 U.S. Dist. LEXIS 131595 (S.D. Miss. 2018). In *Collins v. Mnuchin*, the Fifth Circuit found that the Federal Housing Finance Agency was unconstitutionally structured based, in part, on Judge Kavanaugh's reasoning regarding the CFPB. 896 F.3d 640 (5th Cir. 2018).

⁵ Free Enterprise Fund v. PCAOB, 537 F.3d 667 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁶ Free Enterprise Fund v. PCAOB, 561 U.S. 477 (2010).

⁷ *Id.* at 542-43.

⁸ *Id.* n. 10.

⁹ *PCAOB*, 537 F.3d at 699 n. 8.

law judges who adjudicate individual cases for the independent agencies are too removed from presidential politics. The same structure that characterized PCAOB's relationship to the president also characterizes the relationship of administrative law judges to the president: they, too, enjoy a double layer of job security. Administrative law judges may be removed "only for good cause established and determined by the Merit Systems Protection Board,"¹⁰ and the members of the Merit Systems Protection Board may be removed only for "inefficiency, neglect of duty, or malfeasance in office."¹¹ Last Term, the Supreme Court held that the administrative law judges of the Securities and Exchange Commission are "officers" within the meaning of the Constitution, and thus must be appointed by the heads of the agencies they serve.¹² The Court left for another day the question whether the job protection Congress has given to these judges unconstitutionally intrudes upon the president's power, but its opinion already has brought administrative law judges closer to presidential politics than they were before.

Not that long ago, the important constitutional question about administrative law judges was whether they could be impartial *enough*, given that they lack the lifetime tenure enjoyed by federal court judges appointed under Article III of the Constitution.¹³ Now, thanks to theories propounded by unitary executives like Judge Kavanaugh, we find ourselves in the remarkable position of asking whether these judges are, in effect, *too* impartial, and must be moved a step closer to presidential politics to satisfy constitutional demands.

Judge Kavanaugh prides himself on being a neutral "umpire," blandly calling balls and strikes in the cases before him. But his umpiring with respect to the independence of agencies has unleashed a theory that may make political actors out of judges, politicizing administrative law judges by bringing them closer to political actors when they are hired, when they are removed, and presumably at all stages in between. The Supreme Court has long paid special respect to the necessity of independent adjudicators deciding individual cases. In *Wiener v. United States*,¹⁴ the Court held that "the nature of the function that Congress vested in" the tribunal at issue there – a function that entailed adjudicating disputes over compensation for wartime injuries at the hands of the enemy in World War II – required denial of unlimited presidential removal power. In propounding his views on the constitutional dangers of double layers of protection for agency officials, Judge Kavanaugh cited the unanimous decision in *Wiener* only to report that its rationale "seems questionable."¹⁵

Judge Kavanaugh's approach to the separation of powers says as much about his approach to settled precedent as it does about his views on congressional and presidential power. As a lower court judge, he has unilaterally decided to limit *Humphrey's Executor* to its facts. He has ignored *Wiener* altogether. And, even without a case in front of him,

¹⁰ 5 U.S.C. § 7521(a)-(b).

¹¹ 5 U.S.C. § 1202(d).

¹² *Lucia v. Securities and Exchange Commission*, 138 S.Ct. 2044 (2018).

¹³ *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986).

¹⁴ 357 U.S. 349 (1958).

¹⁵ *PCAOB*, 537 F.3d at 695 n. 5.

he has already announced that he would "put the final nail in" *Morrison v. Olson*, the Court's decision upholding the independent counsel law.¹⁶

Judge Kavanaugh's views on separation of powers would cut deep into the structure of the government. He has announced that he will not extend *Humphrey's Executor* beyond its four corners, and he has made good on this vow by voting to strike down agency structures that are in any way novel. I do not believe he will stop at the Consumer Financial Protection Bureau and the Public Company Accounting Oversight Board. Given the breadth and fervor of his attack on independent agencies, I believe he will, when the occasion arises, vote to overrule *Humphrey's Executor*, and in the process restructure the federal government and reallocate power from Congress to the president and the courts. That restructuring will take as its central premise the surprising idea that the problem with our government today is that the president has too little power and the courts must give him more.

Judge Kavanaugh nowhere grapples with the extreme concentration of power that his theory would achieve. Executive power can be at once unitary and vast; indeed, in his opinions on the separation of powers, Judge Kavanaugh has distinguished the *unitariness* of executive power from the *scope* of that power.¹⁷ Under Judge Kavanaugh's theory of the unitary executive, the president would be able to exercise undiluted control over all of the entities in the government that exercise executive power, even if the degree of policy discretion Congress gave to these entities was calibrated based on the degree of independence it had conferred on them. Ironically, Judge Kavanaugh has taken an instrument aimed at checking concentrated power – the separation of powers – and turned it into in an instrument calibrated to increase the power of the already-most-powerful person in our government.

Legal Authority

Judge Kavanaugh has created a theory of statutory interpretation that holds that an agency may not issue a rule that has great political and economic significance without a precise and crystalline instruction from Congress. This interpretive approach would, perversely, disable agencies in the very circumstances in which we need them the most. It would skew statutory interpretation against agencies' power to undertake protective regulatory programs that run counter to Judge Kavanaugh's own political preferences. And it demands a legislative clarity that Judge Kavanaugh himself has said is well nigh impossible to achieve.

Judge Kavanaugh would disempower agencies from issuing what he regards as "major rules" unless Congress has clearly given them authority to do so. Agencies could, in his framework, issue "ordinary" rules without clear statutory authority, but they could not issue rules raising questions of major political and economic significance without such clarity. He has described his new interpretive principle in this way: "For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute

¹⁶ 487 U.S. 654 (1988).

¹⁷ *PCAOB*, 537 F.3d at 689 n. 2.

only *ambiguously* supplies authority for the major rule, the rule is unlawful."¹⁸ To put the principle another way, highlighting its subtle but profound reallocation of power from Congress to the courts: for Congress to empower an agency to issue a major rule, Congress must satisfy the courts that it has spoken with crystalline clarity and problem-specific precision.

Judge Kavanaugh would distinguish "major" rules from "ordinary" rules by considering "the amount of money involved for regulated and affected parties, the overall effect on the economy, the number of people affected, and the degree of congressional and public attention to the issue."¹⁹ Where these factors are present, Judge Kavanaugh would hold that an agency may not take a regulatory action at all without a clear legislative go-ahead. Judge Kavanaugh would, in other words, disable agency action in precisely the circumstances where it is most important. He has already announced that rules governing the Internet and regulating greenhouse gases are off-limits under his theory.²⁰ Given Judge Kavanaugh's criteria for identifying "major" rules, it is hard to imagine any significant regulatory proceeding that could not be subject to his new, power-stripping interpretive theory.

As Judge Kavanaugh himself has recognized, moreover, the notion of what constitutes a "major" agency decision has "a bit of a 'know it when you see it' quality."²¹ In fact, an agency decision can be shifted from minor to major status simply by changing the frame of reference for evaluating that decision. Judge Kavanaugh has proved adept at manipulating the frame of reference to make an agency decision appear gigantic when it is actually workaday.

Consider his opinion in *SeaWorld of Florida v. Perez*.²² In this case, Judge Kavanaugh dissented from a panel decision upholding a \$7,000 fine against SeaWorld for "exposing its trainers to recognized hazards when working in close contact with killer whales during performances." The panel majority affirmed the finding of the Occupational Safety and Health Administration (OSHA) that SeaWorld had violated the Occupational Safety and Health Act's "general duty" clause, which requires "[e]ach employer" to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."²³ Following an evidentiary hearing, an administrative law judge had found that SeaWorld violated this provision when, on February 24, 2010, a killer whale mutilated and killed the trainer Dawn Brancheau during

¹⁸ *United States Telecom Assn. v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (emphasis in original).

¹⁹ *United States Telecom*, 855 F.3d at 422-23.

²⁰ *Id.* at 422-24 (net neutrality); *Coalition for Responsible Regulation v. EPA*, 2012 U.S. App. LEXIS 25997 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing en banc) (greenhouse gases).

²¹ *United States Telecom*, 855 F.3d at 423.

²² *SeaWorld of Florida, LLC v. Perez*, 748 F.3d 1202, 1216-22 (D.C. Cir. 2014) (Kavanaugh, J., dissenting).

²³ 29 U.S.C. § 654(a)(1).

a public performance, after SeaWorld had failed to take precautions following similar prior attacks.

SeaWorld adjudicated a dispute involving one company's failure to provide a safe working environment on one day. Miraculously, however, Judge Kavanaugh transformed the case into one justifying his "major" decisions treatment. He insisted that if OSHA reprimanded SeaWorld for failing to protect its trainers against its killer whales, then OSHA could not condone punt returns in NFL football or speeding in NASCAR (hypothetical situations that not even SeaWorld had raised in its defense). Once he had blown up this single enforcement action against a theme park into a frontal assault on NFL football and NASCAR races, it was easy enough for Judge Kavanaugh to find that the case involved a question of major "economic and political significance." And once he found that the case was "major," he no longer asked whether the statute's plain language covered the factual situation presented (which it clearly did). Instead, Judge Kavanaugh looked for some additional sign from Congress – beyond the plain language that he, unfathomably, characterized as legislative "silen[ce]" – that it had specifically intended to take on "America's sport and entertainment behemoth." Not finding the sign he was looking for, Judge Kavanaugh would have denied OSHA the legal authority to take action against SeaWorld.

If an agency decision can be transformed into a "major" one based on this kind of logical manipulation, there is no limit to the damage Judge Kavanaugh's "major" decisions theory can do to agencies' legal authority to take on the problems Congress has charged them with addressing.

Equally troublingly, Judge Kavanaugh's new spin on statutory interpretation is structurally designed to favor deregulation and inaction over affirmative regulatory initiatives. Indeed, it is quite clear that Judge Kavanaugh does not intend to apply his concept of "major" decisions to agencies' deregulatory or non-regulatory decisions. This is not a neutral choice. It is as if an umpire, before calling a ball or strike, redefined the strike zone.

Consider Judge Kavanaugh's opinion in *Coalition for Responsible Regulation v. EPA*.²⁴ Judge Kavanaugh dissented from the denial of rehearing en banc in this case, which challenged an Environmental Protection Agency (EPA) rule requiring permitting for greenhouse gas emissions from stationary sources. Uncritically citing the Chamber of Commerce's claim that EPA's rule created "the most burdensome, costly, far-reaching program ever adopted by a United States regulatory agency," Judge Kavanaugh argued that the "major consequences" engendered by the rule counseled against reading the Clean Air Act to require permitting for greenhouse gas emissions. The inescapable implication of his opinion is that if EPA had issued a rule interpreting the Clean Air Act *not* to require greenhouse-gas permitting of the relevant sources, Judge Kavanaugh would have upheld it. But that decision would have engaged *exactly the same* "economic and environmental policy stakes" as EPA's decision did; indeed, Judge Kavanaugh

²⁴ *Coalition for Responsible Regulation*, 2012 U.S. App. LEXIS 25997 (Kavanaugh, J., dissenting from denial of rehearing en banc).

acknowledged that "massive real-world consequences" would have flowed from a decision "in either direction." Judge Kavanaugh's theory on "major rules" thus limits an agency's legal authority only where the agency has made a decision in what Judge Kavanaugh regards as the wrong direction: toward protective regulatory programs and away from deregulation or inaction.

The degree of clarity that Judge Kavanaugh would require from Congress in order to give agencies legal authority to issue "major rules" is also problematic. The flip side of clarity is ambiguity, and Judge Kavanaugh has admitted that judges have "no definitive guide for determining whether statutory language is clear or ambiguous."²⁵ Judge Kavanaugh's "major rules" theory would thus free judges to deny legal authority to agencies based on a distinction that he deems unprincipled.

In addition to creating a new theory for how to interpret statutes that lead to "major rules," Judge Kavanaugh has also criticized legal precedent requiring courts to defer to agencies' reasonable interpretations of ambiguous statutes. He has said that his preference would be to abandon interpretive deference, and to put judges in charge of deciding the single best interpretation of a statute.

The legal framework that Judge Kavanaugh would like to discard comes from *Chevron v. NRDC*, the most famous case in all of administrative law. *Chevron* stands for the following principle, known as "*Chevron*" deference: where a statute is ambiguous, courts should defer to the permissible interpretation of the agency charged with implementing the statute.²⁶ This principle acknowledges that judges are not experts in the complex and technical problems that Congress has instructed agencies to address. Judges also stand aloof from external checks in ways that agencies do not. Agencies are creatures of Congress, and may act only with the authority Congress has given them. Their funding is dependent on Congress and they are subject to Congress's oversight. In addition, they must, in order to take legally binding action, satisfy procedural requirements that require them to hear and to respond to the views of interested parties and then to explain their decisions in reasoned terms.

Judge Kavanaugh has signaled that he would prefer to discard *Chevron* entirely, replacing it with judicial power to interpret the law without deference to agencies' views.²⁷ Undoing *Chevron* would be a radical departure from the Court's long-settled approach to statutory interpretation. The consequences would include legal uncertainty and disruption, as agencies, affected parties, and courts grappled with the new approach to statutory interpretation. The consequences would also include a large shift in interpretive power away from the expert-driven, externally checked agencies and toward the non-expert, insular courts. Here, too, Congress would be the biggest loser. It would no longer have the power to delegate interpretive authority to agencies on questions that

²⁵ Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017).

²⁶ *Chevron v. NRDC*, 467 U.S. 837 (1984).

²⁷ Kavanaugh, 92 NOTRE DAME L. REV. at 1912.

it could not resolve, could not foresee, or could not solve given the limits of its expertise. This massive shift in power away from Congress would come not from a constitutional imperative, but from ostensibly tinkering at the margins of the rules of statutory construction.

At least, however, a full-scale retreat from *Chevron* would not favor one political perspective over another. *Chevron* deference itself is, in principle, agnostic about the political valence of an agency decision; it is triggered by the ambiguity of the statute at hand, rather than by the political direction of the agency's choice. The same cannot be said of Judge Kavanaugh's approach to "major rules."

Congress often delegates authority to agencies to address broad problems whose full dimensions and manifestations are not immediately clear. Congress does so in the expectation that agencies will study and monitor the problems and take regulatory action as necessary to address them. Judge Kavanaugh, however, would require linguistic precision from Congress if it wants to authorize an agency to take on a specific new problem. He looked, for example, for such precise language in considering whether EPA could require permits for greenhouse gases and whether OSHA could fine SeaWorld for failing to protect trainers of killer whales against avoidable risks. In doing so, he has simply failed to listen to Congress's instructions to these agencies to continue to investigate and address new problems. Congress has spoken, but Judge Kavanaugh hears only crickets.

Liberty

The touchstone of Judge Kavanaugh's work as a judge is the separation of powers, and the motivating force behind his focus on the separation of powers is the protection of liberty. Unfortunately, however, the "liberty" Judge Kavanaugh embraces is badly skewed, and terribly small: it is the liberty of powerful groups to do their business unhindered by government, rather than the liberty that comes from meaningful government protections against harmful human behavior. In the name of "liberty," Judge Kavanaugh has rejected rules addressing toxic air pollution, climate change, workplace safety, financial fraud, and more – without acknowledging that in such cases, "liberty" sits on both sides of the legal question. There is, on one side, the liberty of regulated groups to go about their business unimpeded by federal law. There is, on the other, the liberty of the rest of us to go about our lives – at home, at school, at work, and in our communities – with a reasonable assurance that the government has our back in protecting us against coming to harm at other people's hands.

Testimony of Rebecca Ingber
Associate Professor of Law, Boston University School of Law
Before the United States Senate Committee on the Judiciary
On the Nomination of Brett Kavanaugh for Associate Justice of the U.S. Supreme Court
September 7, 2018

Chairman Grassley, Ranking Member Feinstein, and Members of the Committee: thank you for the invitation to testify as you consider the nomination of Judge Brett Kavanaugh to the Supreme Court.

I am an associate professor at the Boston University School of Law, where I write and teach about executive power, international law, and national security, and a Senior Fellow at The Center on Law and Security at NYU School of Law. Previously, I served for several years in the U.S. government as an attorney-adviser in the U.S. Department of State Office of the Legal Adviser, where I advised the State Department and worked with colleagues at the Departments of Justice and Defense, in the intelligence community, and at the White House, on issues of international law and the President's war powers.

I am honored to speak to the committee about these matters as you consider Judge Kavanaugh's nomination to the Supreme Court. Judge Kavanaugh has had an exceptional career, and has many obvious strengths. Nevertheless, I believe there are concerns his jurisprudence raises that should be addressed before final consideration of his nomination. My testimony will focus on two: First, I will discuss Judge Kavanaugh's reluctance to impose checks on the President in the national security realm, and the harms in undue deference for national security decision-making and government accountability. Second, I will address Judge Kavanaugh's unusually dismissive views on the role of international law in the U.S. domestic system, and in particular, international law's role in constraining the limits Congress sets on the President's authority. Taken together, should they be adopted by the Supreme Court, these approaches could result in a President wielding essentially unfettered power at the mere invocation of war or national security. Both put him at odds with the judicial philosophy of Justice Kennedy, whom Judge Kavanaugh has been nominated to replace. The difference in their judicial approaches is stark and significant, both to the separation of powers and to the United States' reputation on the world stage. Should he be confirmed, Judge Kavanaugh may be in a position for decades to restrict the ability of courts and Congress to check the President, and to shape how the United States engages with and defines international law.

National Security Deference to the President

I will turn first to Judge Kavanaugh's approach to deference to the President in the national security sphere, and the consequences of such deference for the national security decision-making of the executive branch. I spent several years working in the government on the receiving end of this deference, as an attorney within the executive branch working on national security matters under two presidential administrations. During that time, I had a front row seat to how the executive branch grapples with national security litigation, and my experience from my government service informs my views on these matters.

Judge Kavanaugh's opinions reveal that he is exceedingly reluctant to impose checks on the President in the national security sphere, including by declining to impose congressional limits on Presidential action. He has referred generally to his approach as deference toward the political branches—the President and Congress—together, and indeed he has expressed in his scholarship the view that Congress has a strong constitutional role to play in war powers decisions. But his judicial opinions suggest that he is not inclined to take a neutral position as between Congress and the President even in the face of congressional legislation. In fact, Judge Kavanaugh has set an extremely high bar for finding that Congress has spoken to constrain the President's war powers or where the President invokes national security.¹ And he has set a low bar for finding that Congress has empowered the President.² Furthermore, Judge Kavanaugh has suggested that the President holds significant Constitutional authority to act *unilaterally* in wartime, without Congress, and that as a result, courts must broadly construe any statutory grant of power to the President in this area.³ The result is that—in stark contrast to Justice Kennedy, who regularly authored or joined opinions upholding limits on the President's wartime powers—Judge Kavanaugh has almost never found occasion for constraining the President in the national security space.

It is therefore worth reflecting on what this level of extraordinary deference to the government in the national security sphere looks like, and the effect it has on government decision-making and on the rights of the individuals affected by these decisions.

In this section, I will first discuss why judicial review is so important to Presidential accountability on matters of national security specifically. Second, I will address some of the myths surrounding national security decision-making and beliefs about the necessity for aggressive deference from the courts. Third, I will discuss why the particularities of executive branch decision-making in litigation make it critical that national security adjudication have real teeth, and not just be a rubber stamp on the positions the government pursues zealously in the context of defensive litigation.

The Importance of Judicial Review of National Security Decisions

The importance of judicial review of the President's national security decisions comes down to this: litigation is one of the very few lawful vehicles that provides a check on the President's power, and accountability for harms to individuals who typically have no other recourse, ideally divorced from partisan politics.

¹ See, e.g., *Rattigan v. Holder*, 689 F.3d 764 (2012) (Kavanaugh, J., dissenting) (arguing that the court should not review claims under the Civil Rights Act where the alleged retaliation involved reporting security concerns); *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 858 (D.C. Cir. 2010) (en banc) (Kavanaugh, J., concurring) (“courts must be cautious about interpreting an ambiguous statute to constrain or interfere with the Executive Branch’s conduct of national security or foreign policy”).

² See, e.g., *Ali v. Obama*, 736 F.3d 542 (2013) (finding that the 2001 AUMF grants the President to detain individuals who—in the words of Judge Edwards’ concurrence—“is not someone who transgressed the provisions of the AUMF or the NDAA.”) Judge Edwards thus argued that Judge Kavanaugh’s opinion and the precedents he had joined “stretched the meaning of the AUMF and the NDAA so far beyond the terms of these statutory authorizations that habeas corpus proceedings ... are functionally useless.” *Id.*

³ *El-Shifa, supra*, at 858-59 (Kavanaugh, J., concurring) (“The Executive plainly possesses a significant degree of exclusive, preclusive Article II power in both the domestic and national security arenas.”)

Judicial review of the President's actions is not some modern contrivance, but is rather a fundamental component of the separation of powers established by the Framers. It is a necessary means of checking the President, and it is also a means of addressing individual rights and harms, particularly when the affected individuals do not have powerful political allies, or when protecting those individuals does not play well in the political moment. In the national security context, in particular, the individuals whose rights are at stake often have the least political power to remediate their harms in any way other than through the courts.

Moreover, judicial review is all the more critical in the national security space because so much of what the executive branch does in this sphere takes place in secret. But secret or not, these actions often have a direct impact on real people's lives. When a judge says that a matter is not for courts to decide but should instead be left to the accountable branches, we need to then ask, how precisely—and by whom—is this branch being held accountable? One way we hold these branches accountable is through public scrutiny. And yet public scrutiny is often impossible when so many of the government's actions are taken in secret.

Thus, one of the few tools available for holding the executive branch accountable for actions taken in the name of national security is lawsuits brought by people who feel they have been harmed by the government's policies, which can then be litigated in a non-politicized forum.

This is not to say that we have to attribute bad faith to executive branch actors in order to deem judicial review important. In my experience there is a great deal of thoughtful decision-making that happens inside the executive branch national security apparatus. There is often significant, robust process and debate that accompanies major decisions, and executive actors grapple with legal rules that they interpret to constrain themselves even in areas where the courts may never tread, and even when the legal rules or interpretations are those that the executive branch has itself established.

But sometimes, even a robust process can lead to Presidential overreach. After all, the premise of the separation of powers is that each branch will seek to enhance its own authority, and the other branches (including the courts) are there to impose limits. And sometimes the process itself is lacking. Mistakes happen. Bad decisions may come about through incompetence, insufficiency of facts, exigency, and even, yes, through the intentional abuse of power.

The executive branch, in short, has to be held to account, and it must be held to account by some source outside itself: by the courts, by Congress, and by civil society. Even for officials acting with the best intentions, the fire drill of government life at the highest levels means that officials will not always have or take the opportunity to revisit decisions, even poorly or insufficiently processed decisions, unless forced to do so by some external trigger. And litigation is one of the few available triggers for doing so. But litigation is not costless, even for actors seeking to hold the government accountable, and it can in fact have perverse effects when litigation occurs in a context in which judges are not inclined to impose real checks on the President. I will discuss below the effect of litigation on impelling an aggressively defensive posture in executive branch decision-making, which makes it critical that judicial review have real teeth.

Myths Surrounding Judicial Review of National Security Issues

Before I turn to that, I will first address the arguments that tend to underlie deference to the President on matters of national security, and that animate much judicial deference in this realm, including in Judge Kavanaugh's own decisions. These arguments focus on institutional competence: that national security matters are somehow different than other areas, and that the President is best placed to make expedient, expert decisions on matters that require immediate attention and could affect the safety of citizens and residents of this country or the use of force abroad.

On this, I think it's important to pull away the veil of mystery draped over national security law. First, when national security matters receive a heightened level of deference to the executive, this incentivizes the President to classify more and more activity as coming within the national security ambit. "National security" is often an overbroad, malleable term. For example, does addressing the abuse alleged in the *Meshal* case, of an American citizen by FBI agents overseas, demand a different set of rules than other cases of abuse, simply because the government asserts "national security" concerns?⁴ Should the President's claim of national security prerogative change the U.S. citizen's rights or remedy? If so, why? Crafting a deference policy that is triggered whenever the President cites national security or foreign actions is not merely a neutral policy of waiting for the political branches to weigh in. In practice, it can mean casting aside normal process and established rights in favor of the executive branch, at the utterance of the magic words "national security" or "war." And yet, despite government claims to the contrary, very few—if any—activities for which the President claims national security deference involve matters where the nation's security will actually turn on whether the President's actions are reviewable in court, or whether remedies are provided for abuses and overreach.

Second, while some national security actions obviously do require expedience, many do not. Expedience is an argument that the executive branch often uses to stave off interference from the courts, but it is not otherwise a common feature of executive branch action. We were told that battlefield exigencies necessitated holding detainees as combatants without judicial review. Ultimately, detainees at Guantanamo (many of whom were not in fact captured on a battlefield) did receive review, some in multiple fora, and the sky did not fall. We were told that military commissions were necessary to try the 9/11 attackers in order to bring them to justice quickly. A decade and a half later, we are still waiting for that military commission to get off the ground. And we are told time and again that the exigencies of war demand that the President have urgent flexibility in determining the scope of the conflict, and thus do not permit him to return to Congress to update the now seventeen-year-old use of force statute, each time he intends to bring a new group into its ambit. ISIS, which we are currently fighting, did not exist at the time that Congress enacted that 2001 statute, but the President tells us it must come within its scope. The President is as we speak detaining a U.S. citizen under this theory. We have been fighting ISIS now for over four years. We have been holding this U.S. citizen for a year. There has been time to review this decision in court, and there has been time for the President to go to Congress.

Finally, and perhaps most importantly, arguments about national security deference focus on the executive branch's unique expertise. Here, I think there is a great deal of truth to the argument.

⁴ *Meshal v. Higgenbotham*, 804 F.3d 417, 429-30 (2015) (Kavanaugh, J., concurring)(arguing against the application of a *Bivens* remedy to a case where a U.S. citizen alleged abuse in detention by FBI officers abroad, based on "extraterritoriality and national security," and because such extension would render "U.S. officials undoubtedly ... more hesitant in investigating and interrogating suspected al Qaeda members abroad.")

The executive branch as a whole—operating as it does the war machinery of the state, intelligence collection and analysis, diplomacy and foreign policy, not to mention the system of classification keeping so much of this operation secret—surely holds within it a significant advantage in expertise over the courts on matters of national security. But this, too, can be overstated. The courts deal with many complicated and sensitive issues—consider mob trials, or terrorism trials in Article III courts, which have as yet been quicker and more successful than military commissions—and the three branches have found ways to accommodate judicial review in these contexts.

Executive Positions in National Security Litigation

Moreover—and this caveat may swallow the government’s expertise-related advantages—this wealth of national security expertise is not necessarily responsible for any given position the executive branch takes in court.

What do I mean by this? As I mention above, litigation forces the government to revisit its prior acts. But once the government is facing a legal challenge, it does not revisit those acts in a vacuum, in which it seeks the “best view” of the law or policy that it might have taken in advance of the challenged conduct. Instead, once the executive branch faces a lawsuit, all forces—down to which officials within the executive branch draft the argument or hold decision-making authority—align to shape the government’s legal position from a defensive crouch.

What this means in practice is that the government’s legal position in national security litigation will be aggressively protective of the government’s prior decisions and actions. Defensive litigation over the President’s national security policies is not an area where the government is inclined to give any ground. Department of Justice litigators who take the lead in these cases view their role in narrow terms: their job, as they see it, is to protect executive power and flexibility for the policy-makers, and refuse to concede an inch, even if the policymakers themselves do not support the underlying policies or would not take the underlying actions were the decision to come to them anew.

Accordingly, what judges tend to view as the executive’s well-considered legal position is often instead not the result of an expert-led robust process to come to the “best view” of the law, but instead simply a zealously-pursued litigation position, heavily shaped by litigators.

Moreover, much as Judge Kavanaugh views deference to the executive as pursuing a limited role for judges in the national security space, the reality is that the executive branch looks to the *courts* to understand the parameters of its authority. Once a court defers to the President in a given case, the argument that the executive branch had made before the court that the court finds sufficient becomes baked into the executive branch’s understanding of the law, even if the court only intended to defer to the executive’s power to define those parameters itself. The court’s deference thus has the effect of a merits decision, which becomes the law for the executive branch going forward. When a judge weighing whether the government has met its burden in that regard rules that, for example, staying at a particular guest house in Afghanistan, at which the government claims certain members of al Qaeda resided, is “overwhelming” evidence,⁵ he may intend merely that this is enough to permit the government to go ahead and make its own unilateral determination about the individual’s proper status. But the government is likely to read this not as mere deference but as a status determination itself, and moreover, as an assessment of the necessary facts to make that status

⁵ *Al-Bihani v. Obama*, 590 F.3d 866 (2010).

determination going forward. In other words, there is a tendency in the government to see judicial ratification of the principle that staying at this guest house or one similarly situated as sufficient to make someone an enemy combatant. The results of such a status? For many in the executive branch, that would mean that the President could not only detain such a person—indefinitely, for now, as there does not seem to be an end in sight to the conflict—but also target and kill him.

What this “limited role” for courts in the national security realm means in practice is that the court defers to the government’s aggressive litigation position, crafted to maximally protect presidential power, which then becomes the judicially-ratified law that the government follows going forward. If the courts never push back—and under Judge Kavanaugh’s preferred approach, but contrary to Justice Kennedy’s, such pushback would be exceedingly rare—the result will be an ever-ratcheting up of executive power, both vis-à-vis the other branches and as against individuals.

One might respond to this reality in a few ways. First, one might seek to do away with litigation entirely and leave the executive branch to decide these matters through internal processes without judicial intervention. But as I note above, the government does make mistakes that impose genuine harm on individuals, it makes them in secret, it does not often revisit them, and there are few lawful processes outside of litigation to check the President. Second, this suggests that Congress itself needs to act more assertively to create clear checks on the President for the courts to uphold. (Congress does grant power to the President against a backdrop of constraints, in particular constraints based in international law, but as I will describe in the second section below, Judge Kavanaugh has dismissed these as a check on the President.) In any event, litigation shines a spotlight on government action that almost no other mechanisms can match.

Thus, the third option—which to my view is essential alongside Congressional engagement—is for judicial review to have real teeth, and for judges to see the government as a litigant in a genuine adversarial process, where the President has a real prospect of losing.

This is the crux of the matter when considering extremely deferential judicial leanings in this space. For national security litigation to operate as a real check on the President, it is not enough to simply bring the parties into court and rubber stamp the executive branch’s litigation position. In fact, extreme deference to the executive branch is often—for the reasons I discuss above—worse than no judicial review at all.

International Law as United States Law

Next, and relatedly, I would urge the committee to consider the positions that Judge Kavanaugh has taken seeking to dismiss or severely limit the role of international law in the U.S. legal system. Judge Kavanaugh’s position on the limited role for courts in considering international law is highly relevant to his position on the limited role for courts in checking the President. In wartime, international law—law that the United States itself played an outsized role in crafting and convincing other nations to adopt—often provides the most important set of clear rules checking the President’s legal authority. It has been the longstanding approach of all three branches of government that statutes must be construed in light of international law—including international law limits on the President’s wartime conduct—and it is the approach the Supreme Court takes to this day, and which Justice Kennedy has consistently adopted. If the Court were instead to adopt Judge Kavanaugh’s approach rejecting such limits, the courts would have little recourse for interpreting the limits of the President’s power in wartime.

This is not an area where Judge Kavanaugh has merely followed precedent with his hands tied. Rather, he has gone to great lengths to dismiss the role of international law as a legal constraint even on the President's war powers, in the face of longstanding precedents to the contrary, and even where the majority of his colleagues have found his position unnecessary to the merits of the case. I will focus in particular here on Judge Kavanaugh's dismissal of the role of international law in shaping the courts' and the political branches' interpretation of statutes generally, and the President's war powers specifically.

Under longstanding precedent, even those international law norms that are not judicially enforceable in the first instance as a rule of decision form the backdrop against which courts must engage with statutes, and this is all the more true for statutes governing the President's war powers. For more than 200 years, under what is known as the *Charming Betsy* canon of construction, it is a well-established rule – as Justice Scalia reiterated in his dissent in *Hartford Fire* – that in the absence of a clear statement by Congress to the contrary, the courts will assume that Congress intended for the United States to comply with its international law obligations, rather than read a statute to violate international law.⁶ Judge Kavanaugh has written that he would reject that rule, and would instead hold that courts have *no role* in interpreting an ambiguous statute with reference to international law unless Congress makes a clear statement that they *must*.⁷

This position is all the more untenable in the war powers context, where all three branches of government have looked to international law to define war powers over the entire course of this nation's history.⁸ The concept of “war” itself, and thus the Constitution's allocation of war powers, have always been understood against the backdrop of what war and force mean on the international plane. When Congress authorizes the President to use all “necessary and *appropriate*” force, it does so against the backdrop of that history. Indeed, Presidents have consistently interpreted their war powers in line with international law, and the Supreme Court has ratified this understanding repeatedly, including in opinions that Justice Kennedy joined.⁹

Perhaps because these rules have always guided our understanding, international law is one of the *only* tools the courts and the political branches have for interpreting war powers. This means that international law is often the only limiting principle for interpreting the outer bounds of the President's wartime authorities.

This is not only a matter of *constraint* on the President. The use of international law as an interpretive tool to shape Constitutional or statutory powers can have both constraining and permissive effects on the President's powers. The President and the Supreme Court both have long looked to international law to construe the outer limits of the President's wartime authority expansively as well as narrowly, and even to override what would otherwise be the normal operation of other domestic constitutional or statutory protections. For example, in *Hamdi v. Rumsfeld*, a case involving a U.S. citizen detained by the U.S. government on U.S. soil, the government argued that

⁶ *Murray v. Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting)

⁷ *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

⁸ See, e.g., *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814); *Prize Cases*, 67 U.S. (2 Black) 635 (1863).

⁹ *Hamdi v. Rumsfeld*, 542 US 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

the President's wartime detention authority derived from both the U.S. constitution and statute, and was non-reviewable.¹⁰ The Supreme Court disagreed with that overly aggressive position, but nevertheless found that the President's authority to use force under a congressional statute—the 2001 Authorization for the Use of Military Force, which did not mention detention—implicitly granted the President authority to detain U.S. citizens. The Court read this implicit authority to detain into the statute even though a prior statute—the Non-Detention Act of 1971—prohibited detention of citizens without a clear act of Congress, and even though the Constitution calls for specific processes to be followed before the government may restrict an individual's liberty. The Court nevertheless held, in a plurality opinion joined by Justice Kennedy, that the 2001 AUMF authorized detention by looking to the international laws of war, which both recognizes detention as incident to war *and which imposes constraints on that power to detain*. Justice Kennedy joined the *Hamdi* Court in incorporating these international law constraints—such as that detention may last only until the end of hostilities—into what the statute means when it authorizes “appropriate” uses of force.

When the President uses force in wartime, he or she is acting outside the normal operation of domestic law in numerous ways. But once the courts accept that the law is different in war or “armed conflict,” and that the President has a prominent role in discerning the line between war and not-war, it is critical to identify limiting principles on what the President can do.

One of the only limiting principles that the executive branch itself has advanced time and again, as a means of reassuring both the courts and Congress that his authority in this realm is not entirely unfettered, is compliance with the international laws of war. These rules do not hamper the President's ability to fight a war, but rather prohibit conduct that centuries of experience dictates falls outside of what humanity will tolerate. And they are not rules imposed by some outside source. They are instead rules states have agreed to be bound by, specifically in wartime. Rules prohibiting torture. Rules prohibiting the detention of individuals after hostilities have ended. Rules prohibiting the intentional targeting of civilians. And the United States in particular has always played an outsized role in shaping these rules. We do not agree and have not agreed to rules for war that do not serve our interests, and that we do not intend to follow.

Judge Kavanaugh would have courts ignore these rules in interpreting the President's wartime statutory (and constitutional) authority. He views them as merely precatory—important for the President to follow, perhaps, as a matter of good policy, but not commitments with the force of judicially enforceable law. What is more, he would have the courts ignore these rules even in considering the otherwise open-ended “necessary and appropriate force” Congress generally authorizes the President to use in war. The result, should the Supreme Court adopt Judge Kavanaugh's approach, would be virtually no limiting principles on what the President can do in war, at least as far as the courts are concerned.

Yet it is the province of the courts to say what the law is. The question is not whether international law is binding law on the United States, which it unarguably is and will always be. The question is whether the U.S. Supreme Court will continue to play a role in interpreting that international law and the President's war powers against the backdrop of those rules, as it always has. Judge Kavanaugh's opinions suggest that the United States need not honor these commitments as law, and that Congress does not presumptively intend to ensure U.S. compliance with such law, but that they are merely political promises that can be ignored as political realities demand.

¹⁰ *Hamdi v. Rumsfeld*, 542 US 507 (2004).

It is essential, especially today, that the United States present a strong message to the world: we honor our legal commitments. The Supreme Court is a key player in this arena, and Judge Kavanaugh's opinions on international law going forward will have real salience on the world stage. Despite the Judge's limited view of the judicial role in this sphere, the reality is that all three branches have a role to play in matters of international law. The Supreme Court is frequently taken to speak for the United States when it issues pronouncements on international law, which are then understood as the U.S. position by international tribunals and foreign courts looking for evidence of *opinio juris*. And the Supreme Court's opinions on the domestic status of our international obligations have a significant effect on the extent to which the United States is able to honor those commitments. For all of these reasons, the Supreme Court's pronouncements on the role of international law in the U.S. domestic system have real effects internationally, and may cause states to question the extent to which the United States is able to keep its promises. Should he be confirmed, Judge Kavanaugh's positions on international law will have a world audience. I would therefore urge the committee to consider and to impress upon Judge Kavanaugh the importance of upholding the *Charming Betsy* canon and the well-established role of international law in interpreting war powers as longstanding precedent against which this body legislates, as well as the rhetorical importance of the Supreme Court's jurisprudence in demonstrating to the world the United States' commitment to the rule of law.

Conclusion

This is a dangerous time for the separation of powers. Many are looking to the courts as the last bulwark against a President who often shows a casual disregard for the rule of law and the longstanding norms that represent good government. This Committee should ask Judge Kavanaugh to make clear that, should he be confirmed, he will hold the President accountable for his national security decisions that violate the Constitution or statutory constraints. Congress, too, should assertively legislate clear constraints in this arena. Judge Kavanaugh has in his scholarship exhibited support for some role for Congress in national security, as long as congressional statutes are loud and clear. We also know that he sees constitutional limits to Congress's ability to constrain the President in this space, and we do not know where he would draw that line, although his jurisprudence suggests it will favor the President.¹¹ I would urge that the Committee seek to assure itself in this regard that Judge Kavanaugh would support congressional checks on Presidential power should he be confirmed to the Supreme Court. And then I would urge you to consider legislative means for checking the President where the courts, under Judge Kavanaugh's approach, may otherwise step aside.

¹¹ *El-Shifa, supra*, at 858 (“if a statute were passed that clearly limited the kind of Executive national security or foreign policy activities at issue in these cases, such a statute as applied might well violate Article II”).

United States Senate Committee on the Judiciary

**Hearing on the Nomination of Brett M. Kavanaugh to Serve as Associate Justice of
the Supreme Court of the United States**

September 7, 2018

**Prepared Statement of
A.J. Kramer
Federal Public Defender for the District of Columbia**

Members of the Committee:

Thank you for the opportunity to comment on Judge Brett Kavanaugh's nomination to be an Associate Justice of the Supreme Court of the United States. It is a privilege to take part in this process.

My name is A.J. Kramer, and I am the Federal Public Defender for the District of Columbia. In that position, I represent indigent criminal defendants before the United States District Court in D.C. as well as the U.S. Court of Appeals for the D.C. Circuit. I am here today in my personal capacity (and am not speaking on behalf of any Federal Defender office or the program).

I have known and interacted with Judge Kavanaugh for the past 12 years. I first got to know Judge Kavanaugh shortly after he became a judge (although I had met him a couple of times briefly before that at events). Since then, I served on two committees with him and talked with him on numerous occasions at various events in the courthouse. As D.C.'s Federal Public Defender, I have argued many cases before Judge Kavanaugh. The two committees on which I served with him are the U.S. Court of Appeals Advisory Committee on Procedures and the U.S. Court of Appeals Criminal Justice Act Panel

Committee. Based on that cumulative experience, it's clear to me that Judge Kavanaugh should be the next Associate Justice of the Supreme Court.

Listening to some of the rhetoric surrounding Judge Kavanaugh's nomination, you could be forgiven for thinking he is, among other things, committed to sending every criminal defendant to prison. Nothing could be further from the truth. Judge Kavanaugh treats all litigants fairly, no matter how unsympathetic they might be, and his overriding commitment is first and foremost to the rule of law. To understand that, one need look no further than two cases I argued before him, along with a third line of cases that I have followed closely. (I should add that I do not recall reading any of Judge Kavanaugh's opinions in civil cases.)

First is the case of *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016). A woman named Queen Nwoye was convicted of conspiring with her boyfriend to extort money from a prominent doctor. At trial, Ms. Nwoye's defense was that she acted under duress because her boyfriend repeatedly beat her and forced her to participate in the extortion scheme. But Ms. Nwoye's counsel did not introduce any expert testimony on battered woman syndrome, which is the set of "psychological and behavioral traits common to women who are exposed to severe, repeated domestic abuse." *Id.* at 1132. As a result, at the close of trial the District Court denied her request to instruct the jury to consider as a defense that she acted under duress. She was convicted.

On appeal, I argued that the failure of Ms. Nwoye's counsel to introduce the battered-woman-syndrome testimony had been prejudicial. Writing for the majority, and over the dissent of a colleague, Judge Kavanaugh agreed. Judge Kavanaugh explained that the testimony would have helped Ms. Nwoye prove the defense of duress by

explaining to a jury why a woman in her situation may have felt unable to leave her abuser. It would have been easy for Judge Kavanaugh to dismiss Ms. Nwoye's argument as a mere "syndrome" of her imagination. Instead, Judge Kavanaugh demonstrated that he recognized the subtle ways in which being a battered woman might have influenced Ms. Nwoye's understanding of her situation. Indeed, Judge Kavanaugh wrote a thorough and thoughtful legal and factual discussion of battered women syndrome in his opinion.

Judge Kavanaugh exhibited this same open-mindedness in the second case I want to discuss, *United States v. Williams*, 836 F.3d 1 (D.C. Cir. 2016). Rico Williams was the leader of a gang that killed a new member during a violent hazing ritual. After the court instructed the jury on both manslaughter and second-degree murder, the jury convicted Mr. Williams of second-degree murder—the more serious offense. The difference between the two crimes—and the validity of the conviction—turned on Mr. Williams's *mens rea*, or intent. In other words, the question was whether Mr. Williams knew that his conduct created an extreme risk of death or serious bodily injury. During the initiation, the victim had repeatedly stated that he was okay and that the hazing should continue. The Government argued to the jury that those statements were irrelevant because consent is not a defense to murder.

Judge Kavanaugh saw through that argument on appeal. He agreed with me that, although consent is not a defense to murder, it might bear on whether Mr. Williams understood the risks associated with his actions. In his concurrence, Judge Kavanaugh acknowledged that "Williams committed a heinous crime," but he argued that nevertheless "the jury did not have a correct understanding of the law and, armed with that misunderstanding, . . . proceeded to convict Williams of second-degree murder rather

than manslaughter.” *Id.* at 20. However “heinous” Mr. Williams’s actions, Judge Kavanaugh made clear that he was “unwilling to sweep” the Government’s fundamental mistake “under the rug.” *Id.*

Once again, Judge Kavanaugh saw past the wrongs committed by the defendant and focused instead on the fact that the defendant had not received a fundamentally fair trial. In retrospect, I should not have been surprised: *Williams* was only the latest in a long line of cases that has established Judge Kavanaugh as a leading voice in favor of robust *mens rea* requirements. *See, e.g., United States v. Burwell*, 690 F.3d 500, 527 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting); *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

Third and finally, Judge Kavanaugh has repeatedly expressed serious concerns about district courts’ use of conduct for which a defendant was acquitted to calculate higher sentencing ranges. *See, e.g., United States v. Bell*, 808 F.3d 926, 927–928 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of rehearing en banc); *United States v. Settles*, 530 F.3d 920, 923–924 (D.C. Cir. 2008); *United States v. Henry*, 472 F.3d 910, 918–922 (D.C. Cir. 2007) (Kavanaugh, J., concurring). As he has explained, such behavior “seems a dubious infringement of the rights to due process and to a jury trial.” *Bell*, 808 F.3d at 928. After all, if a jury finds someone not guilty of a particular offense, how is it fair for the trial court to still rely on that offense to impose a higher sentence? Supreme Court precedent ties Judge Kavanaugh’s hands on the issue. But in a telling display of thoughtfulness, he has nevertheless urged district court judges as a matter of discretion to refrain from using acquitted conduct to calculate higher sentencing ranges.

These three examples are not outliers. Time and again, Judge Kavanaugh has been willing to rule for criminal defendants and to check prosecutorial overreach. To name only a few cases: Judge Kavanaugh ordered resentencing in *United States v. Burnett*, 827 F.3d 1108 (D.C. Cir. 2016), because the District Court had improperly based the defendant's sentence on pre-conspiracy conduct. In *United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011), Judge Kavanaugh vacated a defendant's conviction of felony possession of a firearm on Confrontation Clause grounds. In *United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008), he upheld a probationary sentence for a defendant over the Government's objection, writing an opinion describing sentencing review in light of the Supreme Court's rulings. In *United States v. Papagno*, 639 F.3d 1093 (D.C. Cir. 2011), Judge Kavanaugh concluded that the Mandatory Victims Restitution Act did not require criminal defendants to reimburse organizations for the costs of private internal investigations. When Judge Kavanaugh issued his opinion in *Papagno*, he opened a circuit split with half a dozen other circuits. Last Term, the Supreme Court vindicated his view unanimously. *See Lagos v. United States*, 138 S. Ct. 1684 (2018).

This is not to say that Judge Kavanaugh has not ruled in favor of the Government in criminal cases. Of course he has. But even when Judge Kavanaugh rules against a criminal defendant, he does so because he believes that the best view of the law requires that result. He is always evenhanded and extremely well prepared at oral argument, engaging in thorough questioning of both sides at argument, a practice which shows that he reads every brief with an open mind, cover to cover. He also goes out of his way to be fair to the losing party in his opinions, taking great pride in making every litigant feel like they've been heard. And in his capacity as a member of the Criminal Justice Act Panel

Committee, he has always pushed to ensure that criminal defendants receive the absolute highest-quality representation available, recognizing the importance of effective advocacy to any fair system of justice.

America needs an Associate Justice who can apply the law fairly and neutrally to all cases that come before him. Judge Kavanaugh has repeatedly demonstrated that he is that judge. He understands the value of a fundamentally fair trial grounded in the law for *all* parties, including unsympathetic ones. The Senate should vote to confirm him.

**Testimony Regarding the Nomination of Brett Kavanaugh
to Serve as an Associate Justice of the U.S. Supreme Court**

U.S. Senate Committee on the Judiciary

by

Hunter Lachance

Kennebunkport, Maine

September 7, 2018

Senator Grassley, Senator Feinstein, and Members of the Senate Judiciary Committee, my name is Hunter Lachance. I live in Kennebunkport, Maine and I am a sophomore at Kennebunk High School.

I am 15 years old and suffer from asthma. I live in a state that has some of the highest rates of asthma in the nation. According to the Maine Center for Disease Control, nearly 12% of the adults in our state have asthma, compared with 9% nationally. Maine children also suffer from a higher rate of asthma than the national average. I am one of those statistics.

Despite Maine's many beauties, it has worse air quality than most people realize.

Because Maine sits at the end of America's "tail-pipe," air pollution from upwind states is carried into Maine by the prevailing winds. Air pollution makes life extremely difficult for those of us with asthma, and it makes it harder for me to breathe.

For me to live a healthy life, air pollution needs to decrease; not increase. I am concerned that the Supreme Court could make major decisions in the next few years that will cause air pollution in Maine to increase if Brett Kavanaugh is confirmed.

Many people in this room may have asthma, or know someone who does. So what I'm about to describe may be familiar to you.

Here is a coffee stirrer. If you have one, I encourage you to put it to your mouth and try breathing through it. Now, imagine only being able to breathe through a hole this size for an hour, or a day, or even a week. That is what it feels like during an asthmatic attack.

Unfortunately, I am not alone in having asthma impact my life. Asthma affects nearly 25 million Americans, including over 6 million children. Nearly 2 million people go to an emergency room each year because of asthma. I am here today because my future, and my health, may depend on it.

I am just your everyday kid from Maine. I play sports, like to swim, and love playing in the snow. But my active life changed when I was diagnosed with asthma at age 10. Suddenly, everything became more difficult. I was sidelined from sports, began missing school, and my parents constantly worried about my health.

The year after I was diagnosed, I missed close to a quarter of the school year. I can vividly remember times when my asthma attacks were so strong and scary that I was removed from class by my teacher and sent to the nurse's office. Most of the time, the nurse sent me home or asked my parents to get me medical attention. I remember one really bad attack when I was home sick for 3 weeks straight.

Asthma is a leading reason why kids miss school, and it has directly impacted my ability to learn from my teachers and spend time with my friends.

Although air pollution doesn't cause asthma, it triggers attacks. On ozone alert days, people across the country have trouble breathing. And this should worry everyone. It worries me.

In Maine, we need strong federal regulations on air pollution because pollution doesn't stop at state borders. If states upwind from Maine are allowed to pollute more because federal regulations are weakened, then that's bad for me. It's bad for Mainers. And it's bad for anyone in America who suffers from asthma or a respiratory disease.

That's why I'm here. I'm deeply concerned that if Brett Kavanaugh is on the Supreme Court, he would vote to weaken laws that protect my health—because he already has. In a 2012 ruling, he rejected the Cross-State Air Pollution Rule based on the Clean Air Act's "Good Neighbor" provision, which regulates air pollution that crosses state lines. According to the EPA, this rule reduces sulfur dioxide and nitrogen oxide pollutants and will prevent 34,000 premature deaths.

During his time on the DC Circuit Court of Appeals, Mr. Kavanaugh has repeatedly struck down other Clean Air Act protections. This worries me a lot because clean air is a life or death issue for so many people like me. We need a Supreme Court that will protect clean air because lives depend on it.

We also need a Supreme Court that will uphold protections to address climate change because my generation's future depends on it. For me, climate change means that life will be even more difficult with more ozone alert days, more dust and soot in the air from forest fires, and more mold due to extreme weather and flooding.

Here's my coffee stirrer again. Next time you have the chance, pick one up and try breathing through it, and see how long you can last. This is what it's like to suffer through a serious asthmatic attack. If the Supreme Court fails to protect clean air, then it is failing to protect me and millions of other Americans.

Please don't confirm someone for the Supreme Court with a record like Judge Kavanaugh's—a record that could mean more air pollution, more asthma attacks, and more premature deaths for the millions of Americans unfortunate enough to be afflicted with asthma like me.

Thank you for letting me testify today.

Statement of Maureen E. Mahoney in Response to the Request of the United States Senate Committee on the Judiciary to Provide Testimony at Its Hearing on the Judicial Nomination of Brett M. Kavanaugh to Serve as Associate Justice of the Supreme Court of the United States

September 7, 2018

The American Bar Association has unanimously rated Judge Kavanaugh “well-qualified” to serve on the Supreme Court. Having worked with Judge Kavanaugh at the Solicitor General’s Office and appeared before him on the D.C. Circuit, I agree with that assessment. Indeed, it is hard to think of someone more qualified.

In my testimony today, I would like to make two further points. First, I want to share my view that Judge Kavanaugh has much in common with my friend and former colleague Chief Justice John Roberts, whom the Senate voted to confirm overwhelmingly. Second, I would like to discuss Judge Kavanaugh’s extraordinary record of mentoring female lawyers.

In 2005, I testified before this Committee in support of Chief Justice Roberts’ confirmation and I am struck by the many similarities between him and Judge Kavanaugh. Some are obvious: Both are extraordinary lawyers; both worked in the White House Counsel’s Office and the Solicitor General’s Office; and both served as judges on the D.C. Circuit. Perhaps less evident to some, the Chief Justice and Judge Kavanaugh also share a civility and evenhandedness on the bench that reflects their genuine effort to consider all sides of an argument thoroughly before reaching any conclusions. I have had the pleasure of arguing before both men. Like the Chief Justice, Judge Kavanaugh asks difficult and incisive questions of both parties; yet he is also polite and conveys his thoughts with an open mind. My experience is not unique. Don Verrilli, Solicitor General during the Obama Administration, has called Judge Kavanaugh a “brilliant jurist” who is

“a gracious person, both on the bench and off.”¹ Bill Clinton’s lawyer in the Paula Jones case, Bob Bennett, has called the Judge an “unusually balanced questioner” who has an “innate sense of fairness and civility.”² And a bipartisan group of appellate practitioners praise the “unfailing courtesy” that the Judge “extends to his colleagues and to counsel who appear before him.”³ Judge Kavanaugh once wrote that “it is critical” for a judge to “demonstrate civility,” and to “guard against . . . arrogance.”⁴ In an era when some appellate judges have behaved like brusque advocates for one side during oral argument, Judge Kavanaugh has been a model of the proper judicial disposition.

More importantly, the Chief Justice and Judge Kavanaugh both understand the proper role of a federal judge: to be an independent, neutral arbiter. During his confirmation hearing, the Chief Justice famously described judges as umpires who apply the rules “without fear or favor.”⁵ I think it is fair to say that the Chief Justice has done so: At various times, both sides of the aisle have been disappointed by his rulings. And Judge Kavanaugh has similarly demonstrated impartiality and fairness over and over again in his 12 years on the D.C. Circuit. Most tellingly, he repeatedly ruled against the Bush Administration—where he worked prior to becoming a judge—in his first three years on the bench.⁶ He has ruled for an al Qaeda terrorist and for a woman suffering

¹ Interview with Marcia Coyle, LegalSpeak Podcast (July 13, 2018).

² Letter to Senators Grassley and Feinstein (Aug. 28, 2018).

³ Letter to Senators Grassley and Feinstein (Aug. 27, 2018).

⁴ Brett M. Kavanaugh, *The Judge As Umpire: Ten Principles*, 65 CATH. U. L. REV. 683, 689 (2016).

⁵ *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 443, pp. 55–56 (2005) (Statement of J. John Roberts).

⁶ See, e.g., *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008); *Tax Analysts v. IRS*, 495 F.3d 676 (D.C. Cir. 2007); *Felter v. Kempthorne*, 473 F.3d 1255 (D.C. Cir. 2007); *Baker & Hostetler LLP v. Department of Commerce*, 473 F.3d 312 (D.C. Cir. 2006).

from Battered Woman Syndrome.⁷ He has ruled in favor of Emily’s List, a pro-choice Democratic interest group, and against the Republican Party.⁸ And to the surprise of some, he has embraced greater Title VII protections for employees who suffer racial discrimination at work.⁹ Even the ACLU has recognized that Judge Kavanaugh has been “sympathetic” to Title VII claims.¹⁰

As these cases show, and as Judge Kavanaugh has explained in multiple speeches over the years, a judge must “check any prior political allegiances at the door.”¹¹ I am confident that Judge Kavanaugh will stay true to that ideal.

Judge Kavanaugh also stands out as a mentor to, and champion of, female lawyers. You have no doubt heard the statistics before, but they are worth repeating. Over half of Judge Kavanaugh’s law clerks—25 of 48—are women. Twenty-one of those twenty-five law clerks have been hired to clerk on the U.S. Supreme Court. That is astounding. Judge Kavanaugh’s female law clerks have gone on to serve in all three branches of government, including in prestigious positions in the White House and the Solicitor General’s Office. Four are federal prosecutors; one is Deputy Solicitor General of the District of Columbia; and one serves as a judge on the Eleventh Circuit.

It is difficult to overstate how important opportunities like these can be for a lawyer’s career—especially in appellate practice. Credentials like a Supreme Court clerkship or a job at the Solicitor General’s Office are keys that unlock doors at the

⁷ *Hamdan v. United States*, 696 F.3d 1298 (D.C. Cir. 2012); *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016).

⁸ *Emily’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009); *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010).

⁹ *Ortiz-Diaz v. HUD*, 867 F.3d 70 (D.C. Cir. 2017) (Kavanaugh, J., concurring).

¹⁰ *Report of the American Civil Liberties Union on the Nomination of Judge Brett M. Kavanaugh to Be Associate Justice of the United States Supreme Court* 30 (Aug. 15, 2018).

¹¹ Kavanaugh, *The Judge As Umpire*, 65 CATH. U. L. REV. at 686.

highest levels of the legal profession. And very few women have historically held these elite positions. When I clerked for Chief Justice Rehnquist in 1979, for example, just over 20 percent of the law clerks at the Supreme Court were women. This gender imbalance endures today. Almost twice as many men as women have been hired as Supreme Court clerks since 2005.¹² In the most recent Supreme Court Term, women delivered just 12 percent of the oral arguments.¹³ And women make up only 19 percent of law firm equity partners.¹⁴

I was one of the lucky few. I argued 21 cases before the Supreme Court, and this never would have happened without the efforts of two mentors: Chief Justice Rehnquist and Chief Justice Roberts. Rehnquist helped launch my appellate career by hiring me as his law clerk at a time when some justices were still uncomfortable with women working in their chambers. And then he arranged for me to argue my first Supreme Court case: In 1988, I was the first woman to receive the honor of being appointed by the Supreme Court to argue a case by invitation.¹⁵ With that maiden argument under my belt, Chief Justice Roberts recruited me to join him in the Solicitor General's Office as one of four deputies in 1991—a position that very few women in history had held at that time. These were the opportunities that made it possible for me to me compete with the men who dominate the Supreme Court bar.

For more than a decade, Judge Kavanaugh has been instrumental in opening these doors for a new generation of women lawyers. He has been a teacher, adviser, and

¹² Tony Mauro, *Shut Out: SCOTUS Law Clerks Still Mostly White and Male*, NATIONAL LAW JOURNAL (Dec. 11, 2017).

¹³ Mark Walsh, *Number of Women Arguing Before the Supreme Court Has Fallen Off Steeply*, ABA JOURNAL (Aug. 2018).

¹⁴ AMERICAN BAR ASSOCIATION, A CURRENT GLANCE AT WOMEN IN THE LAW 2 (2018).

¹⁵ *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825 (1988).

advocate for women in ways that unquestionably demonstrate his commitment to equality and that will ultimately reduce persistent gender disparities in the legal profession.

In short, Judge Kavanaugh's independence, his civility and open-mindedness, and his generous mentorship are just a few of the many characteristics that make him superbly qualified to serve on the Supreme Court. Like Chief Justice Roberts, Judge Kavanaugh deserves the Senate's overwhelming support.

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**Statement of Jennifer L. Mascott
Former Law Clerk to Judge Brett M. Kavanaugh
Assistant Professor of Law
Antonin Scalia Law School, George Mason University**

**Hearing on the Nomination of the Honorable Brett M. Kavanaugh
to be an Associate Justice of the Supreme Court of the United States**

September 7, 2018

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee: Thank you for the opportunity to testify today. I am honored to speak in support of my mentor and former boss, Judge Brett Kavanaugh, and to share with you why I believe he would be an outstanding Supreme Court Justice. My testimony will highlight three aspects of Judge Kavanaugh's character and judicial service that demonstrate his fairness and care in applying the law. Judge Kavanaugh's superb qualifications for Supreme Court service are complemented by his commitment to mentorship and instruction, his fair-minded and careful consideration of legal questions independent of personal policy preferences, and his commitment to following the law. These are qualities that I have witnessed firsthand as Judge Kavanaugh's law clerk and as a student of his opinions in the years to follow.

I served as a law clerk to Judge Kavanaugh during his first year on the bench, from 2006 to 2007. Already, Judge Kavanaugh demonstrated a commitment to seeking out diverse perspectives from a diverse group of law clerks. Our group of four clerks hailed from different parts of the country, came from diverse racial backgrounds, grew up among distinct religious traditions, and graduated from Ivy League as well as non-Ivy League law schools. I graduated from the George Washington University Law School—a top-flight law school but one that sends far fewer clerks to the D.C. Circuit than Harvard and Yale. Growing up in a family of modest means in a rural community, I graduated from the local public high school and attended my public state university on a scholarship. Judge Kavanaugh's decision to hire our group of clerks showed his value for perspectives of people from different walks of life. The Judge values hard work, achievement, and determination—not any specific pedigree.

We routinely had lively discussions in the Judge's chambers as the Judge prepared each month for oral arguments. The Judge encouraged us to ask tough questions of him and to debate legal issues with him and with each other. The camaraderie that the Judge facilitated during those discussions helped create an enduring bond between the four of us. The Judge wanted to hear and consider all sides of an issue, apply the law fairly, and along the way help train us to bring more rigor and precision to our legal analysis—skills that have stayed with me throughout my career. Now that I am a law professor, I view it as part of my job to pass along those skills to another generation of law students.

In addition to training us professionally, the Judge also mentored us on a more personal level. We had regular lunches with the Judge where we would discuss our families, our professional aspirations, and even sports. We attended a Nationals baseball game together, and a version of that outing has become one of several annual traditions, with current and former clerks

joining the Judge and Mrs. Kavanaugh each September to support the home team at Nationals Park.

Judge Kavanaugh's devotion to training female and male leaders in the legal profession does not conclude at the end of a clerkship in his chambers. He has remained a close mentor to me, providing advice at every major point in my career since the conclusion of my clerkship—which ended more than eleven years ago. And Judge Kavanaugh branches out to assist young lawyers far beyond the four corners of his clerk community—presiding over student moot court proceedings, speaking to student associations, and regularly teaching courses to students on law school campuses.

Judge Kavanaugh's record of mentoring and instructing young lawyers and his practice of hiring law clerks with diverse life experiences demonstrate his commitment to giving back to the legal profession and reveal him to be a jurist with an open mind. It also demonstrates that Judge Kavanaugh is aware of the impact that members of the judiciary can have on the legal profession, the state of the law, and the lives and futures of real people. Judges take an oath to decide cases according to the law and the Constitution. But care for people and the legal system in its entirety can make a jurist a more careful, modest, and thoughtful judge.

Judge Kavanaugh's determination to consider all relevant issues and hear discussion from all sides also evidences the Judge's humility. During my time in his chambers I witnessed a judge with a deep commitment to giving each legal question a fresh look when it comes before him in a particular case or controversy without predetermined ideas favoring a particular outcome. This commitment derives principally from Judge Kavanaugh's understanding of the constitutional role of the judge as the modest one of applying the law as enacted by Congress, rather than deciding cases to promote personal policy preferences.

Consistent with his judicial oath to "do equal right to the poor and to the rich," Judge Kavanaugh approached each case with the same in-depth level of care regardless of the identity of the litigants or the legal issues presented. He saw it as his job to consider all relevant statutory provisions, precedent, and history in every case. Claims that might affect only one or two individuals received the same level of attention as cases involving broader legal claims related to regulatory activity or governmental power.

Judge Kavanaugh's dedication to fairly administering equal justice to all under the law was also apparent through his meticulous attention to the opinion drafting process. The Judge worked through scores of opinion drafts before sending his final work product out the door. He wanted his opinions to reflect rigorous reasoning and legal precision. He wanted the opinions to be clearly written so that lower-court judges and litigants could more easily understand and apply them. He wanted the opinions to be accessible and transparent so that the public could understand them.

To this day, in my scholarly writing, I remember the Judge's constant admonition to simplify. Write short and clear sentences. Make sure each sentence contains only one idea. Present a concise summary of the principal reasoning up front in the introduction.

In the years since clerking for the Judge, I have become a professor who teaches and writes in the areas of administrative law and the constitutional separation of powers. Serving as a clerk for Judge Kavanaugh helped prepare me to analyze issues rigorously, write carefully, and think through issues from every angle to comprehensively evaluate all relevant aspects of complicated legal questions.

During my clerkship for Judge Kavanaugh, it was clear that the Judge himself always wanted to learn more. He kept abreast of current legal scholarship and opinions from other federal courts to have a fuller, more comprehensive, understanding of the law. From Judge Kavanaugh's example, I acquired a sense of the value of better understanding legal theory, the constitutional structure, and the role of the judiciary in the legal system. This understanding has helped to guide my own scholarship.

Judge Kavanaugh's view of the role of the independent judiciary, which he has called "the crown jewel of our constitutional system," leads him to independence, rigor, and fair-mindedness when he considers cases. He is not looking to reach a preconceived result and then justify it after the fact. Rather, he wrestles with every relevant legal issue and precedent, one by one, and only then reaches a decision.

In addition, Judge Kavanaugh works to build consensus and evenhandedly decide each case. For example, during the year that I clerked for Judge Kavanaugh, he wrote a unanimous opinion deferring to the National Labor Relations Board on two collective bargaining determinations, rejecting challenges to the Board brought by both a corporation *and* a labor union. *See E.I. Du Pont de Nemours & Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007). Then-Judge Merrick Garland (now Chief Judge Garland) and Judge David Sentelle both joined Judge Kavanaugh's opinion upholding agency action.

Judge Kavanaugh also sticks to the law regardless of the policy outcome to which it leads. One representative example of many is embodied by his opinions in two cases addressing Environmental Protection Agency (EPA) regulation of greenhouse gases. In a 2012 dissent from the denial of rehearing en banc in *Coalition for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, Judge Kavanaugh concluded that a greenhouse gas regulation exceeded the EPA's authority to regulate under the Clean Air Act. But the very next year, Judge Kavanaugh concluded that the proper interpretation of the Act and precedent called for more expansive greenhouse gas regulatory activity. In *Center for Biological Diversity v. EPA*, the Judge concluded in a concurring opinion that the court's precedent interpreting the Clean Air Act required the EPA to impose broader permitting requirements on facilities emitting greenhouse gases. *See* 722 F.3d 401 (D.C. Cir. 2013). Judge Kavanaugh's rulings against greenhouse gas regulation one year but then for expanded regulation the next were driven by Judge Kavanaugh's careful application of all the relevant law. Judge Kavanaugh's opinions indicated that he understood the outcome in each case was not dependent on whether he as an individual thought increased regulation was best as a policy matter but instead hinged on his task as a judge to accurately apply the law.

Judge Kavanaugh's commitment to follow the law regardless of party or policy outcome is also on display in two opinions addressing campaign finance regulations. In 2010, Judge

Kavanaugh *rejected* a claim by the Republican National Committee that certain contribution limits violated the First Amendment. *See Republican National Committee v. Federal Election Commission*, 698 F. Supp. 2d 150 (D.D.C. 2010). But in 2009, Judge Kavanaugh *granted* a First Amendment challenge brought by Emily's List against certain campaign finance regulations. *See* 581 F.3d 1 (D.C. Cir. 2009). The contrasting outcomes for campaign finance-related challenges in those two cases were not driven by Judge Kavanaugh's personal policy views but by careful application of the relevant law and precedent.

The Judge's record further includes rulings both for and against the government in cases involving criminal defendants. During my clerkship with the Judge, he joined a per curiam opinion with Judge Garland and Judge Karen Henderson vacating a drug sentence and remanding it for resentencing. *See U.S. v. Henry*, 472 F.3d 910 (D.C. Cir. 2007). In his concurring opinion in the case, Judge Kavanaugh emphasized the importance of adherence to the constitutional requirement that a criminal sentence be increased only on the basis of facts that a jury finds to be true beyond a reasonable doubt.

Finally, Judge Kavanaugh's record reveals his understanding that adherence to the constitutional system of separation of powers is not just a matter of formality or technicality but is essential to the protection of individual liberty. Sometimes the judge's role within that system, as explained by Judge Kavanaugh, is to step in and enforce the law when its boundaries have been violated. But where the text of statutes and the Constitution and history do not mandate a particular outcome, the judge should refrain from imposing his or her policy preferences and let the electorally accountable federal branches and state governments govern.

For example, in *El-Shifa Pharmaceutical Industries Company v. United States*, Judge Kavanaugh wrote a concurring opinion explaining that courts must step in to interpret and apply relevant statutory restrictions on executive foreign affairs and national security activities. *See* 607 F.3d 836 (D.C.Cir. 2010). If courts instead treat the question of whether the Executive has violated a statutory restriction as a political question that courts may not resolve, courts would inadvertently favor the Executive Branch over Congress without fully evaluating the relevant separation of powers considerations. Judge Kavanaugh showed similar respect for the role of Congress in defining the law in national security matters when the Judge vacated a conviction for material support of terrorism in *Hamdan v. United States* because Congress had not yet criminalized the offense as of the time of Mr. Hamdan's conviction. *See* 696 F.3d 1238 (D.C. Cir. 2012).

Judge Kavanaugh's commitment to constitutional principles and an independent judiciary, his mentorship of young lawyers, and his willingness to listen to diverse perspectives demonstrate that Judge Kavanaugh would be an excellent Supreme Court Justice. I strongly support his confirmation.

PREPARED STATEMENT OF MONICA MASTAL

Mr. Chairman Grassley, Ranking Member Feinstein, & Members of the Senate Judiciary Committee:

I am honored to be here today to address you in support of my friend and my child's favorite coach, the Honorable Brett Kavanaugh. My testimony today will not be from a legal perspective, but from a personal and parental perspective. Consider it more about the person than the nominee.

I have known Judge Kavanaugh for many years, but in recent years have seen him on a regular basis thanks to his position as the coach of the CYO girls 5th/6th grade basketball team at Blessed Sacrament School. In our house, he is not known as Judge Kavanaugh but as "Coach K." He was my daughter's coach for two years. Our first year, his daughter was in 4th grade & therefore ineligible for the team, and he still coached- in my book this alone qualifies him for sainthood. As a high school & college player, Coach K had the job prerequisite of basketball knowledge, however, more importantly he had the other necessary attributes of patience, fairness and diplomacy... and he had them in spades. Fairness with young players and opposing teams, patience with boisterous parents, diplomacy with referees who are on their 5th game of the day and making some questionable calls.

In the few hours a week of practices and games, much more than the fundamentals of basketball were taught. The major concepts of team work, hard work, commitment, setting and achieving goals, striving to be your best were all there. An enormous task to communicate to young girls in so little time. His calm demeanor got the message across, no yelling or gavel was necessary.

Of course, the Kavanaugh's contribution to our community extends beyond basketball. School auctions, food drives and service projects are abundant at Blessed Sacrament, they are always there to participate. This leads me to another personal perspective: Brett is relatable to everyday Americans. In the public eye, Supreme Court Justices are strictly cerebral, ethical, humble, courageous. He is all of these, however, I am one of the everyday Americans who sees him getting his children to practice, having four games a weekend, as a lector at Church, running on your high school track and socializing with friends. The general population can relate to this nominee.

As my Final Note today, I would like to read Coach Kavanaugh's "Final Note" to my daughter from his end of the season player evaluation. I share this with the utmost confidence that every player on the team received the same honest, appreciative, supportive, heartfelt and confidence building message.

It stated: "Thanks Mary Grace. You are an excellent athlete and were a great contributor to the team. We loved your spirit and attitude. We really enjoyed coaching you and wish you all the best. We look forward to having you on the team next year. Keep up your great spirit, attitude and work ethic and you will be a big success in all you do."

Kind of makes me want to go back to 5th grade basketball...

Thank you for the opportunity to share this personal perspective. As the great UCLA basketball coach John Wooden said "Young people need models, not critics." I think this "Final Note" says it all as to the model that Coach Kavanaugh has been to our children. I know the parents of his players feel as fortunate as I do that our girls had such a wonderful mentor. Through basketball he taught them the skills they will need not only for a season, but for a lifetime.

Statement of Luke McCloud, Former Law Clerk to Judge Kavanaugh

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee. I am honored by the opportunity to speak with you today about my former boss, and my current mentor and friend, Judge Kavanaugh.

I had the privilege of serving as one of Judge Kavanaugh's law clerks from 2013 to 2014. During that time, I worked closely with the judge, day in and day out, helping him prepare for arguments and draft opinions. I witnessed firsthand the judge's approach to deciding cases large and small, and what I saw leaves no doubt that Judge Kavanaugh would make an outstanding Supreme Court Justice.

Judge Kavanaugh is a fair-minded and independent jurist. Regardless of the parties to the case, or the issues being litigated, Judge Kavanaugh worked hard to understand every argument and perspective. There was always another opinion to read, another piece of the record to review, another angle to explore. That was true even when a case turned on legal issues the judge knew well; he never looked for an easy answer, or assumed that he had already considered the relevant points. Judge Kavanaugh pushed himself to master every aspect of the cases he worked on, and he expected his clerks to do the same.

Judge Kavanaugh and I did not always see eye to eye about what the law required. But the judge did not want clerks who reflexively agreed with him, or who never offered a contrary opinion. Just the opposite, Judge Kavanaugh has made a point of surrounding himself with a diverse group of law clerks—diverse ideologically, diverse racially, and from diverse backgrounds—so that he can better understand all sides of a given issue. I can vividly recall spending hours with my fellow clerks gathered around the judge's desk, debating the meaning of some statutory phrase, or the best way to understand a precedent. Invariably, the opinions that Judge Kavanaugh produced reflected his careful consideration of, and respect for, views other than his own.

Moreover, when we disagreed, I always knew that Judge Kavanaugh had come to his position honestly, based on a rigorous analysis of the strengths and weaknesses of the arguments before him. There was no hidden agenda or partisan axe to grind. Just the law—always the law.

These qualities have earned Judge Kavanaugh a sterling reputation for his work on the bench. But Judge Kavanaugh has also shown himself to be a leader in the judiciary when he is outside of chambers. I especially admire Judge Kavanaugh's efforts as an advocate for those who are underrepresented in the legal

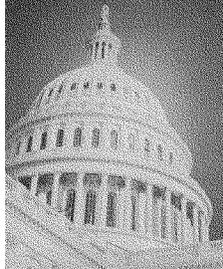
profession. He regularly speaks to diverse law student associations to encourage their members to apply for clerkships. The judge also actively mentors the minority students he teaches, helping them become future leaders within the law.

Judge Kavanaugh's commitment to promoting the careers of minority attorneys is also apparent from his own clerk hiring. Of his 48 law clerks, 13 are racial minorities, including five African Americans. These percentages are nearly unheard of among his judicial peers. Many of the judge's minority law clerks have gone on to clerk for the Supreme Court. I am fortunate to count myself among them. But I would not even have applied for that position had it not been for the support and encouragement of Judge Kavanaugh.

Again and again during the year I worked for him, Judge Kavanaugh showed himself to be a model of judicial excellence. But even more than his intelligence and his diligence, it is Judge Kavanaugh's character—his fundamental decency and kindness—that inspired me then, and continues to inspire me now. Despite being one of the most prominent judges of his generation, Judge Kavanaugh remains humble and gracious. He is unfailingly polite to everyone he interacts with at the courthouse, from his colleagues on the bench, to litigants, to the court's professional staff. Judge Kavanaugh also volunteers regularly in his community, and encourages all he knows to do the same. He is, in short, a dedicated public servant, in the truest sense of those words.

I will always be proud of the time I spent as Judge Kavanaugh's law clerk, and I am prouder still to support his confirmation to the Supreme Court.

Thank you.



Governmental Affairs
Office

STATEMENT

of

PAUL T. MOXLEY, CHAIR

**STANDING COMMITTEE ON THE
FEDERAL JUDICIARY**

AMERICAN BAR ASSOCIATION

Concerning the

NOMINATION

of

THE HONORABLE BRETT M. KAVANAUGH

to be

**ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES**

before the

**COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE**

SEPTEMBER 7, 2018

1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Mr. Chairman, Ranking Member Feinstein, and Members of the Committee:

My name is Paul T. Moxley, of Salt Lake City, Utah, and it is my privilege to chair the American Bar Association's Standing Committee on the Federal Judiciary. I am joined today by John R. Tarpley of Nashville, Tennessee, who was this Committee's representative for the Sixth Circuit from August 2015 through August 2018 and served as the lead evaluator for the Standing Committee's investigation of Judge Brett M. Kavanaugh. We are also joined in the gallery by the Standing Committee's D.C. Circuit representative, Robert P. Trout of the District of Columbia, who worked with John as an additional evaluator for the Committee's investigation of Judge Kavanaugh. We are honored to appear here today to explain the Standing Committee's evaluation of the professional qualifications of Judge Kavanaugh to be Associate Justice of the Supreme Court of the United States.

The Chair of the Standing Committee is appointed by the ABA president each year and assumes the role in August. As our Committee's change in leadership coincided with the nomination and evaluation of Judge Kavanaugh, I owe a debt of gratitude to Pamela Bresnahan, the Standing Committee's immediate past Chair. Pam worked with me from the outset of Judge Kavanaugh's nomination and provided invaluable guidance and insight during the transition. Pam also conducted the Standing Committee's original evaluation of Judge Kavanaugh in 2003, when he was first nominated to serve on the D.C. Circuit Court of Appeals.

President Trump announced his nomination of Judge Kavanaugh to serve on the Supreme Court on July 10, 2018. The Standing Committee began its evaluation shortly thereafter and continued its work for the next several weeks. By unanimous vote on August 30, 2018, the Standing Committee awarded Judge Kavanaugh its highest rating of "Well Qualified" for

appointment to the Supreme Court of the United States, and the Standing Committee published its rating the next day.

THE STANDING COMMITTEE'S EVALUATION PROCESS

The Standing Committee has conducted its independent and comprehensive evaluations of the professional qualifications of nominees to the federal bench since 1953. The 15 distinguished lawyers that make up our Committee come from across the country, representing every federal judicial circuit in the United States. Members are from diverse backgrounds professionally, ethnically, and politically. They come from both large and small law firms and academia; they include a mix of "plaintiff" and "defense" lawyers. These prominent lawyers, who are identified in Exhibit A to this Statement, spend hundreds of hours each year without compensation conducting nonpartisan peer reviews of the professional qualifications of all nominees to the Supreme Court of the United States and all federal district and appellate courts, as well as the Court of International Trade and the Article IV territorial district courts.

The Standing Committee does not propose, endorse, or recommend nominees. Its sole function is to evaluate a nominee's integrity, professional competence, and judicial temperament and then rate the nominee as "Well Qualified," "Qualified," or "Not Qualified." In so doing, the Committee relies heavily on the confidential, frank, and considered assessments of lawyers, academics, judges, and others who have relevant information about the nominee's professional qualifications.

The Standing Committee's investigation of a nominee to the Supreme Court of the United States is based upon the premise that the nominee must possess exceptional professional qualifications. As set forth in the ABA's publicly available manual about the Committee's work, known as the *Backgrounder*:

To merit the Committee's rating of "Well Qualified," a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence, and judicial temperament. The rating of "Well Qualified" is reserved for those found to merit the Committee's strongest affirmative endorsement.¹

The significance, range, complexity, and nationwide impact of issues that a justice will confront on the Supreme Court demands no less. For that reason, our investigation of a Supreme Court nominee is more extensive than investigations conducted for nominations to the lower federal courts, and it is procedurally different in two principal ways.

First, all members of the Standing Committee conduct separate investigations into the nominee's professional qualifications within their respective circuits. In accordance with our procedures, each Standing Committee member prepared a confidential circuit report that was included in the comprehensive confidential final report on which the Standing Committee based its rating.

Second, when examining nominees to the Supreme Court, the Standing Committee assembles reading groups of scholars and practitioners to review the nominee's written work. With regard to our evaluation of Judge Kavanaugh, the University of Maryland Law School and the University of Utah Law School formed Reading Groups, comprising a total of 38 professors who are recognized experts in the substantive areas of law they reviewed. A third reading group, the Practitioners' Reading Group, was composed of 10 nationally recognized lawyers with significant trial and appellate experience who are knowledgeable concerning Supreme Court practice. The dedicated members of the three Reading Groups are identified in Exhibits B, C, and D to this Statement.

¹ American Bar Association, *Standing Committee on the Federal Judiciary: What it is and How it Works* ("Background") 11 (2017).

The Reading Groups were guided by the same standards that are applied by the Standing Committee, measuring only professional competence and, if evident from writings, integrity, and judicial temperament. The members of the Reading Groups independently evaluated factors such as Judge Kavanaugh's analytical ability, clarity of writing, knowledge of the law, application of the facts to the law, expertise in harmonizing a body of law, and ability to communicate effectively. Each member of each group reduced his or her evaluation to writing, with cited examples, and each member's written evaluation was provided to the members of the Standing Committee. Additionally, the chair of each group provided a summary of each group's work.

During their extensive investigation of the professional qualifications of Judge Kavanaugh, Standing Committee members solicited input from almost 500 people who were likely to have knowledge of the nominee's professional qualifications, including federal and state judges, lawyers, and bar representatives. Those contacted included individuals who were likely to have first-hand knowledge about his professional qualifications inasmuch as they were identified on Judge Kavanaugh's response to the Senate Judiciary Committee Questionnaire. Standing Committee members also identified people with such knowledge through their interviews, their analyses of Judge Kavanaugh's writings, and sources identified through the investigative process. Additionally, the Standing Committee considered the confidential evaluations conducted in 2003, 2005, and 2006, when Judge Kavanaugh was nominated to the United States Court of Appeals for the District of Columbia Circuit.²

² In connection with the 2003 evaluation, the Standing Committee found Judge Kavanaugh "Well Qualified" to serve on the United States Court of Appeals for the District of Columbia Circuit. In connection with the 2005 evaluation, the Standing Committee found Judge Kavanaugh "Well Qualified" to serve on the United States Court of Appeals for the District of Columbia Circuit. In connection with the 2006 evaluation, the Standing Committee found Judge Kavanaugh "Qualified" to serve on the United States Court of Appeals for the District of Columbia Circuit.

In total, the Standing Committee reached out to 471 judges, lawyers, and professors for information regarding Judge Kavanaugh's integrity, professional competence, and judicial temperament. The Standing Committee received more than 120 responses, and the members of the Standing Committee conducted interviews with those respondents who had personal knowledge of Judge Kavanaugh through their professional or personal dealings with him. These interviews were reduced to writing for the Standing Committee's collective consideration.

The Standing Committee based its evaluation on the data received from its extensive outreach; on its own analyses of Judge Kavanaugh's writings; on reports of the three Reading Groups; and on a personal interview of Judge Kavanaugh that was conducted on August 9, 2018, by our lead evaluator, John R. Tarpley, our second evaluator, Robert Trout, and me, as Chair of the Standing Committee. The written record of all analyses and interviews was assembled to comprise the Standing Committee's confidential final report that was distributed to each Standing Committee member. Standing Committee members were given approximately seven days to review this material, which totaled 1,635 pages, to individually evaluate Judge Kavanaugh's integrity, professional competence, and judicial temperament. Thereafter, the Standing Committee unanimously voted that Judge Kavanaugh is "Well Qualified" to serve as an Associate Justice on the United States Supreme Court. As Chair of the Standing Committee, I submitted our rating to the Senate Judiciary Committee, the White House, and the nominee on August 31, 2018. The rating was also published on the website of the Standing Committee on the Federal Judiciary.

**OUR EVALUATION OF JUDGE KAVANAUGH'S
PROFESSIONAL QUALIFICATIONS**

The Standing Committee did not consider Judge Kavanaugh's ideology, political views, or political affiliation. It did not solicit information with regard to how Judge Kavanaugh might vote on specific issues or cases that could come before the Supreme Court of the United States. Rather, the Standing Committee's evaluation of Judge Kavanaugh was based solely on a comprehensive, non-partisan, non-ideological peer review of his integrity, professional competence, and judicial temperament.

1. Integrity

In evaluating integrity, the Standing Committee considers the nominee's character and general reputation in the legal community, industry, and diligence.³ The Committee also considers any ethical violations or disciplinary proceedings involving the nominee, of which there have been none relating to Judge Kavanaugh. The Standing Committee found that Judge Kavanaugh enjoys an excellent reputation for integrity and is a person of outstanding character.

It was clear from our interview and other lengthy conversations with Judge Kavanaugh that he learned the importance of integrity from his mother and father, both of whom are lawyers, during his early childhood and developed a strong commitment to public service. (His mother also was a state court judge.) There are abundant examples of his devotion to public service, including being a judge, a law clerk, a law professor, a mentor to his diverse law clerks, a lawyer in the Office of the Independent Counsel, the White House, and the Office of the Solicitor General. Additionally, he was a partner at Kirkland & Ellis from 1997-2001.

³ American Bar Association, *Standing Committee on the Federal Judiciary: What it is and How it Works* ("Backgrounder") 3 (2017).

Many of the lawyers, judges, and others we interviewed praised Judge Kavanaugh's integrity. We cite representative comments as follows:

"His integrity is absolutely unquestioned. He is very circumspect in his personal conduct and harbors no biases or prejudices."

* * *

"He has the highest personal morality and the highest ethics."

* * *

"...his integrity is absolutely unquestioned. He harbors no biases or prejudices."

* * *

"He is what he seems, very decent, humble, and honest."

* * *

"He is entirely ethical and is a really decent person."

* * *

"He is believed to be trustworthy and of high integrity, a man of good character. He is a nice person and a good human being."

* * *

"His reputation for honesty and integrity is excellent."

* * *

"He always seeks to be fair. He is not result oriented. He always wants to do the right thing."

* * *

On the basis of the foregoing comments and additional comments received during our comprehensive evaluation process, the Standing Committee concluded that Judge Kavanaugh possesses the integrity required to receive our unanimous “Well Qualified” rating.

2. Professional Competence

“Professional competence encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience.”⁴ A Supreme Court nominee must possess exceptional professional qualifications, including an “especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence. [The nominee must be able] to write clearly and persuasively, harmonize a body of law, and to give meaningful guidance to the trial and circuit courts and the bar for future cases.”⁵ Judge Kavanaugh’s professional competence exceeds these high criteria.

In their evaluation of Judge Kavanaugh’s professional competence to be an Associate Justice of the Supreme Court of the United States, the members of the Standing Committee examined not only the thorough reports of the Practitioners’ and Academic Reading Groups, but also the views of lawyers, academics, and Judge Kavanaugh’s judicial peers. All of the experienced, dedicated, and knowledgeable sitting judges, legal scholars, and lawyers who have worked with or against Judge Kavanaugh had high praise for his intellect and ability to communicate clearly and effectively.

We received many positive comments, including the following:

“He is in an elite category. His academic work and his teaching and extra-judicial speaking are evidence of his superior academic credentials.”

* * *

⁴ *Id.* at 3.

⁵ *Id.* at 9.

“His professional competence is among the best in the federal system. His intellectual integrity is very strong. He thinks deeply about the legal issues and focuses on the right questions.”

* * *

“He is just the best -- brilliant, a great writer, fair, and he is open-minded.”

* * *

“He is susceptible to being persuaded to the opposite position from where he started.”

* * *

“He is extraordinary. He is very bright, very careful, very thoughtful, very thorough, and very conscientious.”

* * *

“His work ethic is among the best.”

* * *

“His competence is second to none. He is one of the smartest guys in every room.”

* * *

“His opinions are scholarly, thoughtful, well-written, and easy to follow despite often complex subject matter.”

* * *

The academics and practitioners who comprised the three reading groups overwhelmingly concluded that Judge Kavanaugh’s opinions and writings were analytically rigorous and demonstrated exceptional writing ability and legal scholarship.

Dean Robert Adler and Professor Wayne McCormack, who chaired the Utah Law School Reading Group, provided the following summary of their findings with regard to Judge Kavanaugh's professional competence:

Summary and Overview

The overall impression expressed by the Utah Reading Group is that Judge Kavanaugh is a very competent jurist. His writing is clear and understandable, his reasoning logical and well organized, his understanding of the law typically excellent and sometimes extremely insightful... and his adherence to precedent generally apparent even where there is reasonable cause for disagreement in gray areas. Several reviewers also mentioned an apparent willingness to entertain competing arguments, a conclusion based on outcomes in different cases for competing interest groups such as industry/environmental or prosecution/defense. In addition, to the extent that judicial temperament can be measured from published opinions, he seems to be quite respectful of both counsel and colleagues, with extremely few rhetorical flourishes or observations that might be viewed by some as disrespectful of others and their views. Also, to the extent that it can be discerned from written opinions and academic writing, we saw no evidence whatsoever of any concern about Judge Kavanaugh's judicial integrity.

Legal Writing and Analysis

The Reading Group members were unanimous in their view that Judge Kavanaugh writes and analyzes the law (and application of facts to law) with exceptional clarity, and that his opinions are well organized, resulting in relatively clear precedent for lower courts and later litigants. He states appellate issues plainly, and clearly articulates the holding and relevant reasoning. He avoids unnecessary legal jargon, making his opinions accessible to both lawyers and non-lawyers. His writing style is extremely efficient, which often results in shorter opinions than is typical for appellate courts. In many cases Reading Group members found this to be refreshing and commented that he focused mainly or exclusively on the essential controlling precedents and other applicable law, and that he avoided the tendency to write a legal treatise where a simple opinion would suffice....

The Maryland Law School Reading Group was led by Professors David Gray and Renée M. Hutchins. They made the following observations:

- The ruling in each case is workmanlike, and appears grounded in precedent or the record before the court. Even Judge Kavanaugh's dissenting opinion does not appear to be an illogical or unduly constrained reading of precedent.
- Judge Kavanaugh is an excellent writer with a flair for making complicated facts understandable.
- As a law professor, I appreciated the logical and analytical way in which Judge Kavanaugh addressed the issues presented in these cases. In the cases I reviewed, his writing is clear and to the point, and his conclusions are thoughtful. And while it is difficult to judge judicial temperament from a judicial opinion, I very much appreciated the way in which he engaged, in his writing, with those who had opinions different than his own. He made his points and engaged with the assertions of others, but did so in a respectful and reasonable way. There was no sarcasm or disrespectful banter, either of the litigants or other judges.
- Overall, the opinions are clearly and logically written, well supported with case law, and based on sophisticated interpretations of relevant statutory provisions. The opinions are not flashy or quotable and very few have any stylistic ruffles and flourishes. Every now and then an opinion makes a clever argument, but for the most part the writing is workmanlike (in the non-pejorative sense) more than eloquent. There is no pedantry, no showing off, no self-authorizing "because we say so" rhetoric, and no ridicule or dismissal of contrary views.... the opinions I read are professional in tone, respectful of the arguments they reject, and careful to explain why those arguments were unpersuasive.
- Judge Kavanaugh is a clear, concise, skillful writer. He provides a thorough but not excessive recounting of the facts of each case. His legal analysis is easy to follow. His prose is fairly straightforward and his tone is neutral.
- Judge Kavanaugh's research...appears to be thorough. His legal arguments are well-supported and hew closely to precedent.
- In all, Judge Kavanaugh's opinions are clearly written, follow conventional legal and statutory analysis, and are well within the mainstream of legal thought in [tax procedure law].

The Practitioners' Reading Group, which was chaired by Laurie Webb Daniel, arrived at similar positive conclusions about Judge Kavanaugh's professional competence. Summarizing the findings of the committee, the report stated:

...Judge Kavanaugh's opinions [are] clear and cogent. His writing is overwhelmingly well organized, thoughtful, articulate, and thorough. Judge Kavanaugh seems to be very thoughtful about synthesizing case law—drawing lessons from larger bodies of case law. He is particularly skilled at distilling complex facts into easily digestible portions early in the decision. Judge Kavanaugh is methodical in addressing the issues one-by-one. And he often includes a section of housekeeping matters to remand for correction of technical errors in the judgment.

* * *

Given the breadth, diversity, and strength of the positive feedback we received from judges and lawyers of all political persuasions and from so many parts of the profession, the Committee would have been hard-pressed to come to any conclusion other than that Judge Kavanaugh has demonstrated professional competence that is exceptional. Time and again, those with whom he has worked and those who have been involved in cases over which he has presided have applauded his intellectual acumen, thoughtful discernment, and written clarity. Based on the results of our extensive investigation and the resulting input we received from varied and knowledgeable sources, we have determined that Judge Kavanaugh possesses sufficiently outstanding professional competence to be rated "Well Qualified."

3. Judicial Temperament

In evaluating judicial temperament, the Standing Committee considers a nominee's "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and

commitment to equal justice under the law.”⁶ Lawyers and judges overwhelmingly praised Judge Kavanaugh’s judicial temperament.

The following representative comments provide insight into Judge Kavanaugh’s demeanor as a jurist:

“He is very straightforward. He stays on point.”

* * *

“He maintains an open mind about things.”

* * *

“He is affable, a nice person. He is easy to get along with and has a good sense of humor.”

* * *

“He is a really decent person, has not done anything untoward on a personal basis.”

* * *

“He...gets the highest marks in the area of professionalism.”

* * *

“His temperament is terrific. He is thoughtful, and fair-minded in his questions to counsel.”

* * *

“He is charming and delightful; is thoughtful and careful in his works”

* * *

“He always approaches cases intelligently and respectful of the views of others with whom he disagreed.”

⁶ *Id.* at 3.

* * *

"[He] is a wonderful colleague and is very, very bright. Is very fair minded and patient."

* * *

"Is even keeled, respectful of counsel and his colleagues. When he disagrees with colleagues, he is not just being stubborn."

* * *

"He is susceptible to being persuaded to the opposite position from where he started."

* * *

"He is unfailingly polite with advocates, with colleagues, and with everyone he deals with."

* * *

"He is very companionable, fun and funny, and gregarious. He is a fine person who likes people. He has very good people skills. He is always prepared, he will listen, and asks good questions of both sides."

* * *

"He is warm, friendly, and unassuming – he is the nicest person."

* * *

"He maintains an open mind about things. He is affable, a nice person. He is very easy to get along with and has a good sense of humor."

4. Judicial Independence

While judicial independence is not itself a criterion that we separately evaluate, it is a quality essential to measuring integrity, professional competence, and judicial temperament. Based on the writings, interviews, and analyses that comprised this evaluation, we concluded that

Judge Kavanaugh believes strongly in the independence of the judicial branch of government, and we believe that he will be a strong and respectful voice in protecting it.

CONCLUSION

In conclusion, Judge Kavanaugh meets the highest standards of integrity, professional competence, and judicial temperament. It is the unanimous opinion of the Standing Committee that Judge Kavanaugh is “Well Qualified” to serve as an Associate Justice of the Supreme Court of the United States.

Mr. Chairman, I note the ABA Standing Committee shares the goal of your Committee – to assure a qualified and independent judiciary for the American people. Thank you for the opportunity to present this statement.

EXHIBIT A

ABA Standing Committee on the Federal Judiciary, 2018-2019

CHAIR

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COHNE KINGHORN, P.C.
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TESTIMONY OF MELISSA MURRAY
PROFESSOR OF LAW, NEW YORK UNIVERSITY SCHOOL OF LAW
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON THE NOMINATION OF BRETT KAVANAUGH TO
THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER 7, 2018

Thank you very much for the opportunity to appear before you in these hearings on the nomination of Judge Brett Kavanaugh to the Supreme Court of the United States. My name is Melissa Murray. I am a Professor of Law at New York University School of Law, where I teach constitutional law, family law, and reproductive rights and justice and serve as a faculty co-director of the Birnbaum Women's Leadership Network. Prior to my appointment at New York University, I was the Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley, where I taught for twelve years and served as Faculty Director of the Berkeley Center on Reproductive Rights and Justice and as the Interim Dean of the law school.

As a number of women's rights and reproductive rights, health, and justice groups have argued, Judge Kavanaugh's nomination to the United States Supreme Court raises grave concerns for constitutional protections for women's reproductive decision-making, including the rights to birth control and abortion care.

Judge Kavanaugh has ruled repeatedly against women seeking to make their own reproductive health decisions. His record shows a cramped reading of the right to liberty and personal decision-making that distorts or ignores existing precedent. If Judge Kavanaugh were to join the Supreme Court, his record suggests that he would overturn or eviscerate these critical rights.

This threat is neither hyperbolic nor hypothetical. There are a number of cases concerning access to abortion and birth control in the pipeline to the Supreme Court. That should give pause to anyone who cares about a person's ability to decide fundamental decisions about their lives and future—and especially those who care about the least privileged among us, who have the most to lose if Judge Kavanaugh is confirmed to the Supreme Court.

I. The Constitution's Protection of Personal Liberty, Including Access to Contraception and the Right to Abortion, is Central to Women's Dignity and Equality and to Other Important Rights.

The Fourteenth Amendment guarantees all of us liberty and equality. These guarantees cannot exist without recognition of the dignity afforded every member of society as an autonomous individual. For that reason, the Constitution protects an individual's right to make certain personal decisions about intimacy, marriage, and procreation.

The Supreme Court has specifically recognized that a woman has the right to make her own decision about whether to have an abortion.¹ Indeed, according to the Court "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy,

than a woman's decision . . . whether to end her pregnancy."² The exercise of this right without undue hindrance from the State is essential to her dignity as an individual and her status as an equal citizen.

A woman's reproductive autonomy is rooted in the deeply personal nature of her decisions about bearing children and expanding her family. However, the decision of "whether to bear or beget a child" has ramifications beyond the home and family. As the Court has recognized, women's ability "to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."³

The Supreme Court's decision in *Roe v. Wade*, establishing the right to abortion, does not stand on its own; it is part of a line of cases solidifying and expanding the constitutional right to privacy and liberty to encompass personal decisions essential to an individual's dignity and autonomy. These decisions include the right to contraception—first recognized in *Griswold v. Connecticut* (1965)⁴—and the right to procreate—first recognized in *Skinner v. Oklahoma*.⁵ The Court relied on these core precedents in deciding *Roe v. Wade*, and in *Carey v. Population Services*, it relied on *Roe* in turn for its central holding that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State."⁶

Critically, the right to personal liberty is not limited to reproductive rights. It includes the right to marry, first recognized in *Loving v. Virginia*,⁷ and reaffirmed in 2015 in *Obergefell v. Hodges*.⁸ It includes the right of parents to direct the upbringing of their children, first recognized in two 1920s cases *Meyer v. Nebraska*⁹ and *Pierce v. Society of Sisters*.¹⁰ It includes the right to maintain family relationships, including relationships that go beyond the traditional nuclear family.¹¹ And *Roe* has also influenced the Supreme Court's decision to recognize the right to form intimate relationships,¹² and the right to personal control of medical treatment.¹³

Roe is inextricably bound to this constellation of privacy and personal liberty rights. If *Roe* is dismantled or otherwise eroded, these other rights are threatened too.

II. Judge Kavanaugh's Decisions Demonstrate an Extremely Limited Vision of the Right to Liberty and Reproductive Decision-Making.

Judge Kavanaugh's judicial record evinces a very narrow view of constitutional protections long recognized by the Supreme Court, especially when it comes to women's decisions concerning their bodies and their health care needs. Although he claims to follow precedent, his actual decisions reveal a deep skepticism of the principles and values that animate these precedents. In decisions concerning women's bodily autonomy and their exercise of certain constitutional rights, like the right to contraception and the right to an abortion, Judge Kavanaugh has ignored, distorted, or undermined existing precedents.

In 2017, Kavanaugh voted in *Garza v. Hargan* to allow the Trump Administration to continue blocking Jane Doe, a seventeen-year-old immigrant woman who came to the United States without her parents, from obtaining an abortion.¹⁴ In September 2017, Jane Doe came to the U.S. and was placed in the custody of the Office of Refugee Resettlement (ORR).¹⁵ While in custody, she learned she was pregnant and decided to have an abortion. Jane Doe met all of the requirements of Texas law before obtaining an abortion, including, because she was under 18 at the time, going before a judge to "bypass" the state's parental consent law to obtain an order granting her the right to

consent to the abortion on her own.¹⁶ Throughout all of this, Jane Doe had a guardian ad litem and an attorney ad litem who were available to advise and support her; the cost of the abortion procedure would have been paid for by private funds; and the government did not need to arrange her transportation to the clinic.¹⁷

Despite having made her decision and complying with all of the requirements prescribed by Texas, ORR instructed the government-funded shelter to prohibit Jane Doe from leaving the facility for any abortion-related appointment, including abortion counseling.¹⁸ Her guardian ad litem filed a lawsuit on behalf of Jane Doe, and other similar situated individuals, to prevent ORR from further interfering or preventing Jane Doe from getting the care she needed. In response, the government argued that allowing Jane Doe to leave the shelter would constitute “facilitating” her abortion.¹⁹

The district court issued a temporary restraining order against the government, preventing it from further interference with Jane Doe’s decision.²⁰ The Trump Administration asked the U.S. Court of Appeals for the D.C. Circuit to halt the district court’s order and further delay Jane Doe’s abortion.²¹ A few days later, a divided three-judge panel of the D.C. Circuit, which included Judge Kavanaugh in the majority, issued an order blocking Jane Doe’s abortion—for at least eleven days more²²—in order to give the government time to find her a sponsor, even though the record already showed that the government had been unsuccessful in its earlier attempts to identify a sponsor.²³ On October 24, 2017, an *en banc* panel of the D.C. Circuit overruled the three-judge panel’s order, allowing Jane Doe to obtain the abortion.²⁴ Critically, Judge Kavanaugh dissented, insisting that the majority had “badly erred” and accusing the majority of creating a new right for “unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”²⁵ His dissent disregarded precedent and effectively allowed what amounted to an unconstitutional pre-viability ban on abortion.

What is more, Judge Kavanaugh failed to adequately consider the burdens the government had imposed on Jane Doe’s right to abortion.²⁶ He did not cite or refer to the Supreme Court’s 2016 decision on abortion—*Whole Woman’s Health v. Hellerstedt*—in which a majority of the Court identified the kinds of harms that must be considered when analyzing an abortion restriction.²⁷ He did not account for the weeks the government had already forced Jane Doe to delay the exercise of her constitutional right and force her to remain pregnant against her will; the possibility that additional delay would push her to, or past, the point at which she could obtain an abortion in Texas; the increased health risks associated with that delay; or the fact that after this additional delay, she might have to re-start her litigation, further delaying her.²⁸ By insisting that Jane Doe obtain a sponsor before exercising her constitutional right, Judge Kavanaugh effectively imposed upon Jane Doe a pre-viability abortion ban. This kind of substantial obstacle is clearly out of step with the Supreme Court’s extant abortion jurisprudence.

In his dissenting opinion, Judge Kavanaugh argued that the government’s attempts to block Jane Doe’s abortion were justified because she lacked a sufficient “support network of family and friends.”²⁹ Jane Doe had already made the decision to terminate her pregnancy and complied with all state-mandated requirements, including completing state-mandated counseling and securing a judicial bypass in lieu of obtaining parental consent.³⁰ At this point, the government, by preventing her from leaving the shelter, was simply blocking Jane’s abortion, with no valid reason. Yet, Judge Kavanaugh insisted upon obtaining a sponsor, thereby introducing an unconstitutional delay, because he believed Jane Doe was unable to make this decision on her own, despite the fact that she had satisfied the Texas judicial bypass process. The sponsor search had already lasted for six weeks

before the matter came before Judge Kavanaugh and continued while Jane Doe was in custody and no sponsor was ever found before Jane Doe aged out of ORR's custody at age 18. Without further intervention, Jane Doe would have been forced to carry her pregnancy to term.³¹

Kavanaugh's disregard of precedent and cramped view of personal decision-making is also apparent in his decision in *Doe ex rel. Tarlow v. D.C.*³² There, Kavanaugh upheld a District of Columbia policy allowing health care providers to perform medical procedures on individuals with cognitive disabilities without considering, or even trying to determine, their wishes.³³ The case was brought on behalf of three adult women forced to undergo medical procedures, including eye surgery and abortion care.³⁴ One of the women forced to have an abortion had clearly expressed her wishes to carry her pregnancy to term.³⁵

The case involved statutory claims, as well as constitutional claims involving liberty rights sounding in substantive and procedural due process.³⁶ Kavanaugh sided against the cognitively disabled plaintiffs, whom he referred to as "never-competent patients."³⁷ He overturned the District Court's decision holding that the policy violated plaintiffs' liberty interest to accept or refuse medical treatment.³⁸ Kavanaugh's opinion was brief, summarily rejecting plaintiffs' argument with little analysis.

The analysis Judge Kavanaugh did provide, however, suggests a crabbed understanding of substantive due process rights. When considering whether there was a substantive due process right at issue, Kavanaugh chose to define the right at stake narrowly, asserting that the plaintiffs "have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [the asserted right] were sacrificed.'"³⁹ In defining the right at issue so narrowly, Kavanaugh ignored precedent from his own court and the Supreme Court that make clear every person's right to accept or refuse medical treatment. For example, the D.C. Circuit had previously held, in *In re A.C.*, that "[e]very person has the right, under the common law and the Constitution, to accept or refuse medical treatment. This right of bodily integrity belongs equally to persons who are competent and persons who are not."⁴⁰

At no point in this opinion did Kavanaugh discuss the impact the decision would have on the plaintiffs or the potential harm of forcing individuals to undergo a medical procedure without consideration of their wishes. And Kavanaugh ignored the long and shameful history in this country of forcing individuals with disabilities to undergo medical treatment they do not want or need.⁴¹

In the same vein, in *Priests for Life v. Dep't of Health and Human Services*, Kavanaugh wrote a dissent in support of allowing employers' religious beliefs to override their employees' right to birth control.⁴² *Priests for Life* involved a challenge to the Affordable Care Act's contraceptive coverage requirement, which requires employer health plans to cover the full range of FDA-approved birth control methods, alongside other women's preventive services.⁴³ To accommodate the religious beliefs of certain employers and universities who object to birth control coverage, the government created a process, known as the "accommodation."⁴⁴ This process essentially exempts certain employers and universities who object to birth control coverage from the contraceptive coverage requirement while at the same time ensuring that employees and students get the birth control coverage guaranteed to them by the ACA.⁴⁵ Under the accommodation, objecting organizations must simply notify the government or their insurance company of their objections, and employees and students receive the coverage directly from their insurance companies.⁴⁶ Some organizations that qualified for the

accommodation nonetheless filed a lawsuit claiming that even having to give notice of their objections violated their rights under the Religious Freedom Restoration Act (RFRA).⁴⁷ The objecting organizations claimed that providing the notice burdened religious exercise because it required them to be “complicit” in providing birth control coverage to employees.⁴⁸ In fact, the contraceptive coverage requirement functioned independently of the employer’s notice, requiring insurance companies to provide the birth control coverage.⁴⁹ In other words, the organizations’ claim of complicity rested on an incorrect understanding of how the accommodation actually operated.

Of the nine federal circuit courts of appeals to consider this issue, eight—including the D.C. Circuit—flatly rejected these challenges, concluding that merely giving notice of an objection does not substantially burden religious exercise.⁵⁰ In the D.C. Circuit’s case, *Priests for Life*, Judge Kavanaugh dissented, siding with the objecting organizations.⁵¹ Specifically, Judge Kavanaugh argued that courts have no right to question the claims of religiously-affiliated organizations, even if their claims are based on a misunderstanding of the law.⁵² As he explained, even if the religiously-affiliated organizations were “misguided” in thinking that the accommodation made them “complicit” in “wrongdoing,” the courts had no power to second-guess them.⁵³ As the majority opinion states, the approach favored by Judge Kavanaugh and objecting organizations creates a “potentially sweeping, new RFRA prerogative for religious adherents to make substantial-burden claims based on sincere but erroneous assertions about how federal law works.”⁵⁴ This view would give objectors tremendous power to bring claims to refuse to comply with laws—including anti-discrimination and consumer protection laws—that they claim violate their religion.

As troubling, despite Supreme Court precedent on the issue, Kavanaugh did not conclude that birth control coverage is a compelling government interest. While a majority of justices in *Burwell v. Hobby Lobby Stores, Inc.* squarely found that ensuring contraceptive coverage is a compelling government interest,⁵⁵ Kavanaugh merely noted that *Hobby Lobby* “strongly suggests” that guaranteeing birth control coverage is a compelling government interest.⁵⁶

As a judge on the DC Circuit, Judge Kavanaugh was bound to follow Supreme Court precedent, yet even in that role he has taken steps to undermine the force of the Supreme Court’s precedents on liberty and personal decision-making when it comes to reproductive autonomy. If he were confirmed to the Supreme Court, he would be even less constrained in his ability to reverse or change that precedent, and his decisions would have severe repercussions for women seeking to do no more than exercise their recognized constitutional rights.

III. The Supreme Court with Judge Kavanaugh Could Overturn or Severely Undermine *Roe v. Wade*, with Devastating Consequences for Women.

Based on Judge Kavanaugh’s record, there is every reason to believe that he would provide the fifth vote necessary to overturn or severely undermine *Roe*, if confirmed to the Court.

Of course, the practical effects of overturning *Roe* would be staggering. If *Roe* is overturned, women could be criminalized and punished in this country for having an abortion.⁵⁷ If the Supreme Court overturned *Roe*, 22 states are at high risk for quickly making abortion illegal.⁵⁸ This would erode access even further in this country, leaving women living in large areas in the South and Midwest with potentially no legal access at all—a burden that weighs most heavily on women of color, women struggling to make ends meet, immigrant women, and rural women in these states.

The fact that women would have to flee to other jurisdictions in order to access abortion highlights the degree to which overturning *Roe* would render women reproductive refugees who have been stripped of their dignity and equality as citizens. Not only would this deprive many women of their dignity and autonomy as citizens, it also would require those states that did permit abortion to assume responsibility to treat women as equal citizens under the law.

And of course, with *Roe* in the rearview mirror, an anti-abortion Congress and President could pass a nationwide federal ban on abortion, thereby usurping women's reproductive autonomy for the country as a whole.

Even if Kavanaugh did not vote to overturn *Roe* as a formal matter, he could nonetheless provide a crucial vote to eviscerate abortion rights, effectively rendering *Roe*'s protections toothless. This would be the culmination of a decades-long effort from abortion opponents to gut *Roe* by an incremental "death by a thousand cuts."

Since 2011, politicians have passed 401 new abortion restrictions in 33 states across the country.⁵⁹ These include outright bans on abortion like those that prohibit abortion at six weeks,⁶⁰ before most women even know that they are pregnant, and restrictions that shame, pressure, and punish women who have decided to have an abortion. Many of these laws restrict access to abortion by making the procedure more difficult or expensive to obtain, including requirements that a woman undergo a medically unnecessary ultrasound before obtaining an abortion,⁶¹ requirements that a woman wait a significant amount of time before obtaining an abortion,⁶² prohibitions on purchasing a comprehensive health insurance plan that includes coverage of abortion,⁶³ and medically unnecessary and burdensome facility and staffing requirements.⁶⁴

The restrictions—and associated costs—make it difficult, and sometimes impossible, for women to obtain an abortion. In so doing, the restrictions jeopardize women's long-term economic security and have a negative impact on women's equal participation in social and economic life by threatening financial well-being, job security, workforce participation, and educational attainment. These costs are especially detrimental to women struggling to make ends meet, women of color, rural women, immigrant women, and women who already have children.⁶⁵ In practice, these types of restrictions mean that *Roe* is merely an empty promise, not a reality for many women.

The Court stands as the final bulwark against these efforts to steadily dismantle reproductive rights. In 2016, the Court addressed some of the most restrictive abortion regulations in the *Whole Woman's Health v. Hellerstedt* decision. In that case, the Court issued a 5-3 ruling holding Texas restrictions that created medically unnecessary, burdensome facility and staffing restrictions to be an unconstitutional undue burden.⁶⁶ The Court looked at how all of the burdens women face when accessing abortion operate in tandem to shutter clinics, increase wait times and travel distances, and threaten women's health.

If the Texas restrictions had been upheld, more than 75 percent of abortion clinics in Texas would have closed.⁶⁷ But even during the time in which one of the restrictions was in effect, several clinics were forced to close—and most have never reopened. The closure of these clinics has meant that the average one-way distance to the nearest abortion provider has increased four-fold.⁶⁸ In this regard, although they were eventually invalidated, the Texas restrictions nevertheless had devastating and irreversible effects on access to abortion and other essential health care.

The restrictions on abortion providers not only affected abortion access, but access to other critical health care services, as clinics providing abortion care also typically provide a range of necessary reproductive health care services, and often provide care to underserved communities that are the least likely to have access to other health care providers.⁶⁹

In invalidating the Texas restrictions in *Whole Woman's Health*, the majority—with Justice Kennedy providing the crucial fifth vote—specifically noted that the lower court had applied the undue burden standard incorrectly to uphold the challenged restrictions. By contrast, the *Whole Woman's Health* dissenters—Justices Thomas and Alito and Chief Justice Roberts—took a different view of the undue burden standard, agreeing with the lower court's assessment that the restrictions did not impose an undue burden.⁷⁰

If Judge Kavanaugh had been on the Court in Justice Kennedy's place, his judicial record suggests that he likely would have joined the dissenters in upholding the challenged restrictions. Under this scenario, all but nine or ten Texas clinics would have been forced to close. In a state with 5.4 million women of reproductive age, the impact on access to reproductive care would have been devastating, resulting in fewer doctors, longer wait times, and increased crowding, and leaving broad swaths of the second-largest state without an abortion provider. Put simply, it would have dramatically threatened women's health care and deprived countless women of abortion access.⁷¹

That kind of decision would not have formally overturned *Roe* but would nonetheless render *Roe* essentially meaningless for many women in this country. It would have resulted in many more women facing insurmountable hurdles that would act as a complete obstacle to abortion.

The Supreme Court will have numerous opportunities to review such restrictions in the future. And a Court with Judge Kavanaugh as a member could uphold many or all of them—endorsing the incremental effort to eviscerate *Roe* without ever explicitly overruling it.

IV. Conclusion

Judge Kavanaugh's judicial record evinces a narrow and crabbed understanding of precedent and the principles undergirding those precedents. I urge you to consider what I have described in my testimony: how narrow his views are on the right to liberty, how he has distorted existing precedent, even as a lower court judge who should be bound by it, and how damaging he could be on the Supreme Court for generations to come. When combined with his views on other important rights upon which women rely, including protections against employment discrimination, the right to live free from gun violence, and the right to clean air and water, his views on personal liberty pose a real threat to women's autonomy over their bodies, families, and futures.

¹ See *Roe v. Wade*, 410 U.S. 113 (1973).

² *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

³ *Planned Parenthood v. Casey*, 505 U.S. 833, 556 (1992).

⁴ 381 U.S. 479 (1965).

⁵ 316 U.S. 535 (1942).

⁶ *Carey v. Population Servs. Int'l*, 431 U.S. 678, 687 (1977).

⁷ 388 U.S. 1, 12 (1967).

⁸ 135 S. Ct. 2584, 2604-2605 (2015).

- ⁹ 262 U.S. 390 (1923).
- ¹⁰ 268 U.S. 510 (1925).
- ¹¹ *See e.g.*, Moore v. East Cleveland, 431 U.S. 494, 500-506 (1977).
- ¹² *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003).
- ¹³ *See e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 342 (1990) (Stevens, J., dissenting).
- ¹⁴ Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at *1 (D.C. Cir. 2017).
- ¹⁵ *See* Complaint for Injunctive Relief and Damages at 2, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122), available at <https://www.aclu.org/legal-document/garza-v-hargan-complaint-injunctive-relief-and-damages>.
- ¹⁶ *See id.* at 4.
- ¹⁷ Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at *2-3 (D.C. Cir. 2017) (Millett, dissenting).
- ¹⁸ *Id.* at 2; Complaint for Injunctive Relief and Damages at 3, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122).
- ¹⁹ Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at *4 (D.C. Cir. 2017) (Millett, dissenting).
- ²⁰ *See* Garza v. Hargan, 2017 WL 4707287, 1 (D.D.C. 2017).
- ²¹ Appellants' Emergency Motion for Stay Pending Appeal at 1, *Garza v. Hargan*, 874 F.3d 735 (D.C. Cir. 2017) (No. 17-5236).
- ²² *See* Garza v. Hargan, 2017 WL 9854552 1 (D.C. Cir. 2017).
- ²³ *See id.*
- ²⁴ Garza v. Hargan, 874 F.3d 735, 736 (D.C. Cir. 2017).
- ²⁵ *Id.* at 752.
- ²⁶ *Id.* at 739.
- ²⁷ Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
- ²⁸ Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at *7-8 (D.C. Cir. 2017) (Millett, dissenting).
- ²⁹ 874 F.3d at 755.
- ³⁰ *See* Complaint for Injunctive Relief and Damages at 2-3, *Garza v. Hargan*, 2017 WL 4707287 (D.C. Cir. 2017) (1:17-cv-02122).
- ³¹ Garza v. Hargan, No. 17–5236, 2017 WL 4707112, at *7-8 (D.C. Cir. 2017) (Millett, dissenting).
- ³² 489 F.3d 376 (D.C. Cir. 2007).
- ³³ *See id.*
- ³⁴ *See* Jane Does I Through III v. District of Columbia, 232 F.R.D. 18, 20 (D.D.C. 2005).
- ³⁵ *See id.*
- ³⁶ *See e.g.*, Doe ex rel. Tarlow v. District of Columbia, 489 F.3d 376, 369 (D.C. Cir. 2007).
- ³⁷ *Id.* at 383. In order to reach this outcome, Kavanaugh draws a distinction between individuals who were once able “to make medical decisions for themselves,” *id.* at 378, and then became unable to do so and those individuals “who have never had the mental capacity to make medical decisions.” *Id.* at 382-383. According to Kavanaugh, those who were once able to make medical decision and then became unable to do so should have their wishes considered. Those who have been deemed to not have “the mental capacity to make medical decisions” should not. *Id.* at 383-383.
- ³⁸ *See e.g.*, Jane Does I Through III v. District of Columbia, 232 F.R.D. 18, 20 (D.D.C. 2005).
- ³⁹ Doe ex rel. Tarlow at 383 (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted)).
- ⁴⁰ 573 A.2d 1235, 1247 (D.C. 1990). Moreover, the Supreme Court has repeatedly reaffirmed the basic principle from an 1891 case that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990) (quoting *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 11 S.Ct. 1000, 1001, 35 L.Ed. 734 (1891)).
- ⁴¹ *See e.g.*, *Buck v. Bell*, 274 U.S. 200 (1927).
- ⁴² *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1, 14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).
- ⁴³ *See Priests for Life v. U.S. Dep't of Health and Human Servs.*, 772 F.3d 229, 144-45 (D.C. Cir. 2014).
- ⁴⁴ *See id.*
- ⁴⁵ *Id.*
- ⁴⁶ *Id.*
- ⁴⁷ *See e.g., id.*; Religious Freedom Restoration Act 42 U.S.C. § 21b (1993).
- ⁴⁸ *See Priests for Life v. Dep't of Health and Human Servs.*, 772 F.3d 229, 241 (2014).
- ⁴⁹ *See Priests for Life v. Dep't of Health and Human Servs.*, 808 F.3d 1, 17-22 (2015).
- ⁵⁰ *Id.*; *Geneva Coll., et al. v. U.S. Sec'y Dep't of Health and Human Servs.*, 778 F.3d 422 (3d Cir. 2015); *Univ. of Notre Dame v. Burwell, et al.*, 786 F.3d 606 (7th Cir. 2015); *Wheaton Coll. v. Burwell, et al.*, 791 F.3d 792 (7th Cir. 2015); *Little Sisters of the Poor Home for the Aged, et al. v. Burwell et al.*, 794 F.3d 1151 (10th Cir. 2015); *East Tex. Baptist Univ. v.*

Burwell, et al., 793 F.3d 449 (5th Cir. 2015); Catholic Health Care System, et al. v. Burwell, et al., 796 F.3d 207 (2d Cir. 2015); Michigan Catholic Conference and Catholic Family Services, et al. v. Burwell et al., 807 F.3d 738 (6th Cir. 2015); Grace Schools, et al., and Diocese of Fort Wayne-South Bend, Inc., et al. v. Burwell, et al., 801 F.3d 788 (7th Cir. 2015); Eternal World Television Network v. U.S. Dep't of Health and Human Servs., No. 14-12696, 14-12890, 14-13239, 2016 WL 659222 (11th Cir. Feb. 18, 2016). But see Sharpe Holdings, Inc. v. U.S. Dep't of Health and Human Servs., 801 F.3d 927 (8th Cir. 2015); Dordt Coll., et al. v. Burwell, 801 F.3d 946 (8th Cir. 2015).

⁵¹ *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1, 14 (Kavanaugh J., dissenting) (D.C. Cir. 2015).
⁵² 808 F.3d 1, 5-6 (2015).

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 2.

⁵⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). In a concurring opinion, Justice Kennedy stated that “the mandate serves the Government’s compelling interest in providing insurance coverage that is necessary to protect the health of female employees, coverage that is significantly more costly than for a male employee.” *Id.* at 2785-86 (Kennedy, J., concurring). Justice Ruth Bader Ginsburg, writing for the four Justices in the dissent, concluded that “the Government has shown that the contraceptive coverage for which the ACA provides further compelling interests in public health and women’s well-being. Those interests are concrete, specific, and demonstrated by a wealth of empirical evidence.” *Id.* at 2799 (Ginsburg, J., dissenting).

⁵⁶ See *Priests for Life v. U.S. Dep't of Health and Human Servs.*, 808 F.3d 1, 15 (2015).

⁵⁷ See THE SIA LEGAL TEAM, ROE’S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL 1-2 (2018), <https://www.sialegalteam.org/roes-unfinished-promise>.

⁵⁸ See CTR. FOR REPRODUCTIVERIGHTS, WHAT IF ROE FELL? (2018), <https://www.reproductiverights.org/what-if-roe-fell>.

⁵⁹ Elizabeth Nash et al., POLICY TRENDS IN THE STATES, 2017, GUTTMACHER INST., (Jan. 2, 2018), <https://www.guttmacher.org/article/2018/01/policy-trends-states-2017>.

⁶⁰ Forty-three states prohibit some abortions after a certain point in pregnancy. GUTTMACHER INST., *State Policies on Later Abortion*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>. Two states ban the most commonly used method of abortion in the second trimester. GUTTMACHER INST., *Bans on Specific Abortion Methods Used After the First Trimester*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester>.

⁶¹ Eleven states now require women to undergo a medically unnecessary ultrasound before obtaining an abortion. GUTTMACHER INST., *Requirements for Ultrasound*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>.

⁶² Twenty-seven states require that a woman wait at least 24 hours between receiving state-mandated counseling and obtaining an abortion. GUTTMACHER INST., *Counseling and Waiting Periods for Abortion* (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>.

⁶³ Twenty-eight states now prohibit women from buying an insurance plan that includes abortion coverage, except in limited circumstances, including in an exchange, in insurance for public employees, or in any private insurance plan. GUTTMACHER INST., *Restricting Insurance Coverage of Abortion*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/restricting-insurance-coverage-abortion>.

⁶⁴ Twenty-five states have laws that contain medically unnecessary facility and/or staffing requirements for abortion providers. GUTTMACHER INST., *Targeted Regulation of Abortion Providers*, (Aug. 1, 2018), <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers>.

⁶⁵ Brief of Amici Curiae Nat. Women’s Law Ctr, et al. at 12, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) available at <https://nwlc.org/resources/45623-2/>.

⁶⁶ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016).

⁶⁷ CTR. REPROD. RTS., *Women’s Health Care Providers Ask U.S. Supreme Court to Take On Texas Clinic Shutdown Law* (Sept. 03, 2015), <https://www.reproductiverights.org/press-room/womens-health-care-providers-ask-us-supreme-court-to-take-on-texas-clinic-shutdown-law>.

⁶⁸ Caitlin Gerds et al., *Impact of Clinic Closures on Women Obtaining Abortion Services After Implementation of a Restrictive Law in Texas*, 106 Am. J. Pub. Health 857, 857 (2016), <https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303134>.

⁶⁹ Women of color have long experienced stark health disparities in areas like cervical and breast cancer, unintended pregnancy, pregnancy-related complications, and burdens to accessing safe abortion. Marcela Howell & Ann Starrs, *For Women of Color, Access to Vital Health Services Is Threatened*, The Hill’s Congress Blog (July 27, 2017), <https://www.guttmacher.org/article/2017/07/women-color-access-vital-health-services-threatened>.

⁷⁰ 136 S. Ct. 2292, 2449, 2352 (2016).

⁷¹ CTR. REPROD. RTS., *Whole Woman’s Health v. Hellerstedt* (Feb. 23, 2016), <https://www.reproductiverights.org/case/whole-womans-health-v-hellerstedt>.

SENATE JUDICIARY COMMITTEE

**HEARINGS ON NOMINATION OF JUDGE BRETT
KAVANAUGH
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES**

Testimony of Theodore B. Olson

Thank you, Chairman Grassley, Ranking Member Feinstein, and Members of the Senate Judiciary Committee for the opportunity to appear before you today to present my views on the fitness of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States.

I have had the privilege of practicing law for over 50 years in trial and appellate courts in several states including State Supreme Courts, every federal appellate court except one, and 63 times before the Supreme Court. During the past 35 years, I have argued to twenty different Supreme Court Justices appointed by eleven Presidents, from President Eisenhower to President Trump. That amounts to nearly one-

fifth of all of our nation's Justices appointed by one-fourth of our Presidents.

I believe that my experience is relevant, because it has given me first-hand exposure to the Justices our Presidents have selected for the Supreme Court, the qualities those Justices have exemplified and the standards they have established for themselves and their successors.

Each of the Justices before whom I have practiced has manifested the highest professional and jurisprudential standards. These qualities are what we expect in Justices appointed by Presidents of any political party to our nation's highest court. I have won and lost my share of decisions from Justices appointed by Presidents of every political background. I can say that in every case, my clients and arguments have been treated with respect, understanding and great care. Americans are rightly proud of the Supreme Court and its Justices. Our courts are the envy of the world.

Because our time is limited, I will elaborate on only five of these characteristics.

1. Intelligence and learning. A Justice on the Supreme Court must understand and respect the Constitution, the separation of powers, the Bill of Rights, the vital role of Congress as the font of all legislation, the President's position as chief executive, the role of the judiciary, and federal laws ranging from antitrust and patents to criminal procedure and environmental laws. The Court decides seventy-five cases every year involving an awesome range of complex subjects, demanding from each Justice an extraordinary breadth and depth of understanding, experience, erudition, judgment and insight.

2. Respect for precedent and judicial tradition. The Justices before whom I have appeared have uniformly manifested abiding respect for the role of the judiciary and past decisions of the Court. Not every precedent is inviolate, of course. As Justice Breyer explained in his book, "Making our Democracy Work," the Court has occasionally been mistaken or wrong, but its errors have generally been corrected over time. The Justices are mindful of the importance of *stare decisis* and the public's reliance on its past decisions, but within the context of an

overarching fealty to the meaning and intent of the Constitution and the rule of law.

3. Open-mindedness and independence. Justices, of course, bring to their decision-making their individual histories, predilections, and past writings. But each must examine every case on the merits, carefully review precedents, briefs and oral argument, and the views of their colleagues, and only then come to a decision. Any other approach would, as Justice Ginsburg has explained, “display disdain for the entire judicial process.”

4. Integrity. The Justices of our Supreme Court, like our judiciary in general, reflect rock-solid integrity. We may strongly disagree with the Court’s decisions from time to time, but no credible critic would suggest that the Court’s decisions are corrupt or dishonest. Our citizens respect and obey even very unpopular decisions, because they believe in the integrity of the judicial process and the honesty of our Justices.

5. Temperament. Nearly every Justice has said that he or she has changed their views from time to time about legal issues after reading the briefs and listening to the arguments of the advocates and their colleagues on the Court. An open mind and a respectful temperament and collegiality among the Justices are vital to the Supreme Court's process. And the Justices before whom I have appeared uniformly listened to and probed—often intensely—the arguments presented to them. But, however strongly they have disagreed in a particular case, they have remained respectful, warm and gracious to their colleagues.

I have known Judge Kavanaugh for two decades and argued before him, and I know from personal observations and experience that he possesses and has consistently manifested the qualities I have described. He received an outstanding education in one of the nation's finest law schools, clerked for extraordinary jurists including the Justice he is being nominated to replace, taught Constitutional Law at Harvard Law School, served in the Executive Branch and in private practice, and for twelve

years at the highest level of the federal appellate judiciary short of the Supreme Court. He is thoughtful, respectful, open-minded, respected by his peers and widely praised by lawyers who have appeared before him.

Our system contemplates that Justices will be appointed from Presidents of either party. As lawyers who appear before the Court—and as Americans who must live with the Court’s decisions—we cannot expect that our cases will be decided by jurists who always agree with the positions we might prefer.

But, we can aspire to a judiciary that will be prepared, perceptive, competent, open-minded, honest and respectful. That is the jurist that is Brett Kavanaugh. He is the kind of person and judge that we expect and deserve on the Supreme Court. I hope that you confirm his appointment to this position.

Testimony of the Honorable Cedric L. Richmond, Member of Congress
United States Senate Committee on the Judiciary
"United States Supreme Court Nomination"
Friday, September 7, 2018

I would like to thank Chairman Grassley, Ranking Member Feinstein, and the Members of this esteemed Committee for allowing me to testify before you today.

Earlier this week my Louisiana Senator argued that, “It’s not the U.S. Supreme Court that’s supposed to fix this country – culturally, economically, socially, spiritually. Courts should not try to fix problems that are within the province of the U.S. Congress, even if the U.S. Congress does not have the courage to address those problems. Our courts were not meant to decide these kinds of issues.” That flawed logic would mean that African Americans wouldn’t be able to attend integrated schools, buy a home previously owned by a white person, or sleep at certain hotels. In many cases, the high court has acted when Congress has failed to.

For nearly eight decades, African Americans have arduously and successfully fought to secure historic legal victories that have significantly bent the moral arc of the universe towards justice, even at times when progress felt incremental. Nonetheless, we know that reversing meaningful progress for decades to come would be profoundly devastating and an affront to all who courageously fought on the front lines—some of whom I currently represent as Chair of the Congressional Black Caucus (CBC).

Prior to the 2016 presidential election, Senate Republicans engaged in an egregious obstruction strategy against the previous administration’s nominees. This misguided scheme reached a shameful crescendo when the Senate Majority Leader refused to grant a hearing to D.C. Circuit Chief Judge Merrick Garland—a supremely qualified, dispassionate U.S. Supreme Court nominee. Truthfully, this should really be President Trump’s first nomination for the high court—not his second. These nefarious practices, which left federal courts across the nation irresponsibly unfilled, paved the way for a staggering 112 judicial vacancies when President

Trump was inaugurated. By comparison, President Obama inherited less than half that amount in January 2009.

President Trump has seized on this opportunity to pack the courts by selecting judicial nominees who lack pragmatism, and are often strikingly unqualified and proven intolerant bigots. We are in the midst of a fundamental shift towards nominees that embrace ideology at the fringes of mainstream legal thought. The current administration has nominated, and with help of Senate Republicans, has confirmed a range of nominees whose confirmation hearings portend a precarious legal fate for communities of color moving forward. Many of their records demonstrate callous racism, ignorance of critical racial dynamics or other abhorrent forms of discrimination that hearken back to a darker time when structural and institutional bigotry worked to ensure that the rights of the underrepresented classes in this country were trampled upon.

Sadly, the nomination of D.C. Circuit Judge Brett Kavanaugh to the United States Supreme Court is merely the latest, and undoubtedly the most consequential, episode in this administration's scheme to dramatically reshape the federal judiciary as we know it. First nominated to the bench by President Ronald Reagan as an Associate Judge in 1987, the recently retired Chief Justice Anthony Kennedy's 30-year tenure underscores the true gravity of a lifetime appointment. Mr. Kavanaugh's confirmation would fortify a generation of destructive conservative ideology at a time when several historically significant legal challenges will come before the high court. As Members of the CBC, we cannot overstate what is at stake for African Americans and communities of color across the nation.

If Judge Kavanaugh is confirmed, we are concerned about his likely rulings on several matters that disproportionately impact the historically disenfranchised African-American

community. Judge Kavanaugh, who relies heavily on the same “textualist” reading of the Constitution employed by former Justice Antonin Scalia, possesses a conservative judicial record that leads us to believe that voting rights, education, criminal law, and access to affordable health care could be greatly endangered in the coming years. A careful, in-depth evaluation of his record, which has largely been shrouded in secrecy and withheld from public examination, uncovers a litany of writings that distinctly illustrate sparse commitment to equal protection under the law or judicial restraint. Additionally, Judge Kavanaugh’s lack of deference to precedent is staggering and inconsistent with other conservative judges who currently preside on the D.C. Circuit Court with him. A judge who frequently questions key legal precedents represents a grave danger to many key legal frameworks that have benefitted the black community.

Voting Rights

From Ohio, to Wisconsin, to Georgia, the vestiges of Jim Crow have resurfaced under a new cloak unchecked and unabated. While these states are no longer conducting literacy tests, the effects of their new policies have been implemented with staggering precision and efficiency. By a 5-4 vote more than five years ago, the U.S. Supreme struck down Section 4 of the Voting Rights Act of 1965, making Section 5 of the law essentially unworkable. Section 4’s coverage formula was designed to determine which states would be required to preclear with DOJ any modifications made to voting practices. In its wake, the decision has precipitated a myriad of voter suppression efforts across the country. Most recently, the Randolph County Board of Elections and Registration in Georgia inexplicably considered a proposal calling for the closure of more than three quarters of the polling locations in the county—including one of which that is 97 percent African American. Despite the eventual rejection of this ill-fated proposal, the federal

government never bothered to even intervene and fulfill its statutorily obligated responsibilities. Even after Section 4 was struck down in 2013, former Attorney General still prioritized oversight of voting laws across the country. Predictably, under Attorney General Jeff Sessions' lifeless leadership, DOJ has conspicuously failed to sustain this focus with any rigor or meaningful commitment. The DOJ has wholly abdicated its responsibility to protect the American people from the impact of racially charged voter suppression and as a result there is no longer any federal government mechanism or resource dedicated to safeguarding an individual's constitutionally protected right to vote. As I told you in January 2017, Jeff Sessions doesn't care about civil rights—this proves that point.

It is within this context that we have grave concerns about Judge Kavanaugh's opinion on the 2012 case of *State of South Carolina v. United States of America and Eric Holder*. In 2011, under the fully workable Voting Rights Act of 1965, the Obama administration blocked enforcement of South Carolina's state issued photo identification voting law because it affected up to eight percent of black South Carolinians. In his ruling to uphold the law, Mr. Kavanaugh claimed it "does not have the effects that some expected and some feared." Not only is this statement inexplicably tone deaf, it is also inconsistent with reality. Ninety-two-year-old South Carolina native Larrie Butler is one of many law-abiding, civically-engaged members of our community who was maliciously stripped of their opportunity to participate in the democratic process. These same real-life consequences palpably reverberate to other elements of everyday life for Black families that would be negatively impacted should Kavanaugh have the opportunity to assume a tenured position on the high court.

Criminal Justice

Judge Kavanaugh's record on criminal justice is entirely unsatisfactory for a country persistently struggling to hold law enforcement accountable for mass incarceration and police brutality. He has expressed a strong desire to overturn precedent that protects civilians from officers engaging in activities inconsistent with the Constitution—and more specifically the Fourth Amendment. By suggesting that the probable cause standard should be more flexible, his jurisprudence would expose more African Americans to failed policing tactics like “Stop and Frisk.” Additionally, Judge Kavanaugh's misguided support for narrowing individuals' Miranda rights would adversely impact people of color who are disproportionately subject to excessive law enforcement engagement in their respective communities. It's clear that the very foundation of the justice system, which is already tenuous, would perilously erode with this judge on the bench.

Affirmative Action

Among the troublesome constitutional interpretations Mr. Kavanaugh has penned while on the bench, his record on affirmative action is particularly disturbing and ripe for intense scrutiny. Almost 20 years ago, while in private practice he wrote that in the future the Supreme Court would agree that, “in the eyes of the government, we are just one race.” Given the Department of Justice's (DOJ) recent investigation into Harvard University's admissions practices, we are deeply troubled by the increased likelihood this issue will come before the Supreme Court in short order.

Cloud of Criminality & Lack of Transparency

Lastly, the omnipresent cloud of criminality surrounding the White House gives us legitimate skepticism that a U.S. Supreme Court justice with such an expansive view of

executive power can act impartially on Special Counsel Mueller's ongoing investigation into reported collusion with foreign governments. Despite playing a pivotal role in the investigation of President Clinton in the 1990's, Mr. Kavanaugh has since softened his stance on the necessity of such investigations of sitting presidents and heightened his rhetoric on the president's expansive executive power—including his authority to terminate high level administration officials. With the looming possibility that an appeal related to the investigation's outcome could be considered by the Supreme Court in the future, we are justifiably worried about this nominee's ability to remain objective and independent. Sadly, it appears that our concerns regarding his dismal record and potential conflict of interest with an ongoing investigation are contributing to the Majority's unwillingness to conduct this confirmation process with any genuine transparency.

There is no way any sitting Senator can look the American people in the eye and say they are faithfully executing their constitutional obligation to provide advice and consent when hundreds of thousands of documents from his time at the White House have not yet been produced. The flippant attempt by former President George W. Bush attorney William Burck to privately release more than 5,000 documents with over 42,000 pages Monday night is insufficient and unreasonable for Senators to thoroughly review in time. Those materials, and the remaining outstanding documents, may hold additional substantive background into his views on criminal justice, voting rights, affirmative action, hate crimes and more. These hearings should have been postponed until those documents were produced in full so that we could have seen what the administration was hiding in his record.

During a speech he delivered a mere three years ago, Mr. Kavanaugh ironically quipped that interpreters of the law should, "check those political allegiances at the door." Unfortunately,

after thorough review of what little has been made available, we have concluded that nearly every decision and dissent he has written throughout his career is reflective of a jurist who overwhelmingly serves as a partisan activist.

A lifetime appointment on the highest court in the land deserves a justice who is highly qualified, reflects our nation's values, and commits to the 14th amendment's promise that guarantees all citizens equal protections of the law. As the first African-American Supreme Court Justice Thurgood Marshall once said, "I wish I could say that racism and prejudice were only distant memories... We must dissent because America can do better, because America has no choice but to do better."

Just last year I sat before this very same panel and asked, "will you stand with him and allow history to judge you for doing so? If the tables were turned, do you believe he would stake his legacy on your record as he's asking you to stake your legacy on his?" I was referring to then-Senator Jeff Sessions, who now as U.S. Attorney General has attacked vulnerable communities with surgical precision that will take decades to reverse. Now, the stakes couldn't be higher. Like Chief Justice Kennedy, Mr. Kavanaugh could go onto serve for more than 30 years. So, I ask you all again, where do you stand? Once again, history will be your judge.

**Testimony of Peter M. Shane
To the Committee on the Judiciary of the U.S. Senate
Concerning the Nomination of Brett M. Kavanaugh
to Serve as an Associate Justice on the Supreme Court of the United States
Friday, September 7, 2018**

Chairman Grassley, Ranking Member Feinstein and Distinguished Committee Members:

My name is Peter M. Shane. I hold the Jacob E. Davis and Jacob E. Davis II Chair in Law at Ohio State University's Moritz College of Law. I have been teaching constitutional law, both at Ohio State and elsewhere, with a special focus on law and the presidency, since 1981. I co-author the only law school casebook on separation of powers law¹ and served early in my career as an attorney-adviser in the Department of Justice Office of Legal Counsel and as an assistant general counsel in the Office of Management and Budget.

This committee's consideration of any potential Supreme Court Justice immerses its members in profound constitutional issues. At this moment, no issue before you is more important than Judge Kavanaugh's approach to constitutional questions of executive power and presidential accountability. There is a straightforward constitutional principle that ought to frame any sound analysis of these questions. That principle is that no one, including the president, is above the law. The law's authority over presidents is arguably the most important check and balance for executive power built into our constitutional system.

By way of contrast, in my scholarly writing, I have used the word "presidentialism" to describe a contemporary "theory of government and a pattern of government practice that treat our Constitution as vesting in the President a fixed and expansive category of executive authority largely immune to legislative control or judicial review."² The briefest way of stating my concern about Judge Kavanaugh is that he appears to be an extreme presidentialist. Both on and off the bench, he has crusaded for an indulgent interpretation of the President's constitutional powers that could effectively undermine a President's accountability to law.

Aggressive presidentialism always poses serious constitutional risks. All our Chief Executives, both Republicans and Democrats, have powerful political incentives to press the boundaries of their authority. But at this moment in history, the threat of presidentialism to our constitutional democracy is unusually profound. Our current President and some of his closest associates stand at the center of an ongoing investigation of an election campaign tainted by covert foreign involvement and multiple potential crimes. The President has refused to distance the performance of his public duties from those commercial activities that enrich his private fortunes. The President's plainly expressed contempt for democratic institutions will likely insure that, in the next few years, the Supreme Court will face a host of issues testing the Justices' commitment to the "government of laws" ideal.

The purpose of my testimony is three-fold. First, I want to explain what is wrong in general with so-called Unitary Executive Theory, the specific reading of Article II of the

¹ PETER M. SHANE, HAROLD H. BRUFF, AND NEIL J. KINKOPF, SEPARATION OF POWERS LAW: CASES AND MATERIALS (4TH ED. 2018).

² PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 3 (2009).

Constitution that Judge Kavanaugh enthusiastically champions. Second, I want to highlight why I fear that Judge Kavanaugh will approach questions of presidential authority more as an habitual activist for presidentialism than as an open-minded arbiter. Finally, I want to review the immediate dangers from presidentialism and explain why this is an especially inopportune moment to move the Supreme Court in a yet more presidentialist direction.

I. The Tenets and Errors of Unitary Executive Theory

At least since leaving his role in the independent counsel investigation of President Bill Clinton, Judge Kavanaugh has become an unabashed adherent to the tenets of what has been known since the 1980s as “unitary executive theory” (UET). As UET advocates read Article II of the Constitution, the President is constitutionally vested with the authority to remove from office any executive branch administrator at will and to direct how all such officers discharge their discretionary functions under the statutes Congress enacts. UET purports to root these conclusions in the Executive Power Vesting Clause of Article II of the Constitution and the President’s obligation to take care that the laws be faithfully executed.

It bears noting at the outset that the Supreme Court thus far has largely rejected UET. Two well-settled decisions are pivotal. The first is *Humphrey’s Executor v. United States*,³ the Court’s unanimous decision over 80 years ago that Congress was constitutionally entitled to protect members of the Federal Trade Commission from removal at will by the President. The second is *Morrison v. Olson*,⁴ the Court’s 1988, 7-1 decision upholding the independent counsel provisions of the Ethics in Government Act. Notably, each opinion was written for the Court by a prominent conservative Justice—George Sutherland in the earlier case and William H. Rehnquist, Jr. for the latter.

The Court’s opinions upholding Congress’s design of independent agencies are sound for multiple reasons. First, even if UET were an accurate reading of what Article II meant in 1787—and it is not—tethering Congress’s modern institutional design choices to the realities of 1787 government administration would make no sense. The smallest 21st century cabinet department is larger than the entire federal executive branch in 1800. In 1787, facing the prospect of a federal civil establishment likely to employ at most a few thousand persons,⁵ Americans might have found it plausible to institutionalize a hierarchical civil command structure with meaningful accountability effectively vested in a single human manager. Such an aspiration is wholly fanciful today.

Moreover, today’s federal government wields extensive powers that the founding generation could not have envisioned. As the libertarian legal scholar Ilya Somin has argued, it makes no sense from an originalist point of view to give the President comprehensive authority over today’s vastly more sprawling federal administration: “In many cases, it might be more in the spirit of the Founding Fathers to divide this overgrown authority than to give it all to the President. After all, the Founders repeatedly warned against excessive concentration of power in the hands of any one person.”⁶

³ 295 U.S. 602 (1935).

⁴ 487 U.S. 654 (1988).

⁵ SOLOMON FABRICANT, TRENDS OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900 161–203 (1952).

⁶ Ilya Somin, “Rethinking the Unitary Executive,” THE VOLOKH CONSPIRACY (May 3, 2018), <https://reason.com/volokh/2018/05/03/rethinking-the-unitary-executive>.

Imputing plenary supervision and removal powers to the President because he is vested with “the executive power” imagines a 1787 consensus as to the meaning of executive power that simply did not exist. The most obvious evidence of the ambiguity in the Constitution itself is the Appointments Clause in Article II which allows Congress to vest the appointment of inferior officers not only in the executive branch, but also in the courts of law.⁷ An 1879 Supreme Court decision upholding the authority of courts to appoint election inspectors highlights how the clause signals the debatable contours of executive power:

It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, *it would be difficult in many cases to determine to which department an office properly belonged.*⁸

It is an especially egregious error to imagine that the late 18th century understood “executive power” as necessarily embracing criminal prosecution. This is why Justice Scalia’s famous “unitary executive” dissent in *Morrison v. Olson* lacks any historical basis. The influential writings of John Locke a century earlier had made no distinction between executive and judicial power.⁹ In England, criminal prosecution was still largely a private function.¹⁰ A number of the early states authorized the legislative appointment of their Attorneys General or the judicial appointment of prosecutors. Connecticut is especially instructive. Its 1818 Constitution not only vested the executive power in the governor, but—like the federal Constitution—required the governor to take care that the laws be faithfully executed and gave the governor the equivalent of Opinions Clause authority. Yet Connecticut courts appointed prosecutors at least until 1854.¹¹ Other early state constitutions explicitly gave their legislatures significant power over the selection of officers to perform what would usually be considered executive duties, again suggesting that the vesting of executive power did not entail that the executive branch be, in every respect, unitary.¹² In its *Siebold* decision, the Court pointed to U.S. Marshals as officials who could be sensibly viewed as officers of either the executive or the judiciary; the same ambiguity surrounds prosecutors.

The First Congress’s creation of our initial federal administrative bodies likewise reflected a diversity in organizational design and supervisory arrangements that belies any consensus around a hard version of a unitary executive.¹³ An especially important debate concerned a proposed duty of the Treasury Secretary “to digest and prepare plans for the

⁷ U.S. CONST., Art. II, § 2.

⁸ Ex parte Siebold, 100 U.S. 371, 397 (1879) (emphasis added).

⁹ Victoria Nourse, The Special Counsel, *Morrison v. Olson*, and the Dangerous Implications of the Unitary Executive Theory 11 (June 2018), <https://www.acslaw.org/wp-content/uploads/2018/07/UnitaryExecutiveTheory.pdf>.

¹⁰ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 605 (1989).

¹¹ Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PENN. J. CONST. L. 323, 348 (2016).

¹² *Id.*, at 334-344.

¹³ JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012).

improvement and management of the revenue, and for the support of public credit." This wording was nearly identical to the charge to financial officers authorized under the Articles of Confederation. Some in Congress were alarmed that this parliamentary duty would so involve the Secretary in legislation as to undermine the authority of the House; others saw the charge as undermining the President's power to propose legislation. Nonetheless, Congress conferred this duty upon the Secretary, essentially borrowing a description of the Secretary from this country's former, short-lived parliamentary system.¹⁴

Judge Kavanaugh's writings in defense of UET take no account of these arguments or evidence. Instead, he insists: "Presidential control of . . . agencies . . . helps maintain democratic accountability and thereby ensure the people's liberty."¹⁵ This assertion profoundly oversimplifies the meaning of accountability and ignores the multiple ways in which presidential elections are too blunt an instrument to insure presidential responsiveness to the nation as a whole.¹⁶ Moreover, Judge Kavanaugh's modern notion of democratic accountability can hardly be linked to the Framers. As Professor Somin has written, the Framers "would be especially appalled to see [unitary control] in the hands of an office whose occupant is now selected by a far more populist selection process than the Founders intended, and therefore more likely to be a dangerous demagogue."¹⁷

The so-called originalist defenses of UET demonstrate what the celebrated judicial conservative Judge J. Harvie Wilkinson III has urged as most dangerous about originalism:

[O]riginalism, perhaps more than other cosmic theories, provides cover for discretionary interventions into the democratic process that might otherwise not take place. Our theories are convincing us that we are being objective when broad daylight reveals that we are not.¹⁸

Judge Kavanaugh's record on issues of presidential authority demonstrates that he has become an activist in just the sense Judge Wilkinson fears.

II. Judge Kavanaugh's Presidentialist Crusade

Judge Kavanaugh is not just an enthusiast for presidential power; he is a campaigner. He has elaborated presidentialist theories in cases that did not require constitutional analysis at all. He has written law review articles urging Congress to expand and protect presidential power.¹⁹ He was a key White House official when the George W. Bush Administration made some of its most outlandish claims for presidential authority

¹⁴ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 615 (1989).

¹⁵ *In re Aiken County*, 645 F.3d 428, 440 (D.C. Cir. 2011), subsequent mandamus proceeding, 725 F.3d 255 (D.C. Cir. 2013).

¹⁶ Peter M. Shane, *Political Accountability in A System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 196 (1994).

¹⁷ Somin, *supra* note 7.

¹⁸ J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 57 (2012).

¹⁹ See, e.g., Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454 (2009); Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 Geo. L.J. 2133 (1998).

under Article II of the Constitution.

Judge Kavanaugh's most noteworthy judicial opinions on the unitary executive were rendered in disputes where no constitutional issue should have been addressed. One was his concurrence at a preliminary stage in *In re Aiken County*,²⁰ a suit that required no constitutional analysis. Judge Kavanaugh's concurrence offered a detailed explanation why, in his view, the creation of independent administrative agencies like the Nuclear Regulatory Commission departed from a proper reading of Article II—a reading in which the President would be deemed singly and personally responsible for all “execution of the laws.” Although insisting that his point was “not to suggest that [*Humphrey's Executor*] should be overturned,”²¹ a concession not binding on a Supreme Court Justice, he suggested that the earlier case might best be regarded dismissively as a decision “by a Supreme Court seemingly bent on resisting President Roosevelt and his New Deal policies.”²² At a later stage in the litigation,²³ he detailed at length his expansive view of the President's prerogatives regarding criminal prosecution—before concluding that the NRC could not use that prerogative to defend the challenged NRC decision at issue. This presumably came as no surprise to the NRC, which had never raised the issue in its briefs.

Moreover, in a more recent decision, Judge Kavanaugh demonstrated that unitary executive theory could well be promoted—and Congress's design for agency independence undermined—not by overturning *Humphrey's Executor*, but by inventing wholly new theories that would enable courts to work around it. *PHH Corp. v. Consumer Finance Protection Bureau*²⁴ involved a challenge by a mortgage lender against the CFPB's imposition of a massive penalty for an alleged impropriety. The three-judge D.C. Court of Appeals panel to which Judge Kavanaugh belonged concluded unanimously on statutory grounds that the CFPB's order was improper. Judge Kavanaugh nonetheless used the case as occasion to cut a new theory from whole cloth as why the CFPB's structure as a single-headed independent agency was unconstitutional under the separation of powers.

Recognizing that *Humphrey's Executor* precluded his holding the CFPB unconstitutional simply on the ground that the President could not fire its director at will, Judge Kavanaugh manufactured an entirely new rationale for *Humphrey's Executor*, namely, that “[i]n the absence of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and abuse of power, and thereby to protect individual liberty.”²⁵ He then determined that a single-headed independent agency lacks the liberty-protecting features of multimember agencies and proceeded to hold the CFPB structure unconstitutional on that ground—a conclusion the D.C. Circuit has since reversed en banc.²⁶ Arrogating to a court the power to determine whether a congressionally designed administrative structure is sufficiently protective of liberty under a wholly subjective metric is extraordinary enough. Equally remarkable,

²⁰ 645 F.3d 428 (D.C. Cir. 2011), subsequent mandamus proceeding, 725 F.3d 255 (D.C. Cir. 2013).

²¹ *In re Aiken County*, 645 F.3d 428, 446 (D.C. Cir. 2011).

²² *Id.*

²³ *In re Aiken County*, 725 F.3d 255, 259-266 (D.C. Cir. 2013).

²⁴ 839 F.3d 1 (D.C. Cir. 2016), reh'g en banc granted, order vacated (Feb. 16, 2017), on reh'g en banc, 881 F.3d 75 (D.C. Cir. 2018).

²⁵ *Id.* at 26.

²⁶ 881 F.3d 75 (D.C. Cir. 2018).

however, is that the author of a judicial opinion five years earlier that decried the constitutionality of multimember agencies like the Nuclear Regulatory Commission then offered in his *PHH* decision the most robust policy defense in the history of U.S. jurisprudence of the wisdom of multimember independent administrative agencies.

Judge Kavanaugh's on-the-bench activism for executive power may also be reflected in his possible role crafting aggressive claims for executive authority during the George W. Bush Administration. In signing statements alone during his first six years in office—when Judge Kavanaugh was in White House Counsel's office or serving as staff secretary—President Bush raised nearly 1,400 constitutional objections to roughly 1,000 statutory provisions of over 100 statutes, more than three times the total such objections raised by his 42 predecessors combined.²⁷ After Judge Kavanaugh left his role as staff secretary, the pace of Bush signing statements slacked off. This fact raises the question to what degree Judge Kavanaugh was responsible for urging such aggressive claims of presidential power.

Nearly all of Bush objections either implied or claimed outright a constitutional barrier to Congress's authority to exercise its legislative powers in the face of the President's Article II authorities. Many of these assertions were also unprecedented, if not bizarre—suggesting, for example, that the President's power to recommend measures for Congress's consideration might limit Congress's authority to demand reports from the executive branch or that Congress's requirements that administrators “consider” specified factors in the course of their decision making would conflict with the President's supervisory powers over the “unitary executive.”

Two signing statements stand out as both exemplary and outlandish. It is conventional wisdom that the president's commander-in-chief power extends to presidential decisions concerning the deployment of military force. Yet a 2002 Bush signing statement²⁸ claimed that the commander in chief power also extends to deciding troop strength in the Defense Department's Office of Legislative Affairs. It would be revealing to know if Judge Kavanaugh agreed that Congress burdened the president's commander in chief powers by limiting the number of Defense Department civilian and military personnel who could be engaged in liaison with the legislative branch.

A 2004 signing statement accompanying the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 made a yet more worrisome suggestion.²⁹ Among other things, that Act prohibited Department of Defense personnel from interfering with certain military lawyers who might give independent legal advice to their superiors. The Bush signing statement insisted that this provision raised constitutional concerns and would be implemented only as consistent with “the President's constitutional authorit[y] to take care that the laws be faithfully executed.” It would plainly be worrisome if Judge Kavanaugh believes a prohibition on interference with independent legal advice within the military could compromise the president's obligation of legal fidelity. One would assume that protecting the independent legal advice of military lawyers would help to bolster that presidential obligation, not threaten it.

²⁷ Neil Kinkopf and Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006* (October 2007). Ohio State Public Law Working Paper No. 106. Available at SSRN: <https://ssrn.com/abstract=1022202>.

²⁸ <http://coherentbabble.com/Statements/SShr3801.pdf>.

²⁹ <http://coherentbabble.com/Statements/SShr4200.pdf>.

Without a more complete documentary record than we now have concerning Judge Kavanaugh's service in both the office of White House Counsel and as Staff Secretary, we cannot know his precise role in crafting, advocating, or approving such audacious constitutional claims. Yet they seem to be of a piece with the views he has expressed as both judge and author that are exceptionally protective of presidential authority and antagonistic to the roles of Congress and the courts in checking that power. His White House experience, like his unnecessary judicial opinions on independent agencies, suggests he is more a campaigner for presidentialism than a neutral arbiter. This is troubling.

III. Unitary Executive Theory and the Dangers of an Authoritarian Presidency

Aggressive presidentialism on the Supreme Court would pose a risk to constitutional checks and balances at any time, but the danger at this current moment is exceptionally grave. We have a President not only disdainful of the institutions most important to checking abuses of executive power, but his utterances betray a fantasy that the other branches of government should actually take direction from him. As I explained earlier, it is likely that legal issues nearly unprecedented in their volume and seriousness will emerge from this President's public and private conduct. It would be disastrous if the federal judiciary addressed those issues in ways that undermined effective constitutional checks on overreaching presidents.

Judge Kavanaugh has already expressed potentially troubling views on three of these issues: whether the President has constitutionally based authority to supervise or dismiss the special counsel investigating his campaign, whether the President can be required to respond to judicial or congressional subpoenas, and whether a sitting President may be indicted. His views are presumably a source of comfort to the President.

Judge Kavanaugh's views on independent prosecutors are clear. He wrote a law review article in 1998 advocating that Congress require criminal investigations of high-level executive branch officials to be conducted only by prosecutors directly answerable to the President. "The President," he wrote, "should have *absolute discretion* (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel."³⁰ He urged that Congress give the President complete control over such a prosecutor's jurisdiction.

Judge Kavanaugh would thus vote in all likelihood to overturn any attempt by Congress to give statutory protection to the special counsel investigating President Trump. As I mentioned earlier, a key Supreme Court precedent inconsistent with unitary executive theory is *Morrison v. Olson*, which properly upheld the constitutionality of the Ethics in Government Act. That post-Watergate statute authorized the judicial appointment of an independent counsel to investigate serious allegations of wrongdoing against the President and high-level Administration officials.³¹ In a 2016 speech to the American Enterprise Institute, Judge Kavanaugh—ignoring the historical baselessness of Justice Scalia's lone dissent—expressed the dubious view that *Morrison v. Olson* had "been effectively

³⁰ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2136 (1998) (emphasis added).

³¹ *Morrison v. Olson*, 487 U.S. 654 (1988).

overruled," but added, "I would put the final nail in."³²

It is worth comparing Judge Kavanaugh's enthusiasm for the unitary executive with the measured approach of the *Morrison v. Olson* Court. The 1988 Court recognized that, more than 50 years earlier, *Humphrey's Executor* had rested the constitutionality of the Federal Trade Commission on that agency's "quasi-legislative" and "quasi-judicial" functions. Yet the Court wrote: "[O]ur present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'"³³ Instead, after reviewing the powers and duties of the Independent Counsel, the Court concluded:

Although the counsel exercises no small amount of discretion and judgment in deciding how to carry out his or her duties under the Act, we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.³⁴

The Court found it constitutionally sufficient that the Attorney General—himself subject to removal at will by the President—could remove the independent counsel for good cause, should it arise. The Court logically regarded this distribution of authority as sufficient to ensure the President's capacity to take care that the laws be faithfully executed.

Yet it is doubtful that a potential Justice eager to put "the final nail in" *Morrison v. Olson* would be protective of a special counsel appointed by an Acting Attorney General to investigate the 2016 presidential campaign. At the very least, UET would grant the President authority to re-enact the Saturday Night Massacre until he found an acting Attorney General willing to fire the special counsel, with or without the bureaucratic nicety of rescinding the regulation that protects the special counsel from at-will dismissal. At the extreme—and this may be Judge Kavanaugh's view—the President would be entitled to delimit the Special Counsel's jurisdiction and require him to operate within it.

That such control would plainly be at odds with an effective investigation of the President might not pose a problem of principle for Judge Kavanaugh because of his view that a sitting President should not be subject to criminal indictment. He proposed in his 1998 article that Congress prohibit the lodging of criminal charges against a sitting president,³⁵ and suggested that the Constitution itself might provide impeachment as the only permissible recourse against an incumbent for even the most serious misconduct.³⁶ This is an especially intriguing view because Independent Counsel Kenneth Starr, for whom Judge Kavanaugh worked, solicited an opinion on the indictment question from the late law professor Ronald D. Rotunda, one of the most prominent conservative constitutional scholars of his generation. Professor Rotunda concluded that the indictment of a sitting President would be constitutional, citing a long string of Supreme Court opinions

³² <https://www.c-span.org/video/?407491-1/discussion-politics-supreme-court>.

³³ *Id.* at 689.

³⁴ *Id.* at 691-692.

³⁵ *Id.* at 2157.

³⁶ *Id.* at 2160-2161.

supporting the proposition that “no one is above the law.”³⁷

Of course, there can be little accountability to either Congress or the courts if information about a President’s conduct is not available to them. Although Judge Kavanaugh has not expressed his constitutional views categorically on the subpoena issue, two pieces of evidence provoke anxiety. First, he has voiced the possibility³⁸ that the Supreme Court reached the wrong decision in *United States v. Nixon*,³⁹ which upheld a judicial subpoena for the Watergate tapes. This conclusion might seem to follow from Judge Kavanaugh’s apparent belief that an executive branch prosecutor should not be entitled to pursue a subpoena over the President’s objections. Second, he was a member of the White House Counsel’s office in 2001, when President Bush asserted executive privilege to prevent the Justice Department from releasing certain open law enforcement records subpoenaed by the House Committee on Government Reform.⁴⁰ If that letter expresses Judge Kavanaugh’s view on executive privilege, it could conceivably extend to open law enforcement files regarding the President. This is even more likely with regard to subpoenas for presidential testimony, an issue the Supreme Court has not addressed. Judge Kavanaugh has expressed deep sympathy for the proposition that presidents should be able to perform their role “with as few distractions as possible,” including, for example, the need to respond to civil suits.⁴¹ There is no guarantee that Judge Kavanaugh would not regard compulsory presidential testimony before court or Congress as an unconstitutional “distraction.”

Beyond these issues are two that could quite easily reach the Supreme Court and another almost certain to do so. One is whether a President is potentially liable for obstruction of justice if he “corruptly . . . endeavors to influence, obstruct, or impede the due and proper administration of the law”⁴² through an official act. The President’s lawyers say no, which is almost certainly both wrong and dangerous. Yet it is not difficult to imagine an unduly presidentialist opinion seeking to prevent prosecutors from inquiring into the presidential motivation behind an official act.

Another is whether a President may relieve himself of criminal liability through self-pardon, a power President Trump has said he “absolutely” has. The notion of self-pardon is plainly at odds with a President’s obligation to take care that the laws be faithfully executed and the principle of due process that no one should be judge in his own cause. Yet the only explicit constitutional exclusion from the President’s pardon power is impeachment. A misguided reading of the Constitution to allow presidential self-pardons is not unthinkable.

With regard to the President’s business dealings, a case is already underway concerning the President’s attempt to exempt himself from the reach of the Constitution’s

³⁷ Letter from Ronald D. Rotunda to Kenneth W. Starr re: Indictability of the President (May 13, 1998), at 3 and n. 6, <https://www.nytimes.com/interactive/2017/07/22/us/document-Savage-NYT-FOIA-Starr-memo-presidential.html>.

³⁸ Lawyers Roundtable, *Attorney Client Privilege: Does It Pertain to the Government?* THE WASHINGTON LAWYER, Jan./Feb. 1999, at 34, 39.

³⁹ 418 U.S. 683 (1974).

⁴⁰ George W. Bush, Memorandum on the Congressional Subpoena for Executive Branch Documents (Dec. 12, 2001), <http://www.presidency.ucsb.edu/ws/index.php?pid=73498>.

⁴¹ “I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible.” Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1460 (2009)

⁴² 18 U.S.C. §1505.

emoluments clauses. The President takes the position that, unless a payment is made to him personally for services rendered, the profits he pockets from foreign or state governments patronizing his properties are not Congress's business. Although a federal district court has already rejected that view based on a painstaking analysis of the constitutional text, the Framers' purposes, and our institutional history,⁴³ a jurist determined to insulate the President from "distractions" might determine that the resolution of emoluments controversies should be left entirely to the political process.

* * *

With regard to these profound issues of presidential accountability, I fear Judge Kavanaugh would approach them from a set of premises about the Constitution that are unfounded and dangerous, but, for him, unquestioned. They are rooted in both his role as a campaigner for presidential authority and in the unitary executive theory he has embraced.

I would close by reminding this committee of the words of two of the most important legal minds of the twentieth century. One, Justice Robert H. Jackson, had served as Attorney General for one of the most energetic presidents in U.S. history, Franklin D. Roosevelt. He nonetheless remained vigilant as a Justice against executive overreach, dissenting, for example, from the ignominious 1944 *Korematsu* decision.⁴⁴ It was, however, after his service as chief U.S. prosecutor at Nuremberg that he wrote the following as part of his iconic concurring opinion in the *Youngstown* case:

The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. . . [I]f we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that [the Executive Power Vesting] clause is a grant in bulk of all conceivable executive power but regard it as an allocation to the presidential office of the generic powers thereafter stated.⁴⁵

Just as timely are the words of Harvard's Paul Freund, perhaps one of the most revered law teachers of all time, who wrote in approval of the Supreme Court's decision in *United States v. Nixon*:

[T]he notion of a unitary executive branch in which tensions between contending executive interests are authoritatively resolved by the President loses its claim when striking allegations of misconduct have been leveled against high executive officials, including the President himself.⁴⁶

We were told at the founding that our Constitution gives us "a Republic, if we can keep it." Unitary executive theory threatens, rather than advances that sacred charge. I hope I have helped to persuade this committee that bolstering the cause of presidentialism on the Supreme Court would be a grave historic mistake, and I thank you for the opportunity to share these views with you.

⁴³ *District of Columbia v. Trump*, 315 F. Supp. 3d 875 (D. Md. 2018).

⁴⁴ *Korematsu v. United States*, 323 U.S. 214, 242 (1944) (Jackson, J., dissenting), abrogated by *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring).

⁴⁶ Paul A. Freund, *Foreword: On Presidential Privilege*, 88 HARV. L. REV. 13, 15-17 (1974).

Testimony of Colleen E. Roh Sinzdek

Mr. Chairman, Ranking Member Feinstein, and members of the Committee:

Thank you for the opportunity to address the Committee about my former Harvard Law School professor, Judge Kavanaugh. I took Judge Kavanaugh's Separation of Powers class in the Winter Term of 2009. In the years since, he has served as a trusted mentor to me. My experience as Judge Kavanaugh's student and mentee has led me to offer my firm support of his nomination to the Supreme Court of the United States.

In some ways, my support for Judge Kavanaugh is unsurprising. A recent New York Times article catalogued the exceptionally strong reviews that Judge Kavanaugh's students have given to his teaching. Over the years, students' anonymous feedback forms have consistently lauded the judge as an outstanding professor, one who strives to present a balanced view of the material in class and who makes himself uniquely accessible to students outside the classroom. I wholeheartedly agree with that praise.

Multiple articles have also detailed Judge Kavanaugh's role as a mentor and sponsor for young lawyers, many of them females and minorities. You have heard about Judge Kavanaugh's impressive record of hiring women and diverse law clerks, but Judge Kavanaugh's efforts as a mentor are not limited to his clerks. He also works to maintain connections with countless law students and young lawyers across the country. Judge Kavanaugh is an invaluable resource and advocate for those starting out in the profession, and a champion of diversity in the legal world. Ever since I took his class, he has been a mentor and a sponsor, offering friendly advice, helpful support, and a listening ear as I've navigated the stages of my legal career. When I was considering applying for a Supreme Court clerkship, Judge Kavanaugh generously offered his advice and support, helping me to obtain a clerkship with Chief Justice Roberts. And when I went back to work after having my first child, a lunch with Judge Kavanaugh helped bolster my enthusiasm for my legal career.

In other ways, however, my support for Judge Kavanaugh may strike some as surprising. I am a registered Democrat, and from 2010-2011, I had the great honor of serving as a law clerk for then-Judge now Chief Judge Merrick Garland on the D.C. Circuit. In that role, I experienced firsthand what an exceptionally brilliant, fair, and kind jurist he is. I believe the judiciary—and the country as a whole—has suffered greatly from the failure to confirm Chief Judge Garland to the Supreme Court. I nonetheless support Judge Kavanaugh's confirmation. In my view, preserving and protecting the integrity of the judiciary means supporting and confirming highly qualified judicial nominees, regardless of whether one agrees with the politics of the party that nominated them. In my experience, Judge Kavanaugh has the traits that make him eminently qualified to serve as a justice on the United States Supreme Court. His impressive intellect is obvious. But the Judge is also open-minded; he is principled; and he is evenhanded. I'd like to speak a little more about each of those qualities.

First, in my interactions with Judge Kavanaugh he has always demonstrated open-mindedness and intellectual integrity. When I think back on the Judge's Separation of Powers class, it isn't his lectures I remember; it is his insightful questions and the classroom debates they sparked. The course touched on some of the most important issues in our constitutional democracy, but rather than telling us what to think about them, the Judge asked questions that enabled us to develop our own views and share them with the class. More than that, he seemed genuinely interested in hearing our varying perspectives. One of my favorite law school memories is engaging in a fierce debate with a Separation of Powers classmate over whether *INS v. Chadha* was rightly decided. Judge Kavanaugh seemed delighted to hear both sides, and he encouraged us to develop our conflicting views. With Judge Kavanaugh, I was confident that if I could make the right argument, he would accept my position.

My belief in Judge Kavanaugh's open-mindedness has deepened over the years through my one-on-one conversations with him. I often can't resist sharing my views on separation of powers issues, and he is invariably an engaged listener and an insightful questioner, despite the fact that we come from different sides of the political aisle.

Second, in my experience Judge Kavanaugh is highly principled. By that I mean something very specific: He carefully delineates the difference between policy preferences and what the law demands. In the Separation of Powers class, we often discussed current events and the way they implicated various constitutional concerns. Policy considerations inevitably came up, and we certainly discussed those, but the Judge would repeatedly remind us that those policy concerns are beside the point if the Constitution dictates a different outcome. More generally, the Judge taught us that the way to discern the legal principles that undergird our democratic system is to look to the text, history, and precedents regarding the Constitution, not our policy preferences.

Third, Judge Kavanaugh is evenhanded and treats people fairly and with respect. In class, he gave the same consideration to the views of all students. I consistently felt he was judging our answers based on our ability to reason clearly and support our points, not based on any political or ideological standard.

Judge Kavanaugh's evenhandedness goes beyond respect for varying ideologies. In my experience, he treats everyone equitably regardless of their gender, race, or background. One would think—or at least hope—that in 2018, that should not be remarkable. But as a woman, I know that explicit and implicit bias continue to plague the legal profession just as they plague the rest of society. Far too often in my career, I have felt I was being treated as a *female* lawyer, rather than just as a lawyer. But with Judge Kavanaugh, I have never felt that way. In my interactions with him, I know I am being judged on the merits of what I say — nothing less and nothing more.

I believe that a person with such sterling credentials and experience as a judge who so clearly values integrity, principle, and fairness is eminently qualified to serve on the Supreme Court. I therefore enthusiastically support Judge Kavanaugh's nomination.

Thank you for your time.

**Testimony of Melissa Smith
Social studies teacher, U.S. Grant Public High School, Oklahoma City
U.S. Senate Committee on the Judiciary
U.S. Supreme Court Nomination Hearing of Judge Brett Kavanaugh
September 7, 2018**

Mr. Chairman, Ranking Member Feinstein, and members of the Judiciary Committee, thank you for giving me the opportunity to speak on behalf of union members, public school teachers and our students. My name is Melissa Smith, and I am a proud union member and public school teacher at U.S. Grant High School on the southwest side of Oklahoma City.

I am also the proud daughter of a lifelong public servant. My father, LeRoy Burks, was a police officer for 41 years, 25 of which were in my hometown of Enid, Okla. My father instilled in me from a very early age the knowledge that I have a voice, and he taught me how to use it. He made sure that I not only knew my rights, but that I knew how to exercise them. I often wondered how people who didn't have a cop for a dad knew all of these things.

Because of my father's inspiration, I received my bachelor's degree in criminal justice. After college, I became a juvenile probation and parole officer and quickly realized that most teenagers have no idea that they even have rights. This, I realized, was an issue that I could do something about, so I became a high school social studies teacher. My criminal justice classes allow me the opportunity to open my students' eyes to the concepts of equality, justice and fairness—concepts that I see them beginning to understand in their own lives and in the world around them. I teach them that under the U.S. Constitution, they, and all Americans, have human rights and constitutional rights that maybe no one has ever explained but that are enshrined in centuries of history and struggle, and based on real democratic principles for which people have fought and died. I teach them the impact of the law, the impact of our government, and their roles and

responsibilities within the government so that they can be active and engaged citizens in our democracy. It is a humbling and awesome responsibility.

Today, I am honored to be able to show my students exactly what it means to use your voice and participate in our government at the highest level. I am proud to sit here in my capacity as a public school teacher, as a union member and as the first in my family to graduate from college. And I am proud to testify about why public schools matter—for our kids, for our communities and for our economy, now more than ever.

Since you can't be in school with us every day, allow me to share some of our experiences with you as you consider your vote to confirm Judge Kavanaugh to a lifetime appointment to the U.S. Supreme Court.

Oklahoma City Public Schools is the largest district in the state, serving about 46,000 students. Almost 90 percent of our families are considered to be economically disadvantaged, 35 percent are English language learners, and 15 percent are disabled or have special needs. I am a proud U.S. Grant High School General. We have the best administrators, the most dedicated teachers and absolutely amazing students.

But because of a continued decrease in funding from the Oklahoma Legislature, our district has had to cut almost \$40 million from its budget in the last two years. Our fine arts budget was slashed by 50 percent, our library media budget was completely eliminated, and district officials were forced to end the school year days early. Our school building was built for 1,200 people. We currently have almost 2,000 students and 200 staff members.

Our classrooms are extremely overcrowded, with 40 students in some classes. Many rooms don't even have enough desks for our students to sit in, and some teachers don't even have classrooms at all—they have their belongings, textbooks and supplies on carts, and they push them from classroom to classroom, hour to hour. They're called traveling teachers. I have been a traveling teacher; it is almost impossible to be an effective educator like this.

I think the cut that hurt the most was the loss of our two maintenance workers, Gerald and Joe, whose positions were eliminated when our district was forced to cut the first \$30 million in 2017. Gerald and Joe kept our building running. Without them, nothing seems to work. We regularly have days when we don't have air conditioning. Just last Monday, it was almost 90 degrees in my classroom by the end of the day. The next morning, it was 84 degrees when I arrived at school at 6 a.m.

I am telling you about our funding crisis in Oklahoma for two reasons. First, because Judge Kavanaugh's stated position on private school vouchers would exacerbate the situation in Oklahoma City. Research shows that vouchers do nothing to help student achievement but do everything to undermine the public schools that 90 percent of children in this nation attend. Despite the incredible need for resources in a public school like mine, Judge Kavanaugh has, for over 20 years, taken public positions questioning the very foundation of public education and supporting private school voucher programs that use public school funding with little oversight and accountability. Siphoning more funding away from public education will destroy our public schools.

The second reason I am telling you about our funding crisis is that I have seen firsthand how the collective power of unions allows individuals to band together to bargain for resources for

students and teachers. As we saw in the *Janus v. AFSCME* decision, the Supreme Court has enormous power to limit the ability of millions of hard-working Americans to come together in strong unions to bargain for fair wages, equal pay for women and people of color, decent benefits and a voice on the job. Judge Kavanaugh has a strong history of siding with big business over the needs, rights and safety of individual employees. His record shows that he sides with employers who do not adhere to their collective bargaining agreement, does not believe in union representation in employee meetings, and in one decision, would allow the employer to “abolish collective bargaining all together.”

I can tell you that through my union, I have learned the power of collective voice. I can advocate for my own working conditions, which are the same as my students’ learning conditions. Unions give voice and agency to people who can’t find it otherwise—they make it possible for us to accomplish together what we could not do on our own.

Five months ago, Oklahoma City Public Schools teachers walked out of our classrooms. Our state Legislature passed a \$6,000 pay raise in an attempt to stop the walkout, but we were fighting for so much more than just a raise. We were fighting for our students and for their needs, which often go well beyond what you would expect a teacher or a school to take care of. We worried not just about union rights, but about our students’ needs, which are many.

Teachers and staff members across this country take money out of their own pockets to buy classroom supplies, wash students’ school uniforms so that they have clean clothes, and offer students without enough food a bag of pantry items to take home on weekends. Allow me to share some of my—and my students’—specific experiences.

I have students, and fellow staff members, who visit the mobile dental unit—basically a dentist office on wheels—that is stationed in front of our parking lot. Sometimes this dental van is the only dental care that our teachers and students can get.

I have physically picked up a teenager off the floor and carried her to the counselor's office. She was sobbing in the hallway outside my classroom, saying she didn't want to live anymore. Thank goodness the budget allowed us to have a counselor in school that day. I've also been called by one of my students on a Saturday night saying that she thought a friend of hers was going to commit suicide. I spent all night on the phone with her, the police, my assistant principal and the other teen's parents. Neither girl committed suicide.

Just last week, the teacher in the classroom next to mine wrote a reference letter for a student and his family to take with them to their hearing to determine whether they could remain in this country. She stressed about it for days because she needed it to be perfect. Her student has never known anything but his life in Oklahoma, and he is terrified of being sent to a place that is not home, regardless of what anyone tells him.

I have paid a student's senior dues because his guardian moved to another state and left him to support himself in August of his senior year, and I didn't think he should have to choose between paying for rent and food and getting to attend his senior activities. That young man was active in Student Council, an athlete, and employed more than full time. He is currently at a university on a full athletic scholarship.

I have sat next to a student while she told her grandmother that she was pregnant, and we all worried about her future. I have seen the terror on a transgender student's face when he shared

that he identifies as male. And then that terror turn to sheer joy when I, as a trusted adult, accepted him for who he is.

I have sat in a classroom on lockdown because a student brought a loaded .380 gun into the school building. I struggle to put into words what I felt that day. I was on my planning period so I didn't have any students in my classroom—they were spread all over the building with the other almost 2,000 kids that we have. Nobody should have to experience the terror of guns in their school building.

Yet Judge Kavanaugh could stand as a barrier to commonsense gun safety reforms that would keep our schools and communities safe. Judge Kavanaugh's record indicates he is not likely to take public safety into consideration when deciding if a gun violence prevention law is constitutional. This terrifies me. Schools should be safe sanctuaries for teaching and learning; our laws should make it harder to bring guns into schools, not easier.

I arrived to school on the morning after the 2016 presidential election filled with concern for our school community. The majority of our students are Hispanic, some of whom are undocumented or have undocumented family members. The U.S. Grant family rallied around all of our students more than usual on that day. We dried the tears, calmed the anger and tried our best to reassure our kids. Our principal came over the intercom and reminded all of us that ICE officials are not welcome on our campus. He even stated that anyone and everyone who came through the front door would have to roll over him to get to our kids. We don't ask if they or their parents are undocumented; that's not our purpose—and, so far, the U.S. Supreme Court agrees. Our purpose

is to care for our students and teach them. The fear hasn't completely gone away since that day, but it has subsided a bit. Our kids know that we have their backs.

Again, why am I sharing these experiences with you? Because I am kept up at night worrying about my students and who will look out for them. I worry that our government is too far removed from the people it serves, and that the consequences of that gap are far more dangerous than we realize. If confirmed, Judge Kavanaugh's decisions will impact not just teachers and students in schools now, but the lives of my students when they become adults and have their own children, and for generations to come.

Judge Kavanaugh has sided with the powerful and their institutions, rather than with the voiceless and the vulnerable—be they immigrants, individuals with disabilities, or workers—who need protections from the courts. I teach my students about justice and equality, but I worry that we live in a country where these rules no longer apply.

The rulings of the U.S. Supreme Court affect us all. Courts have ruled on school integration plans, access to services for students with disabilities, healthcare, affirmative action in higher education, and the constitutionality of private school vouchers. We can expect all of these to be in play over the course of any nominee's lifetime appointment to the court, and Judge Kavanaugh's record should be examined.

I've shared the experiences of my students, fellow staff members and their families to show that there is a real impact of Judge Kavanaugh's jurisprudence on America's future. This committee is in a unique position to listen to real people, working people, young people. We are here. We

are telling you what we need. Every American I know wants a Supreme Court that understands our struggles, and gives everyone—individuals like myself and my students—a fair shot in court.

I'm in awe of the young people on the panel who are so eloquently representing their generation. They are so incredible not because of the adults in this country, but in spite of the adults in this country. They rise above the problems and inadequacies that we create—the educational system's problems, the unhealthy environment, the ridiculously expensive healthcare system, the never-ending mass shootings, and the negativity of our current political climate. They rise above the problems that might not affect you, or me, or Judge Kavanaugh, but affect them every single day.

I'd like to end my statement the same way I end every Friday at school with my students: Be the example, have a good weekend and make good choices.

Testimony of Rebecca Taibleson

Before the United States Senate Committee on the Judiciary

On the Nomination of Judge Brett Kavanaugh to the United States Supreme Court

September 7, 2018

Mr. Chairman, Senator Feinstein and Members of the Committee: I am honored to be testifying before you today. My name is Rebecca Taibleson. I'm here from Milwaukee, Wisconsin.

I clerked for Brett Kavanaugh in 2010 and 2011, and I enthusiastically support his nomination to be an Associate Justice of the United States Supreme Court.

I'd like to talk about two things today: *First*, what Brett Kavanaugh is like as a judge. And *second*, what Brett Kavanaugh is like as a person.

At work in his chambers, Judge Kavanaugh has a motto of sorts: "Process protects us." I'll admit, it is not very catchy. But it's true to the judge and to his core judicial philosophy. What it means is that Judge Kavanaugh goes through an intense, step-by-step process in order to decide each and every case. That process starts with an open mind and a foundational commitment to the belief that either side might be right. Judge Kavanaugh then reads and analyzes every brief and re-reads every relevant precedent. And he insists that his clerks find the best version of every argument in the case, even when the lawyers themselves failed to do so.

In addition to the parties' arguments, Judge Kavanaugh also takes very seriously the views of his colleagues, the other judges, especially when they differ from his own. I can remember, too clearly, being corrected by Judge Kavanaugh once when I, fresh out of law school, spoke dismissively about a different judge's opinion on a case. I learned from that. Understanding Judge Kavanaugh's humility and respect for his colleagues is essential to understanding his identity as a judge.

Judge Kavanaugh completes his entire process from scratch, for every issue, in every case. It's no coincidence he's often the last person at work in the courthouse each day. But it's worth it. This process, as he says, *protects* us. It protects against snap decisions, shortcuts, and prejudgments. By never skipping a step – never giving short shrift to an argument or ignoring a precedent – Judge Kavanaugh ensures that his decisions are based on the law and the facts of each case and only on those things. That process also protects us, American citizens, from having unelected judges ruling based on their own predispositions or preferences.

Only after completing that process does the Judge decide what he thinks. And once he's decided, he is difficult to budge. He is independent, and stubbornly so. He cannot be pressured by his law clerks or colleagues, and he cannot be intimidated by other actors in Government. It's simply not part of his process.

Politics also have no place in Judge Kavanaugh's process. Having known the Judge for almost ten years, and having worked closely with him, I myself do not know what his views are on the political issues of the day. And as a law clerk, it would have been unthinkable to even mention the political implications of a case. In fact, had we known in advance how to decide a

case based on the parties or some policy goal, we might have skipped a few steps in the process and left the office a little earlier each day. But he never did, and so we never did.

For those reasons, if you want to know what Judge Kavanaugh is like as a *person*, his cases are not the best place to look – because he keeps his preferences out of them. His *process* reflects his fairness, work ethic, and judicial temperament – but the *outcomes* are based on the law, not his personal views.

But I can tell you that as a person, Brett Kavanaugh stands out. He has testified extensively this week, so I don't need to tell you how smart, thoughtful, and unflappable he is. When his guard is down – when he's not before this Committee or on television – he is the same way.

But in my view, those are not his most remarkable qualities. Instead, it's his every-day, universal, disarming kindness. I sometimes find myself saying that Judge Kavanaugh is “normal” or “approachable” – but those clichés are not quite right; instead, those are compliments designed for federal judges, who no one expects to be normal or approachable. Judge Kavanaugh is far, far nicer than normal, and far more approachable than almost anyone you will ever approach. He has an easy laugh and a great sense of humor. I myself am rarely funny, but he laughs at all of my jokes, including the ones at his expense. Although his credentials are elite, you would never know it to talk to him. The Judge is a regular at his neighborhood bar, for example, where he's partial to a Budweiser and a hamburger, and where the long-time bartender did not even know Brett Kavanaugh was a lawyer until he saw his nomination to the United States Supreme Court.

If he is confirmed, Judge Kavanaugh's humility, collegiality, and kindness will stand out on the Supreme Court.

Judge Kavanaugh is going to stand out on the Supreme Court for another reason as well, which is his support for women in the legal profession. Elite legal circles are predominantly male. The year I clerked on the Supreme Court, for example, 26 of the 39 law clerks were men. That is typical. Judge Kavanaugh, by contrast, has hired *more* women than men as law clerks. One year, all four of his clerks were women, which was a first for the D.C. Circuit Court of Appeals. That's something no Supreme Court Justice has ever done.

After hiring us, Judge Kavanaugh goes to bat for us. As the members of this Committee know, hard work and smarts are not always enough to reach the highest levels of your profession. Instead, it takes guidance from people who have been there and advocates willing to fight for you. Studies have shown that women often are at a disadvantage on those fronts. But Judge Kavanaugh is a force of nature. Thanks to his sponsorship, about 85% of Judge Kavanaugh's female clerks have obtained Supreme Court clerkships after working for him. We have clerked for Justices across the Court, including Justices Kagan, Breyer, and Sotomayor. We have served in all three branches of state and federal governments. We are professors, prosecutors, and non-profit attorneys. One of us is now even a judge herself. I know of no federal judge who has more effectively supported women in this profession than Brett Kavanaugh.

Ten years after I first met Judge Kavanaugh, I'm now figuring out how to be lawyer *and* a mom to three children aged three and under. I know firsthand how important it is to have an advocate like Brett Kavanaugh, and I attribute my still-vibrant legal career in large part to him.

I am only one of many. A significant number of Judge Kavanaugh's former clerks have been here for these hearings. We have uniformly recommended him for his character, his work ethic, and his kindness. The United States, and the American people, would be well served with Judge Kavanaugh on the Supreme Court.

Thank you.



**Written Testimony of Elizabeth (Liz) Weintraub
Senior Advocacy Specialist
Association of University Centers on Disabilities**

**Before the U.S. Senate Committee on the Judiciary
Regarding Nomination of Brett Kavanaugh to the Supreme Court of the United
States**

September 7, 2018

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**Written Testimony of Elizabeth (Liz) Weintraub
Senior Advocacy Specialist, Association of University Centers on
Disabilities
Before the U.S. Senate Committee on the Judiciary
Regarding Nomination of Brett Kavanaugh to the Supreme Court of
the United States**

September 7, 2018

Thank you, Chairman Grassley, Ranking Member Feinstein and the members of the Judiciary Committee for this honor to speak with you today about the nomination of Judge Kavanaugh to the US Supreme Court.

My name is Liz Weintraub. I want to tell you a little bit about who I am.

I was born in 1966 with cerebral palsy and an intellectual disability. Fifty-one years ago, I entered a world that had low expectations for me and people like me. Professionals told families like mine that they should put me in an institution. They said that I might distract attention away from my healthy sisters if I was raised at home, that I could never go to college, that I could never get married, that I could never have a career, and that I could never have my own family.

I am proud to tell you that, thanks to a loving family and so many wonderful friends who helped me believe in myself, I have achieved more than many thought possible for someone like me. I work full-time for the Association of University Centers on Disabilities as the Senior Advocacy Specialist. I have also been the host of "Tuesdays With Liz: Disability Policy for All," a weekly YouTube series for almost three years. I talk to people about policy in a way that people with intellectual disabilities can understand.

In addition to my title at work, I am very proud to say that I am a friend, a sister and an aunt. However, the title that I am the most proud of is being a wife to a wonderful man who also happens to have a disability.

My parents, who are no longer here, helped me to become the person I am today. I come from a family where the dinner table conversations were about politics and policy.

From an early age, I was always interested in policy. So when my parents asked me what I wanted to do for a job, I said, "I want to be a lobbyist." My parents thought that was funny, because they never imagined how a person with an intellectual disability could be a lobbyist. I wanted to go to college, like most of my friends did.

Instead, some professionals and my parents thought it would be a good idea for me to be placed into a private institution. Without me being a part of the decision, or even including me in the conversation, they decided that I should live in an institution.

In this place, I was surrounded by other people with disabilities, and separated from my family and from the community.

This was wrong.

My parents loved me. They were good people, and they were only listening to professionals who wanted what was best for me. But, instead of treating me like an adult with opinions and preferences and asking what I wanted, they made the decision for me, like a child.

I have spent the majority of my adult life fighting to be treated like an adult, to be taken seriously when I expressed my wishes, and only in the last fifteen years or so has that started to happen. People with intellectual disabilities have opinions and preferences and they should be recognized.

In the self-advocacy community, there is a saying that we hold very dear to our hearts, and that is "nothing about us without us." This means that if there is a decision of any kind about us, we expect to be part of the conversation; even to lead the conversation!

It is important to know that the idea of self-determination is for ALL people with disabilities, including those who communicate in ways that you all are not used to.

As a twenty-two-year-old woman, I was left out of a discussion that my family had about my future. And to make it worse, my parents asked a cousin to "babysit" me, so I would not go downstairs to hear what the meeting was about. I felt very upset. Just because of my disability, they excluded me from that meeting.

Excluding me from decisions about me has happened throughout my life. The institution where I lived got me a job, without consulting me, in a sheltered

workshop. A sheltered workshop is a place where people with disabilities are kept together, can be paid less than minimum wage, and are given work that is often not meaningful. When I told my family I hated the job at the workshop, I was moved to a job in a library and told that all I could ever be was a person who put books away on the shelf. I got to do that job, which was a great job, but that was not the job that I wanted, or a job that I chose.

Today, I live with my husband in the community and I have a career that I have always dreamt about. Now I get to come to Capitol Hill and advocate for policies that will improve the lives of me and my friends in the disability community. For four months earlier this year, I was honored to do a fellowship in the Senate so I could see what it was like being on the other side of the table from advocates. Now I am working to make it possible for more people with intellectual disabilities to work on the Hill.

Judge Kavanaugh's nomination matters to me.

When I read the decision in the Doe vs DC case, it made me very upset, because Judge Kavanaugh's decision completely disrespected people's rights and their freedom of choice because of their disability.

This is wrong.

All adults deserve to be treated like grown-ups and have the power to make decisions about their lives, especially when it is about their own bodies.

The lower court in Doe told the DC government that it needed to ask people with intellectual disabilities if they wanted certain medical treatments. That requirement respects the civil rights of people with disabilities.

Judge Kavanaugh could have supported the civil rights of people with disabilities and this requirement, *but he failed*. He said that when a medical decision needed to be made, people with intellectual disabilities did not even get a chance to say what they wanted.

Judge Kavanaugh took away the civil rights that the disabled women who brought that case were fighting for. Our country is founded on liberty and justice for all and *All means All!*

People with disabilities often face discrimination. Because of my intellectual disability, I am still sometimes treated like a child who cannot make my own decisions.

Recently, when my husband and I went to renew our lease, the apartment management company did not want to talk to us. Instead, they wanted to talk to my service provider or my sister. My husband and I both have professional jobs. We live on our own and pay our own rent. But people disrespect us and do not expect us to make our own decisions.

This year I was diagnosed with diabetes, a new health condition that comes with lots of new directions about my diet. I am sure that my service provider and my doctors may be worried about my ability to control my diabetes. I expect to be involved in all of the decisions about how I will manage this new condition, and I expect to be able to ask questions until I understand what I need to do. I am fearful that some people will try to make decisions without me, and I will fight that.

Everyone, regardless of their abilities, needs support and help to make decisions. When judges are appointed to the Supreme Court, they are supposed to protect the rights of all citizens of this great country, and that includes people with intellectual disabilities. We are adults who have civil rights, too.

Since the Supreme Court is the highest court of the land, I worry that if a Justice on the Supreme Court does not believe that we, as people with intellectual disabilities, CAN MAKE decisions for ourselves, then we will have the right to make those decisions taken away from us. We will not be able to make any kind of decision for ourselves.

That is why I am opposing Judge Kavanaugh.

I do not want to go back to when people like me were expected to live our lives in institutions, with no opportunities to have a meaningful life in the community.

People do not grow in institutions, and we all deserve a chance to grow as adults.

If Judge Kavanaugh is appointed to the Supreme Court, I am afraid that for generations to come my right to make decisions for myself will be taken away.

I ask you, for myself and as a representative of the disability community, when you vote on Judge Kavanaugh, please do not vote to take away the civil rights that I and other people with disabilities have fought for.

Thank you again for believing that I had something important to say about Judge Kavanaugh's nomination.

ON THE NOMINATION OF JUDGE BRETT KAVANAUGH TO SERVE
AS AN ASSOCIATE JUSTICE ON THE SUPREME COURT OF THE UNITED STATES

Testimony of
Adam J. White
The Hoover Institution, Stanford University
The Antonin Scalia Law School, George Mason University¹

Before the United States Senate,
Committee on the Judiciary

SEPTEMBER 7, 2018

Chairman Grassley, Ranking Member Feinstein, and members of the Committee, thank you for inviting me to testify in support of the President's nomination of Judge Brett Kavanaugh to serve as an Associate Justice on the Supreme Court of the United States.

Judge Kavanaugh would bring great integrity, independence, and intellect to the court, as exemplified by his twelve years of service as a federal judge. For that reason, I urge the Senate to give its advice and consent to his nomination.

My purpose in this testimony is to focus special attention on Judge Kavanaugh's deep record of thoughtful judicial opinions and legal scholarship on matters of administrative law—that is, on the relationship between administrative agencies and the courts, the Congress, and the president.

Other scholars already have catalogued Judge Kavanaugh's impressive record of opinions and scholarship on administrative law and related matters, and I highly recommend their summaries.² In my testimony, I want to focus your attention on the constitutional underpinnings of four major aspects of Judge Kavanaugh's record:

- (1) his method of interpreting laws;

¹ Research Fellow, Stanford University's Hoover Institution; Assistant Professor and Executive Director, C. Boyden Gray Center for the Study of the Administrative State, Antonin Scalia Law School, George Mason University.

² See especially Prof. Christopher Walker, "Judge Kavanaugh on Administrative Law and Separation of Powers," *SCOTUSblog.com* (July 26, 2018); Prof. Aaron Nielson, "Judge Kavanaugh and Justiciability," *SCOTUSblog.com* (Aug. 14, 2018); Prof. Jennifer Mascott, "Judge Kavanaugh: Interpretive Principles as a Way of Life," *Yale Journal on Regulation: Notice & Comment* (July 2, 2018).

- (2) his implementation of the Supreme Court’s doctrines of judicial “deference” to agencies’ legal interpretations;
- (3) his careful maintenance of constitutional limits on the use of judicial power to resolve legal cases and controversies; and
- (4) his particular attention to the profound constitutional ramifications of administrative agencies’ structure.

It is important to note at the outset that these aspects of administrative law have always been the subject of ongoing reform and recalibration. Many of the principles on which Judge Kavanaugh has written, including “*Chevron* deference” and “independent agencies,” reflect efforts by the Supreme Court to strike a balance between competing constitutional priorities—balances that the Justices have then gone on to reform and recalibrate in light of the nation’s subsequent experience in self-governance, as both Justices Scalia and Breyer observed in their early writings on *Chevron*.³

On the D.C. Circuit, Judge Kavanaugh has worked diligently to implement the Supreme Court’s doctrines, pursuant to the Constitution and Congress’s laws, even at times when the Supreme Court’s own precedents are less than clear. It is hard to imagine a judge better suited than Judge Kavanaugh to join the Justices in the work of maintaining and modernizing administrative law.

I. Judge Kavanaugh interprets the Constitution and statutes according to the text’s original meaning, as informed by canons of construction, structure, and history.

To understand Judge Kavanaugh’s approach to administrative law, it is important to begin with his approach to law in general. For Judge Kavanaugh, “the neutral and impartial rule of law” depends on judges

³ Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 363–372 (1986). I explored this theme, with respect to the late Justice Scalia’s writings, in “Scalia and *Chevron*: Not Drawing Lines, But Resolving Tensions,” *Yale Journal on Regulation: Notice and Comment* (Feb. 23, 2016). For a more detailed overview, see Adam J. White, “The Administrative State and the Imperial Presidency,” in Gary J. Schmitt *et al.* eds., *The Imperial Presidency and the Constitution* (2017); and Adam J. White, “Reforming Administrative Law to Reflect Administrative Reality,” in *Policy Reforms for an Accountable Administrative State* (National Affairs 2017).

approaching the interpretation of legal texts in the spirit of a neutral umpire, to the maximum extent possible.⁴

Of course, a text does not interpret itself; this requires not just an awareness of contemporaneous dictionaries, but also an understanding of the given constitutional or statutory term's use in its broader constitutional or statutory context.⁵

This can be challenging. “To be sure, the constitutional text does not answer all questions,” he once observed. “Sometimes the constitutional text is ambiguous, such as the Equal Protection and Due Process Clauses.” But, he stressed, genuine ambiguity is found “in far fewer places than one would think,” and judges “should not strain to find ambiguity in clarity.”⁶ The same is true for statutes.

As his judicial opinions show, he interprets statutes by employing the “traditional tools of statutory interpretation” — namely, “the statute’s text, history, structure, and context.”⁷ This approach is rooted deeply in our constitutional republic’s founding; as Alexander Hamilton observed in *Federalist 83*, “[t]he rules of legal interpretation are rules of COMMONSENSE, adopted by the courts in the construction of the laws.”⁸

And Judge Kavanaugh relies on these principles precisely because they reflect the appropriately limited role of a federal judge in our constitutional republic—as he explained a decade ago, before this Committee: “I believe very much in interpreting text as it is written and not seeking to impose one’s own personal policy preferences into the text of the document. *I believe very much in judicial restraint, recognizing the primary policymaking role of the legislative branch in our constitutional democracy.*”⁹

⁴ Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121–22 (2016).

⁵ Kavanaugh, *The Courts and the Administrative State*, 64 CASE WESTERN L. REV. 711, 717 (2014).

⁶ Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 NOTRE DAME L. REV. 1907, 1926–27 (2014).

⁷ *Loving v. IRS*, 742 F.3d 1013, 1021–22 (D.C. Cir. 2014). See also *PHH Corp. v. CFPB*, 839 F.3d 1, 43 (D.C. Cir. 2016) (“the statute’s text, history, context, and purposes”), *vacated* by 881 F.3d 75 (D.C. Cir. 2018); *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, slip. op. at 12 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from denial of rehearing *en banc*) (“the text, context, and structure of the . . . statute as a whole”).

⁸ *Federalist No. 83*.

⁹ Senate Judiciary Committee, *Confirmation Hearing on the Nomination of Brett Kavanaugh to be Circuit Judge for the District of Columbia Circuit*, S. Hrg. 109-435, at 45 (May 9, 2006) (emphasis added).

Indeed, “this goal is not merely personal preference but a constitutional mandate in a separation of powers system. . . . When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature’s Article I power.”¹⁰ As Alexander Hamilton warned in Federalist 78, the federal judiciary’s credibility and constitutional legitimacy depends on this judicial self-restraint.¹¹

II. On questions of judicial “deference” to agencies’ legal interpretations, Judge Kavanaugh has followed the Supreme Court’s own reform of the doctrine, with careful attention to constitutional principle.

Some of Judge Kavanaugh’s most significant work has involved the interpretation of statutes in light of the Supreme Court’s doctrine of “*Chevron* deference,” under which judges defer sometimes to agencies’ interpretations of statutes. Before examining some of his major *Chevron* cases, let me place his work in the context of the Supreme Court’s own shifting current of precedents that lower-court judges have been tasked with applying.

A. *Chevron*’s judicial critics—liberal and conservative

Courts have long grappled with the extent to which they should “defer” to federal agencies’ interpretations of the laws that the agencies administer.¹² Before *Chevron*, the Supreme Court justified a measure of deference to agencies’ interpretations in light of an agency’s “thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”¹³ But this vague and seemingly circular approach provided little guidance to lower-court judges, legislators, regulators, and the public.

Then, in the *Chevron* case thirty-four years ago, the Court reformulated earlier doctrine into a seemingly straightforward two-step framework, which may be summarized briefly as this: if Congress’s statute is clear (unambiguous), then the courts should interpret it without deference to the agency interpreting it; but if a statute is ambiguous, then the courts

¹⁰ Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. at 2120.

¹¹ Federalist No. 78 (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”)

¹² See Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908 (2017).

¹³ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

should defer to an agency's interpretation as long as the interpretation is reasonable. The Court adopted this approach, ceding significant policymaking discretion to the agencies, for two reasons: *first*, because ambiguous statutes generally leave room for policymaking discretion, and agencies tend to have better regulatory subject-matter expertise than courts do; and *second*, because in our constitutional system policymaking is the province of officials who are accountable to the people, and agency policymakers are at least somewhat more accountable to the people (through the President) than unelected and life-tenured federal judges are.¹⁴

For decades, the *Chevron* framework's staunchest defender was Justice Scalia.¹⁵ And for decades, Justice Scalia found himself defending *Chevron* against colleagues who sought to mitigate *Chevron* deference—such as Justice Souter,¹⁶ and Justice Breyer,¹⁷ and even *Chevron*'s own original author, Justice Stevens.¹⁸ And the risk of stating the obvious, *Chevron*'s early critics and reformers were not mainly conservatives.

Such efforts by Justice Breyer and the others to reform, recalibrate, and constrain *Chevron* deference eventually prevailed. First, in *Mead*, the Court limited the types of agency actions that can receive *Chevron* deference.¹⁹ Later, during the second Bush Administration, the Supreme Court issued significant opinions rejecting the Environmental Protection Administration's self-restrained interpretation of the Clean Air Act as to greenhouse gas emissions,²⁰ and rejecting the Justice Department's broad interpretation of the Controlled Substances Act as to physician-assisted suicide.²¹ Justice Scalia dissented from these opinions, criticizing efforts to reduce or sidestep *Chevron* deference.²² But the Court's changes to the

¹⁴ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984).

¹⁵ See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989); *U.S. v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting).

¹⁶ *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

¹⁷ *Christensen v. Harris County*, 529 U.S. 576, 596–97 (2000) (Breyer, J., dissenting).

¹⁸ *Id.* at 595 n.2 (Stevens, J., dissenting).

¹⁹ *Mead*, 533 U.S. at 227–31.

²⁰ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

²¹ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

²² *Massachusetts*, 549 U.S. at 552–53, 558–60; *Gonzales*, 546 U.S. at 294.

Chevron approach won praise from scholars who saw the Court as reducing deference in order to promote technocratic expertise.²³

In recent years, however, *Chevron* deference has come under increasing fire not just from liberal judges, but also from conservative judges such as Justice Thomas. Where others sought to reform *Chevron* to promote technocratic expertise, Justice Thomas and others now seek to reform *Chevron* to promote the rule of law and judges' duty to interpret the law independently and neutrally.²⁴

In sum, *Chevron's* critics have been found across the entire spectrum of judicial ideology. Even Justice Scalia, *Chevron's* staunchest defender, expressed late in life some public and private doubts about *Chevron's* sustainability. As his friend Ronald Cass wrote recently, "[m]uch as he admired the framework *Chevron* should have been, he had come to be more skeptical of the benefit of the decision, and colleagues whose views on separation of powers closely aligned with his have clearly called for abandonment of *Chevron*."²⁵

Arguably the Court's most significant modification of *Chevron* came in a recent case involving the Obama Administration's Affordable Care Act subsidies: in *King v. Burwell*, the Supreme Court affirmed the Administration's policy but rejected the use of *Chevron* deference in the case. As the Court's majority opinion explained, the legal issue at hand (regarding the availability of subsidies for insurance purchased on federal insurance exchanges) was a statutory issue of such "deep 'economic and political significance[.]" and so "central to this statutory scheme," that the Court

²³ Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 Sup. Ct. Rev. 51, 66 (2007) ("for the current Court insulating expertise from politics is a greater imperative than forcing democratic accountability").

²⁴ See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising that judgment, forcing them to abandon what they believe is 'the best reading of an ambiguous statute' in favor of an agency's construction. . . . It thus wrests from Courts the ultimate interpretative authority to 'say what the law is,' [citing *Marbury v. Madison*], . . . and hands it over to the Executive. . . . Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies. U.S. Const., Art. III, § 1.>").

²⁵ Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & Pol. 277, 288 (2017).

would not presume that Congress had “wished to assign that question to an agency” rather than to judges.²⁶

This was seen immediately as a significant new limitation of *Chevron* deference.²⁷ And this reform of *Chevron*, like several before, came primarily from the Court’s liberal justices, not its conservatives: Justices Ginsburg, Breyer, Sotomayor, and Kagan all joined the Chief Justice’s majority opinion, along with Justice Kennedy; Justices Scalia, Thomas, and Alito did not.

Given the context of these hearings, it is fitting to observe that one of Justice Kennedy’s last judicial opinions focused on precisely the need to significantly reform *Chevron*, to reorient it back toward the Constitution and the rule of law. Surveying recent cases in which the Court deferred to agencies’ statutory interpretations, Justice Kennedy wrote:

*The type of reflexive deference exhibited in some of these cases is troubling. And when deference is applied to other questions of statutory interpretation, such as an agency’s interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still. . . . Given the concerns raised by some Members of this Court . . . it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie Chevron and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary.*²⁸

I offer this background information to illustrate the legal context surrounding Judge Kavanaugh’s recent years on the D.C. Circuit. In faithfully applying the Supreme Court’s binding precedents on *Chevron*, Judge Kavanaugh’s responsibility has been to apply *Chevron* in light of the Court’s own shifting justifications for the doctrine—especially *King*’s prominent withholding of *Chevron* deference from statutory questions of

²⁶ *King v. Burwell*, 135 S. Ct. 2480, 2488–89 (2015). And, the Court added, “[i]t is especially unlikely that Congress would have delegated this decision to the IRS, which has no expertise in crafting health insurance policy of this sort.” *Id.* at 2489 (emphasis in original).

²⁷ See, e.g., Adam J. White, “Defining Deference Down,” *SCOTUSblog* (June 25, 2015) (“After *King v. Burwell*, the ‘major questions’ doctrine is emphatically a *Chevron* Step Zero question – a welcome development in and of itself. Before even beginning to apply *Chevron*’s two-step approach, the courts will need to ask whether the policy matter at hand is of such economic or political significance that it cannot be presumed to have been committed to the agency’s discretion by Congress.”).

²⁸ *Pereira v. Sessions*, 138 S. Ct. 2105, 2120–21 (2018) (emphasis added).

“deep ‘economic and political significance’ . . . central to [the] statutory scheme.”

B. Judge Kavanaugh’s application of *Chevron* pursuant to the Supreme Court’s precedents

As Judge Kavanaugh conceded frankly in his recent *Harvard Law Review* article, one of the challenges of applying *Chevron* is that its two-step framework requires judges to draw lines between “ambiguous” and “unambiguous” statutes, leaving a lot of room for judicial discretion and disagreement: “the doctrine is so indeterminate—and thus can be antithetical to the neutral, impartial rule of law—because of the initial clarity versus ambiguity decision.”²⁹

Because he is a textualist, Judge Kavanaugh “tend[s] to be a judge who finds clarity more readily than some of my colleagues.”³⁰ When he explained this to the Heritage Foundation, he was echoing Justice Scalia’s own seminal explanation of *Chevron*, in which Scalia stressed that textualist judges are more likely to find statutes to be clear and unambiguous, and thus more likely to decide statutory cases in *Chevron*’s “Step One,” rather than proceeding to *Chevron*’s deferential “Step Two” in which the judge will more often defer to an agency’s “reasonable” interpretation.³¹

Judge Kavanaugh’s application of *Chevron* seems also guided in part by his awareness that judges are often at risk of being intimidated or overwhelmed by the executive branch and its agencies. As he has explained, there are times “when judges need to show some fortitude and backbone in those cases where the independent judiciary has to stand up to the mystique of the presidency and the executive branch.”³² His warning echoes Alexander Hamilton’s own warning, in *Federalist 78*, that the judiciary branch “is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches,” which is why judicial independence may “be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.”³³ The Constitution gives judges independence so that they may judge cases independent of political pressure.

²⁹ 129 HARV. L. REV. at 2152–54.

³⁰ Kavanaugh, “The Role of the Judiciary in Maintaining the Separation of Powers,” Heritage Foundation Lecture No. 1284 (Oct. 25, 2017), at 5.

³¹ Scalia, 1989 DUKE L.J. at 520–21

³² Kavanaugh, 64 CASE WESTERN L. REV. at 713–14.

³³ *Federalist No. 78*.

Kavanaugh's most significant regulatory cases exemplify these principles, in terms of his interpretive integrity and independence.

In *Coalition for Responsible Regulation v. EPA*, where Judge Kavanaugh dissented from the Court's denial of *en banc* rehearing, he wrote an opinion involving the EPA's unprecedented assertion of regulatory power to impose its permit-based regulatory regime on greenhouse gases from "stationary sources"—*i.e.*, manufacturing plants, power plants, but also small businesses that the Clean Air Act's drafters explicitly stated would be exempt from this form of regulation. The EPA asserted that all of them were subject to the EPA's new permitting regime (tempered only by the EPA's own exclusive enforcement discretion), but Judge Kavanaugh concluded that this was a violation of the agency's own statutory limits. Applying a variety of statutory tools and canons of construction—"statutory text, the absurdity principle, the statutory context as demonstrated by related statutory provisions, the overarching objectives of the statute, the major unintended consequences of a broader interpretation"—he concluded that the relevant Clean Air Act provision as a whole "overwhelmingly indicates that the" agency's program was unlawful. He did not need to reach the *Chevron's* deferential second step, because he concluded that the statute clearly did not support the EPA's assertion of power.³⁴ His approach reflected the same approach employed by the Supreme Court in *Brown & Williamson*, a famous decision rejecting the FDA's assertion of regulatory power over tobacco products: "Courts do not lightly conclude that Congress intended such major consequences absent some indication that Congress meant to do so," he wrote. "Here, as elsewhere, we should not presume that Congress hid an elephant in a mousehole."³⁵

While Judge Kavanaugh's analysis did not persuade his D.C. Circuit colleagues (it was, after all, his dissenting opinion), he was quickly vindicated by the Supreme Court, which subsequently heard the case and ruled against the EPA. The Supreme Court's majority opinion (written by Justice Scalia) ultimately decided the case in *Chevron's* second step rather than its first step—that is, the Court concluded that the statute was ambiguous but that the EPA's interpretation was patently unreasonable. Yet, like Kavanaugh, the Supreme Court concluded that EPA's interpretation of the Clean Air Act was unreasonable "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-

³⁴ *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *18 (D.C. Cir. 2012) (Kavanaugh, J., dissenting from reh'g en banc). In the interests of disclosure, I note that I was a co-author of briefs filed in this litigation.

³⁵ *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–161 (2000)).

extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ . . . we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”³⁶

Judge Kavanaugh demonstrated a similar approach in his opinion in the FCC’s “net neutrality” litigation. Once again dissenting from the D.C. Circuit denial of *en banc* rehearing, Judge Kavanaugh wrote at length to explain why the FCC’s sudden discovery of vast power, asserting unprecedented regulatory authority over broadband Internet access companies, lacked basis in the FCC’s statutes.³⁷ In his opinion, he highlighted many of the Supreme Court precedents mentioned above, including *Gonzales*, *Brown & Williamson*, *Utility Air Regulatory Group*, and *King v. Burwell*, in which the Court either refused to apply the *Chevron* framework or applied the framework in such a way as to not defer to an agency’s implausible statutory interpretation attempting to justify an assertion of immense regulatory power.³⁸

These are perhaps Judge Kavanaugh’s two most significant regulatory cases involving the interpretation of a statute, but there are others. In *Loving v. IRS*, Judge Kavanaugh wrote for the majority striking down the IRS’s assertion of authority to regulate tax-preparers; he held that the relevant statute, which only authorizes the IRS to regulate taxpayers’ “representatives . . . before the Department of the Treasury,” did not reach professionals who merely fill out tax forms. Much like the net neutrality and greenhouse gas cases, Judge Kavanaugh’s majority opinion reiterated the Supreme Court’s instruction in *Brown & Williamson*: courts should not lightly presume that Congress uses vague statutes to subtly vest agencies with immense power to decide matters of major economic or political significance.³⁹

And, of course, there are cases in which he ruled in favor of regulatory power, sometimes even over the agency’s attempt to under-enforce a statute. In *Center for Biological Diversity v. EPA*, Judge Kavanaugh joined the majority opinion and wrote a concurring opinion concluding that the EPA’s statute required the agency to regulate “biogenic carbon dioxide” in the

³⁶ *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2444 (2014) (quoting *Brown & Williamson*, 529 U.S. at 159).

³⁷ *U.S. Telecom. Ass’n v. FCC*, 855 F.3d 381, 417–25 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from reh’g en banc). In the interests of disclosure, I note I was a co-author of briefs filed in this litigation.

³⁸ *Id.* at 420–21 & n.2.

³⁹ *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

course of the agency's broader greenhouse gas regulatory program (that is, the limited portions of the program that had survived the Supreme Court's decision striking much of the program down). "As a policy matter, EPA may have very good reasons to temporarily exempt biogenic carbon dioxide from the . . . permitting programs," he wrote. "But Congress sets the policy in the statutes it enacts; EPA has discretion to act only within the statutory limits set by Congress."⁴⁰

In fact, Judge Kavanaugh has actually been *more* favorable to agencies' statutory interpretations than other judges. Drawing from their ongoing and exhaustive study of over 1,600 appellate cases, Professors Kent Barnett, Christina Boyd, and Christopher Walker recently reported that "Kavanaugh's overall 75 percent rate of support for agencies in these cases was slightly above the overall average for all judges in our data at 71 percent."⁴¹

Judge Kavanaugh's judicial opinions applying *Chevron* and the tools of statutory interpretation, and his legal scholarship and speeches highlighting some of the challenges inherent in *Chevron*'s current state, have attracted criticism from some who attempt to characterize him as anti-regulatory. But the historical background to his decisions and articles—namely, the evolving body of Supreme Court precedents that Judge Kavanaugh and other lower-court judges are bound to obey—makes clear what Judge Kavanaugh actually has done. In an era when *Chevron* already was being reformed and questioned by conservative and liberal Justices and scholars alike, Judge Kavanaugh applied the Court's precedents and concluded that some significant assertions of unprecedented regulatory powers by administrative agencies were not plausibly rooted in the decades-old statutes that agencies were citing to justify their newly-discovered vast regulatory powers.

It is, in the end, an approach to administrative law that focuses first and foremost on *Congress*, trusting it to remain the branch of government vested by the Constitution with our government's legislative powers. Judge Kavanaugh himself put this point best, on the second day of these hearings, in response to a question from Senator Hatch:

[M]y administrative law jurisprudence is rooted in respect for Congress: have you passed the law to give the authority [to the

⁴⁰ *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

⁴¹ Kent Barnett, Christina L. Boyd, & Christopher J. Walker, "Judge Kavanaugh, *Chevron* Deference, and the Supreme Court," *The Regulatory Review* (Sept. 3, 2018). The authors conclude that Judge Kavanaugh was slightly more deferential to conservative agency interpretations than to liberal ones, but they note that this slight difference was consistent with the similar trends for both conservative and liberal judges.

agency]? I've heard it said that I'm a skeptic of regulation. I am not a skeptic of regulation at all. I am a skeptic of *unauthorized* regulation, of illegal regulation, of regulation that's outside the bounds of what the laws passed by Congress have said. *And that is what is at the root of our administrative law jurisprudence.*

III. Judge Kavanaugh respects the courts' crucial but limited power to resolve policy-related disputes.

Like all parts of our government, the judicial branch can only exercise the powers that have been granted to it by our Constitution. This means, most importantly, that courts cannot singlehandedly reach out to decide legal issues by their own volition; instead, courts can only decide legal issues in the course of deciding the “cases” and “controversies” committed to their jurisdiction by the Constitution and statutes.⁴²

In recent decades, the Supreme Court applied this principle especially through the rule of “standing,” by which a plaintiff can bring a lawsuit in the federal courts only if he has suffered an actual injury that has been caused by the defendant and which can be remedied by the court.⁴³

This, too, embodies and reinforces our Constitution's separation of powers. As Judge Kavanaugh has emphasized in various judicial opinions, “[t]he standing doctrine helps ensure that the Judicial Branch does not perform functions assigned to the Legislative or Executive Branch and that the judiciary is the proper branch of government to hear the dispute.”⁴⁴ The standing doctrine “protects democratic government by requiring citizens to express their generalized dissatisfaction with government policy through the Constitution's representative institutions, not the courts.”⁴⁵

“To be sure,” he has observed, “courts may not shirk their duty to ‘say what the law is’ in cases that are properly before them,” but “history and precedent counsel caution before reaching out to decide difficult constitutional questions too quickly, especially when the underlying issues are of lasting significance.”⁴⁶

At the same time, Judge Kavanaugh has also voiced concerns in the other direction—namely, that the standing doctrine, as elaborated in the D.C. Circuit, has become so esoteric that it risks closing courthouse doors to

⁴² See U.S. Const., art. III, § 2.

⁴³ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

⁴⁴ *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1289 (D.C. Cir. 2007).

⁴⁵ *Coalition for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1278–79 (D.C. Cir. 2012).

⁴⁶ *Seven-Sky v. Holder*, 661 F.3d 1, 53 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

genuinely injured parties. In *Morgan Drexen v. CFPB*, for example, he dissented from the majority's conclusion that a party directly regulated by the agency lacked standing to challenge the agency's constitutionality. "We have a tendency to make standing law more complicated than it needs to be. When a regulated party . . . challenges the legality of the regulating agency or of a regulation issued by that agency, 'there is ordinarily little question' that the party has standing, as the Supreme Court has indicated."⁴⁷

Questions of court jurisdiction can require judges to draw precise lines, often requiring highly fact-specific judgments. Judge Kavanaugh has been particularly attentive to these rules. I know firsthand; in one case, for which I was on the plaintiffs' legal team, Judge Kavanaugh wrote the majority opinion affirming a plaintiff's standing to litigate one claim, but denying the same plaintiff's standing to litigate another claim.⁴⁸ Needless to say, I think that he got that case just half-right. But I remain impressed by the amount of care he dedicated to the jurisdictional issues in that case. It was characteristic of his career on the D.C. Circuit, taking care to maintain the Constitution's limited grant of power to courts, preserving the courts' crucial constitutional role while not allowing the courts to encroach upon the legislative and executive branches' own constitutional powers and duties.⁴⁹

IV. Judge Kavanaugh has dedicated particular attention to the profound constitution ramifications of agency structure.

Finally, Judge Kavanaugh's record on administrative law reflects the great attention he pays to questions of constitutional structure. Just as the Constitution vests legislative powers in Congress and judicial powers in the courts, it vests the executive power in the President and also imposes upon the President the constitutional duty to "take Care that the Laws be faithfully executed."⁵⁰

No president can accomplish this singlehandedly, so these constitutional powers and duties necessarily require that that the President retain sufficient control of agency personnel. Thus, in *Myers v. United States* (1926), the Supreme Court—in an opinion written by Chief Justice Taft, who knew the presidency firsthand—held that the Constitution prohibited

⁴⁷ *Morgan Drexen v. CFPB*, 785 F.3d 684, 698 (D.C. Cir. 2015) (Kavanaugh, J., dissenting). See also *Grocery Mfrs. v. EPA*, 693 F.3d 169, 318–28 (D.C. Cir. 2012) (Kavanaugh, J., dissenting).

⁴⁸ *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

⁴⁹ Again, Judge Kavanaugh's record on these and related issues is detailed by Professor Nielson, in "Judge Kavanaugh and Justiciability," *SCOTUSblog.com* (Aug. 14, 2018).

⁵⁰ U.S. Const. art. II.

Congress from legislating statutory restrictions on the president's ability to fire executive officers at-will.⁵¹

But a decade later, in *Humphrey's Executor* (1935), the Court prescribed a different standard for the FTC and other "independent" regulatory commissions: when Congress creates a commission whose "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative," the commission's "members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience,'" and therefore Congress can lawfully prescribe at least some statutory limitations on the President's power to fire the commissioners.⁵²

Still more decades later, when the Supreme Court held in *Morrison v. Olson* that the Constitution leaves room for Congress to place similar limitations on the removal of the "Independent Counsel," the Court downplayed *Humphrey's Executor's* use of categories such as "purely executive," "quasi legislative," or "quasi judicial," and concluded that statutory removal restrictions should be evaluated in light of their encroachment upon the President's authority or their burdening of the President's power to control the particular officer.⁵³

As a lower-court judge, Judge Kavanaugh has been tasked with following these precedents. (And, as I indicate below, he has followed them.)

But while following those precedents, he has recognized that Congress's imposition of statutory limitations on a President's power to remove officers comes at a cost: it mitigates officers' accountability to the President, and thus mitigates their accountability to the people. "Independent agencies are constitutional under *Humphrey's Executor v. United States*," he observed in one article, "[b]ut what is constitutional is not always wise. . . . [T]his independence has clear costs in terms of democratic accountability."⁵⁴ He stressed that "in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control," particularly the Federal Reserve Board of Governors, but "independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the

⁵¹ *Myers v. U.S.*, 272 U.S. 52 (1926).

⁵² *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935).

⁵³ *Morrison v. Olson*, 487 U.S. 654, 689–94 (1988).

⁵⁴ Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1472 (2009).

Framers' understanding that one person would be responsible for the executive power."⁵⁵

He reiterated these fundamental constitutional concerns in a case involving the Nuclear Regulatory Commission, but recognized that the Court had long ago settled the question. As he put it, *Humphrey's Executor* "lives on."⁵⁶

To summarize, *Myers*, *Humphrey's Executor*, and *Morrison* strike a delicate balance between the President's powers and responsibilities, and the goal of insulating certain classes of officers from direct and unconstrained presidential control. In two particular cases, Judge Kavanaugh worked to apply these precedents' principles to novel agency structures presented by recent legislation.

In the first case, Judge Kavanaugh evaluated the constitutionality of the Sarbanes-Oxley Act's "Public Company Accounting Oversight Board," an independent regulatory body subject to the limited oversight of the Securities and Exchange Commission, which in turn has long been assumed to enjoy an FTC-like degree of independence from the President's control. As he described it, the PCAOB presented a "case of *Humphrey's Executor* squared"—that is, one independent agency created inside of another.⁵⁷

Because the PCAOB's double-independence went beyond the FTC single-layer of independence affirmed in *Humphrey's Executor*, and it also went beyond the impositions on presidential control affirmed in *Morrison*, Judge Kavanaugh and his colleagues were left to conclude whether this novel arrangement was constitutional. His colleagues concluded that the statutory structure was constitutional, but Judge Kavanaugh disagreed. As he explained, "*Humphrey's Executor* and *Morrison* represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power," and when presented with statutory structures for agency independence going beyond what the Supreme Court has allowed, the lower courts should "hold the [Supreme Court's] line and not allow encroachments on the President's removal power beyond what *Humphrey's Executor* and *Morrison* already permit."⁵⁸

⁵⁵ *Id.*

⁵⁶ *In re Aiken*, 645 F.3d 428, 439-42 (D.C. Cir. 2011) (Kavanaugh, J. dissenting).

⁵⁷ *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 686 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

⁵⁸ *Id.* at 698.

His colleagues on the D.C. Circuit disagreed, but the Supreme Court vindicated his analysis. It adopted Judge Kavanaugh’s approach in a decision declaring the PCAOB’s double-layer of statutory independence unconstitutional.⁵⁹

The same principles informed Judge Kavanaugh’s more recent opinion involving the Dodd-Frank Act’s Consumer Financial Protection Bureau—an agency whose director (like the FTC) enjoys independence from the President, but who is (unlike the FTC) a single director instead of a multimember commission. In *PHH v. CFPB*, Judge Kavanaugh wrote the D.C. Circuit’s initial majority opinion holding this novel combination to be unconstitutional. As Judge Kavanaugh recognized, the CFPB’s structure satisfied neither *Morrison*’s nor *Humphrey’s Executor*’s exceptions to the Constitution’s general rule of presidential control: unlike *Morrison*, the CFPB Director’s powers go far beyond the limited powers of the old Independent Counsel, limits that were central to the Supreme Court’s affirmance of the Counsel’s independence. And unlike *Humphrey’s Executor*, the CFPB Director was not created to be the kind of “quasi legislative” or “quasi judicial” multimember body—precisely the grounds for the Court allowing the FTC to enjoy independence that it had previously withheld from traditional executive officers in *Myers*.⁶⁰

Just as he did in the PCAOB litigation a few years earlier, Judge Kavanaugh’s majority opinion concluded that because the CFPB’s structure and powers differed significant from the independent commissions and officers previously affirmed by the Supreme Court, the appropriate course of action would be to maintain the lines already drawn by the Supreme Court, and declare the CFPB’s independence an unconstitutional violation of the Constitution’s vesting of executive power and responsibilities in the President.⁶¹

The D.C. Circuit subsequently reheard the case *en banc*, vacated the original majority opinion, and affirmed the CFPB’s constitutionality.⁶² I think this was a mistake. Judge Kavanaugh’s original majority opinion had the better of the argument, because it respected the original lines drawn by the Supreme Court—it recognized that the categories of agency “independence” allowed by the Court in *Humphrey’s Executor* and *Morrison* were intended to be limited exceptions to the Constitution’s overarching vesting of executive

⁵⁹ *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010).

⁶⁰ *PHH Corp. v. CFPB*, 839 F.3d 1, 17–21 (D.C. Cir. 2016). In the interests of disclosure, I note that was a co-author of a brief filed in this litigation.

⁶¹ *Id.* at 21–36.

⁶² *PHH Corp. v. CFPB*, 881 F.3d 75, (D.C. Cir. 2018).

power and responsibility in the President, and that to affirm such independence to the significantly different CFPB would strike a very different balance to the detriment of fundamental constitutional principles.

Despite the Supreme Court's vindication of Kavanaugh's approach in the PCAOB litigation, and other courts' adoption of his approach in the CFPB litigation,⁶³ some critics still attack Judge Kavanaugh's opinion in the CFPB case—his attempt to preserve the balance that the Supreme Court struck in *Myers*, *Humphrey's Executor*, and *Morrison*, and that it refused to extend still further in *Free Enterprise Fund*). Such criticism reflects the critics' misjudgment, not Judge Kavanaugh's.

Even when particular Presidents are willing to sign legislation ceding their power (and transferring their responsibility) to independent officers like the CFPB Director, the courts must take special care to preserve the Constitution's structure.

Judge Kavanaugh's critics on this point forget the warning of Justice Robert Jackson, in one of his most famous opinions—the “Steel Seizure Case,” in which the President attempted to wrest power away from the Congress. Justice Jackson recognized that Congress itself might not be willing to “prevent power from slipping through its fingers.”⁶⁴ The same can be said, at other moments in our history, of Presidents—as Chief Justice Roberts's majority opinion in the PCAOB case observed.⁶⁵

But as Justice Jackson urged, when faced with threats to the Constitution's structural institutions, “*it is the duty of the Court to be last, not first, to give them up.*”⁶⁶

* * *

Judge Kavanaugh's administrative law opinions and other writings embody Justice Jackson's famous warning in *Youngstown*.⁶⁷ True,

⁶³ *CFPB v. RD Legal Funding, LLC*, --- F. Supp. 3d ---, 2018 WL 3094916 (S.D.N.Y. 2018); *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018) (regarding the FHFA).

⁶⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

⁶⁵ *Free Enter. Fund*, 561 U.S. at 497 (“Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents . . . nor on whether ‘the encroached-upon branch approves the encroachment.’”).

⁶⁶ *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring).

⁶⁷ See also Kavanaugh, 64 CASE WESTERN L. REV. at 714 (“Fortitude and backbone are important characteristics, I think, for our court and courts generally in our separation of

administrative law often involves the striking of pragmatic balances between the Constitution's grants of judicial power, legislative power, and executive power. But judges and justices must always interpret the law with an eye to the constitutional principles that undergird our republic.

As a lower-court judge, Judge Kavanaugh has faithfully applied the Supreme Court's precedents. And in cases where those precedents are not squarely on-point, he has exercised his discretion in light of deeper constitutional principle. Indeed, in cases such as the PCAOB litigation, or the greenhouse gas litigation, his opinion pointed the way toward the Supreme Court Justices' own eventual decision.

If he is appointed to the Supreme Court, then I expect that he will continue the Court's efforts to maintain a body of administrative law that obeys the Constitution's text, and that is mindful of our Constitution's principles, institutions, and history.

Thank you for the opportunity to testify today.

powers structure. Of course, we all think of Justice Robert Jackson in the *Youngstown* case, a role model for all executive branch lawyers turned judges.”).

**Questions for the Record for Brett M. Kavanaugh
Submitted by Senator Richard Blumenthal
September 10, 2018**

1. In a response to a question from Senator Cruz regarding your dissenting opinion in *Priests for Life v. HHS*, you referred to contraceptives as “abortion-inducing drugs.”
 - Do you believe contraceptives are abortion-inducing drugs?**
 - If yes, which ones?**
 - What is the basis for this belief?**

2. During the hearing, Fred Guttenberg, the father of a slain Parkland student, approached you to shake your hand. Video footage of the incident shows you turning around and walking away as soon as he greets you.
 - Did you ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**
 - Did anybody acting at your request or on your behalf ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**

3. **Did you participate in practice questioning or mooting with any Senators or Senate staff prior to the hearing? If so, whom?**

4. **Has anyone paid off any of your debts in the last 10 years? Who? Have you ever incurred any debt worth over \$5000 from gambling?**

5. **Can the President offer someone a pardon in exchange for a promise not to testify against him?**

6. During the hearing, you testified that you were following the so-called “Kagan rule” of refusing to give either a “thumbs up” or “thumbs down” to any Supreme Court precedents. Yet you told Senator Coons that *Morrison v. Olson* was “wrong.” You claimed in a conversation with Paul Gigot at the American Enterprise Institute that *Morrison v. Olson* had “been effectively overruled” and you “would put the final nail in” it.
 - **Why did you make an exception for *Morrison* by giving it a “thumbs down” during the hearing?**
 - Which case or cases effectively overruled *Morrison*?**

7. During the hearing, you stated that *Humphrey's Executor* was “entrenched precedent.” You’ve described *Roe v. Wade* as “existing precedent.”
 - **Please explain the distinction between “entrenched precedent” and “existing precedent.”**

8. During Independent Counsel Kenneth Starr’s investigation of President Clinton, there were numerous accusations that Mr. Starr’s staff leaked grand jury information to the press. At least one reporter, Dan Moldea, asserts that you were the designated person that Mr. Starr made available to the press.
 - **Did you leak protected grand jury information to the press when you were on Mr. Starr’s staff?**
 - To the extent you spoke with reporters on background or off the record about the Starr investigation, are those reporters free to describe their interactions with you?**

Will you take this opportunity to explicitly and clearly release them from any commitment to keep their communications with you secret?

9. In your dissenting opinion in *Priests for Life v. HHS*, you discuss why courts must accept employers' claims that their religious beliefs have been substantially burdened even when those claims may be based on beliefs that are incorrect either as a legal or a factual matter. You quoted a lower court judge to say that as long as an employer's beliefs are sincere, courts have "no choice" but to accept an employer's claim that its religious beliefs have been substantially burdened.
 - **When should courts refuse to defer to a plaintiff's claim that his or her religious beliefs have been substantially burdened by a law?**
 - **How should a court determine whether the burden placed on a plaintiff's religious beliefs is substantial?**

10. The Supreme Court stated in *Burwell v. Hobby Lobby* that the impact of a religious person's actions on third parties is relevant in deciding a RFRA claim. The Court said, "[I]n applying RFRA 'courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.'" Justice Kennedy's concurrence in this case stated that, in deferring to the right to religious exercise, courts may not "unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling."
 - **How do you take "adequate account" of the burdens on "non-beneficiaries" in analyzing a religious group's requested accommodation to a law?**

11. After the Supreme Court's decision in *Hobby Lobby*, various entities have claimed that they should be exempt from laws under RFRA because of their religious beliefs. In many cases, they seek to be exempt from antidiscrimination laws. Businesses that serve the public are also claiming that they should be exempt from antidiscrimination laws under the First Amendment's free exercise clause. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court reaffirmed that states may continue to enforce anti-discrimination protections for LGBTQ individuals so long as they are "neutral" towards the religious viewpoint.
 - **How would you evaluate whether a government action or law is "neutral" towards a religious viewpoint in assessing a claim made under the First Amendment's free exercise clause?**

12. In *Bluman v. FEC*, you authored the majority opinion for a three-judge panel rejecting a constitutional challenge to the foreign national ban on campaign contributions under 52 U.S.C. § 30121. The challenge was brought by individuals residing in the U.S. on temporary visas who wished to donate to certain candidates and to spend money on flyers expressly advocating for President Obama's re-election. You acknowledged the government's interest in preventing foreign interference in elections, but you also went out of your way to interpret the ban to only apply to "certain form[s] of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to *expressly advocate for or against* the election of a candidate." You went on to declare that "[t]his statute, as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate."

- **The intelligence community has determined that Russia’s election interference in the 2016 elections included spending that can be described as “issue advocacy.” Is it your position that current law cannot prevent such election spending?**
13. In the last decade, the Supreme Court has repeatedly rejected First Amendment challenges to laws requiring political disclosure—from a federal statute requiring the reporting of donors financing candidate-related ads to a state measure allowing for the disclosure of signatories of ballot initiative petitions. Justice Scalia has stated in a 2010 opinion that “requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously. . . . This does not resemble the Home of the Brave.” Notably, even in the *Citizens United* decision, eight justices voted to uphold the federal electioneering communications disclosure law that requires groups to report their donors if they run broadcast ads referencing federal candidates shortly before a primary or general election.
- Are there constitutional limits on political disclosure laws?**
 - Can campaign finance disclosure laws regulate speech other than express advocacy?**
14. In *McConnell v. FEC*, the Court upheld the so-called “soft money” limits on contributions to federal party committees on grounds that they prevented corruption and the appearance of corruption—this part of the decision is still good law today. In so holding, the Court rejected a “crabbed view of corruption” that “limit[ed] Congress’ regulatory interest only to the prevention of . . . actual or apparent quid pro quo corruption,” declaring that this view “ignores precedent, common sense, and the realities of political fundraising.” More recently in *Citizens United* and *McCutcheon*, however, the Court spoke of the corruption interest in narrower terms, suggesting that campaign finance laws could “target” only “what we have called ‘quid pro quo’ corruption.” As Chief Justice Roberts wrote in *McCutcheon*, “government regulation may not target the general gratitude a candidate may feel towards those who support him or his allies, or the political access such support may afford.”
- **What is the proper conception of corruption—the one articulated in *McConnell*, or the one articulated in *Citizens United*/*McCutcheon*?**
 - Do you have a different theory that would reconcile the two articulations of corruption?**
15. You have described your role as White House Staff Secretary from July 2003 to May 2006 as “the most interesting and, in many ways, among the most instructive” work you did in preparation for the federal bench. As you know, President George W. Bush made it a priority to get an immigration reform bill passed during his second term.
- **As White House Staff Secretary, did you have any role in the President’s immigration agenda?**
 - If yes, what was the nature of your role?**
 - Did you advocate in favor or against any immigration policies as part of this role?**
 - If yes, what were those positions?**
16. Your dissent in *United States Telecom Association v. Federal Communications Commission* has two main points. First, you stated that there is no clear congressional authorization for “major rules” of the kind the FCC adopted. You argued that Congress has never adopted net-neutrality legislation or clearly authorized the FCC to regulate Internet service providers (ISPs) as common

carriers. Second, you argued that the net-neutrality rule violated the First Amendment rights of ISPs, stating that the rule infringes on the editorial discretion of ISPs.

- **Does any issue relating to the economy that creates a “major rule” require a specific congressional authorization for agencies to promulgate regulations?**
- **Does the absence of a “major rule” mean that regulatory agencies are barred from protecting public interests that generally fall under their enabling acts?**
- How and in what areas can ISPs exercise editorial discretion?**

17. For nearly sixty years since its inception in 1925, the Federal Arbitration Act (FAA) was presumed to apply only in cases involving commercial disputes between businesses with relatively equal bargaining power. The Supreme Court has reinterpreted the FAA broadly in recent years, resulting in the proliferation of arbitration agreements in consumer, financial, and employment contracts.

- Are there any limits to when individuals can be subjected to forced arbitration?**
- If so, what are they?**

18. You were the lone dissenter in *Lorenzo v. SEC*. Your opinion articulated a standard for proving intent in securities fraud cases that would create an extremely high bar for plaintiffs. Specifically, you stated that only the original “maker” of the false or misleading statements would have the requisite intent to be liable for securities fraud. This means that even senior officials that are actively engaged in the fraud, sending emails incorporating the misleading statements to their clients in their capacity as an investment banker, would not have the requisite intent to prove securities fraud.

- Can senior officials avoid liability for securities fraud if they claim ignorance as to their misstatements?**
- Do these officials have a duty to ensure the information they are providing to shareholders and the public is correct?**

19. As the lone dissent in *Doe v. Exxon Mobil Corp.*, you argued that a mere mention by the State Department that an issue involved foreign policy interests was enough to block the case from its day in court. In that case, Indonesian villagers were trying to recover damages from Exxon Mobile for injuries inflicted by Exxon’s security forces such as murder, torture, sexual assault, battery, and false imprisonment. The court contacted the State Department for an opinion on the foreign policy interests involved. The State Department concluded that there were foreign policy interests involved in the case, but did not ask the court to dismiss the case.

- **You felt it was appropriate to intercede and evoke foreign policy interests on the Executive’s behalf. How did you make that judgement?**

20. Please see attached a list of tweets by President Trump attacking the judiciary – to be submitted for the record.

- Which statements do you agree with?**
- Which statements do you disagree with?**

21. During the 2016 presidential campaign, President Trump stated that the Federalist Society and Heritage Foundation were providing him a list of potential nominees to the Supreme Court and

that he would select a nominee from that list.¹ You were not on the initial list of potential nominees but were added on November 17, 2017.

- What communications, if any, did you, or anyone on your behalf, have with members of the board of directors, staff, or members of the Federalist Society or Heritage Foundation concerning your omission from the initial list? Did you or anyone on your behalf advocate for your name to be added? Please describe the participants in the conversations, the dates, the substance of the conversations, and any other relevant details. Please be specific.**
 - If your answer is yes, were your views on any legal issues discussed? What were those legal issues, and what were your views? Please be specific.**
 - Have you discussed any of your legal views with any member of the board of directors or staff of the Federalist Society or Heritage Foundation? If so, please describe the participants in and substance of those communications, as well as the dates. Please be specific.**
22. During the hearing I asked you what happened in the period between when President Trump released his list of potential Supreme Court nominees in May 2016, and when he released a subsequent list of nominees in November 2017. Your name does not appear on the first list, but it appears on the second. You responded that a number of your friends, specifically judges and lawyers that you know, made clear to the President that you should be considered for a Supreme Court nomination and be added to that list.
- What are the names of the individuals who recommended you for this list?**
23. During the time you were serving in the George W. Bush White House, some White House officials communicated about official business using a non-government email server run by the Republican National Committee.
- Please identify all email accounts that you used from 2001-2006, the time of your service in the White House. Of these accounts, please identify those that were used to communicate about your work in the White House.**
 - For any communications you may have sent using a non-governmental server, please provide copies of these communications to the Committee.**
24. Do you have, or have you ever had, a Republican National Committee email account or an account maintained or associated with any other political party, official, or candidate for political office? If so, please identify each account and the time period used.
25. White House spokesman Raj Shah told the *Washington Post* that you went into debt buying tickets for the Washington Nationals over the past decade.
- For how many seasons have you purchased Nationals season tickets?**
 - How many tickets did you purchase each year? What was the overall cost and cost per ticket?**
 - Please identify the other individuals in the group for whom you purchased tickets, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.**

¹ Bob Woodward and Robert Costa, *In a revealing interview, Trump predicts a 'massive recession' but intends to eliminate the national debt in 8 years*, WashingtonPost.com (Apr. 2, 2016), https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html.

26. The White House also stated that, in addition to the season tickets, you accrued debt on your credit cards from expenditures on "home improvements."
- What is the percentage of the credit card debt you would attribute to these home improvements? Please also explain briefly what improvements were undertaken and when.**
 - What percentage of the credit card debt would you attribute to the purchase of baseball tickets? If these two categories (home improvements and baseball tickets) do not account for your total debt, please explain any other reasons for your debt.**
27. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. The prior year, you reported between \$60,004 and \$200,000 in liabilities between three credit cards and a loan from your Thrift Savings Plan (TSP) account. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years.
- For each debt (i.e., each credit card and the TSP loan), please identify the date upon which the debt was paid and the source of the funds for repayment.**
 - Did you report any of the money obtained by you to pay off these debts on your income tax returns, financial disclosure forms, or any other reporting document?**
28. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote "Exempt."
- Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?**
 - For each gift (if any) you believes is exempt from reporting, please provide a description of the gift, the approximate value, the date received, and the donor.**
29. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."
- Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?**
 - For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, and the date and amount of any reimbursements that you received for these costs.**
30. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy. Please also provide to the Committee, on a confidential basis, a complete copy of your state and federal tax returns for the three previous tax years.
31. Your Bank of America accounts appear to have doubled in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.
32. In 2006, you purchased your primary residence for \$1,225,000 in Chevy Chase, MD, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.

- Did you receive financial assistance in order to make this down payment? And if so, was the assistance provided in the form of a gift or a personal loan?
 - If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and who were the individual(s) that provided this assistance.
 - Was this financial assistance disclosed in your income tax returns, financial disclosure forms, or any other reporting document?
33. You have disclosed in your responses to the SJQ that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.
- How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?
 - Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees?
 - If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.
 - To the extent such assistance or rate reduction could be deemed a “gift,” was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?
34. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?
35. In 2004, you were asked by Senator Hatch whether “Mr. Miranda ever share[d], reference[d], or provide[d] you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?” You replied that he had not. At your Supreme Court confirmation hearing you reaffirmed your previous testimony
- Did Manuel Miranda ever send you talking points that Mr. Miranda attributed to “Dem staffers”?
 - Prior to, or in preparation for, your testimony in 2004, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Prior to, or in preparation for, your testimony at your 2006 confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Prior to, or in preparation for, your testimony at this year’s confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Would you like to amend or retract your assertion that Mr. Miranda never shared with you any documents drafted by Democratic staff?
36. Should Supreme Court justices be bound by the same professional code of conduct that other federal judges are required to follow? If so, why, and if not, why not?

37. What are some ways you would work to make the Supreme Court, and the judiciary as a whole, more open to and understood by the larger public?
38. What do you believe are the driving forces behind racial disparities in federal sentencing? Do you believe racial bias — implicit or otherwise — exists in the federal judicial system? What role do judges have in confronting and eliminating it?
39. Immediately prior to my questioning on the second day of hearings (the first day you answered questions), we took an unexpected recess.
- **During that recess, did anybody discuss with you an email from your time in the Bush Administration in which you wrote that you were “not sure that all legal scholars refer to *Roe v. Wade* as the settled law of the land at the Supreme Court level”? If so, who?**
 - **During that recess, did anybody help prepare you to answer a question regarding whether *Roe v. Wade* is settled law? If so, who?**
 - **During that recess, did anybody suggest that I would ask you about abortion, *Roe v. Wade*, or related issues? If so, who?**
40. You have expressed skepticism about *Chevron* deference, arguing that it allows the Executive Branch to effectively rewrite laws.
- **Is any deference due to agency expertise and democratic accountability?**
 - **If *Chevron* deference were eliminated by judicial fiat, should any allowances be made for decades of laws passed by Congress against the backdrop of *Chevron* deference?**
 - **If deference to agencies is contrary to Congressional intent, why has Congress never passed legislation instructing the courts not to employ *Chevron* deference?**

In His Own Words: The President's Attacks on the Courts

Donald Trump has displayed a troubling pattern of attacking judges and the courts for rulings he disagrees with.

June 5, 2017

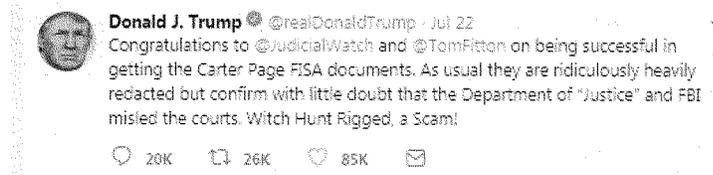
Donald Trump has displayed a troubling pattern of attacking judges and the courts for rulings he disagrees with — a pattern that began during his presidential campaign (and even before), and has continued into his presidency.

This threatens our entire system of government. The courts are bulwarks of our Constitution and laws, and they depend on the public to respect their judgments and on officials to obey and enforce their decisions. Fear of personal attacks, public backlash, or enforcement failures should not color judicial decision-making, and public officials have a responsibility to respect courts and judicial decisions. Separation of powers is not a threat to democracy; it is the essence of democracy.

Collected below are examples of Trump's public statements attacking individual judges and questioning the constitutional authority of the judiciary, including his statements on Twitter. It will be updated with new statements.

Carter Page FISA Application

On July 22, 2018, the Trump Administration [released](#) a previously classified Foreign Intelligence Surveillance Act (FISA) warrant application regarding Trump's former foreign policy campaign adviser, Carter Page. Organizations like Judicial Watch had sued for its [disclosure](#). Trump took the release as an opportunity to [falsely claim](#) the Page surveillance precipitated special counsel Robert Mueller's investigation, to argue that the wiretap application relied too heavily on the unverified Steele dossier, and to argue that Mueller's investigation must end. In a series of tweets, Trump first claimed that the Department of Justice and FBI "misled the courts":



Then Trump used the words of conservative writer Andrew McCarthy to directly attack the judges who authorized the FISA application:



Donald J. Trump @realDonaldTrump · Jul 22

Andrew McCarthy - "I said this could never happen. This is so bad that they should be looking at the judges who signed off on this stuff, not just the people who gave it. It is so bad it screams 'out at you.'" On the whole FISA scam which led to the rigged Mueller Witch Hunt!

23K 33K 112K

Attacks on the Judiciary Following DACA Ruling

On Tuesday, January 9th, 2018, District Court Judge William Alsup temporarily blocked the Trump administration from ending the Deferred Action for Childhood Arrivals (DACA) program, maintaining protections for 'Dreamers.' The Trump administration appealed Alsup's decision. Following Alsup's ruling, Trump tweeted:



Donald J. Trump @realDonaldTrump · Jan 10

It just shows everyone how broken and unfair our Court System is when the opposing side in a case (such as DACA) always runs to the 9th Circuit and almost always wins before being reversed by higher courts.

28K 27K 108K

Critique of the Bergdahl Ruling

Bowe Bergdahl, a former U.S. Army soldier, walked away from his unit and was captured by the Taliban in 2009. From 2009 to 2014, he was held captive by the Taliban. In 2014, the Obama administration brokered a prisoner exchange, and ultimately, the Taliban released Bergdahl in exchange for five Guantanamo Bay detainees.

Trump, while on the campaign trail, repeatedly critiqued the exchange.



Donald J. Trump
@realDonaldTrump

Follow

Sgt. Bowe Bergdahl should face the death penalty for desertion - five brave soldiers died trying to bring him back. U.S. has to get tough!

4:45 AM - 26 Mar 2015 from Manhattan, NY

In [one speech](#), Trump argued,

"So we get a traitor named Bergdahl—a dirty rotten traitor—who, by the way, when he deserted, 6 young, beautiful people were killed trying to find him, and you don't even hear about them anymore. Someone said the other day, well, he has some psychological problems – well, you know, in the old days, bing, bong—when we were strong, when we were strong. So we get Bergdahl, a traitor, and they get 5 of the people that they most wanted anywhere in the world, 5 killers that are right now back on the battlefield, doing a job. That's the kind of deals we make."

Following these comments, Bergdahl's lawyers filed a motion in 2016 to dismiss the charges pending against him, arguing that Trump's comments precluded Bergdahl from receiving a fair trial. This motion was rejected. Ultimately, Bergdahl pleaded guilty to charges of desertion and misbehavior in October of 2017; on November 3, 2017, Bergdahl was sentenced to a dishonorable discharge, a reduced rank, and a monthly fine, but did not receive a prison sentence. In response, Trump tweeted,



Donald J. Trump
@realDonaldTrump



The decision on Sergeant Bergdahl is a complete and total disgrace to our Country and to our Military.

11:54 AM - Nov 3, 2017

44,906 37,363 137,310

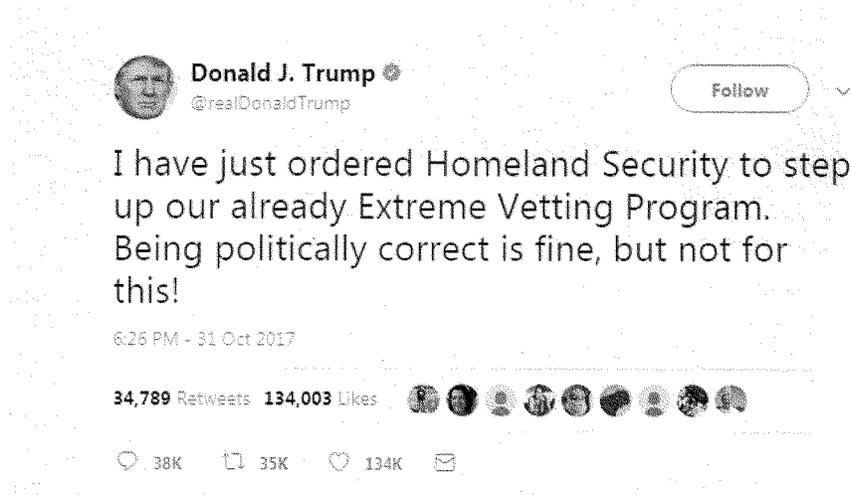
Attacks on the Judicial System in Response to Terrorist Attacks

On Tuesday, October 31st, 2017, a [terrorist attack](#) in Manhattan led to eight deaths and several serious injuries. The suspect [said](#) he drew inspiration from ISIS. On November 1st, 2017, Donald Trump [made the following statement](#) in response, calling the courts a "joke" and a "laughingstock." Trump also [said](#) he would "certainly consider" sending the suspect to the U.S. military prison in Guantánamo Bay. Trump stated:

"That was a horrible event, and we have to stop it, and we have to stop it cold. We also have to come up with punishment that's far quicker and far greater than the punishment these animals are getting right now. They'll go through court for years. And at the end, they'll be — who knows what happens.

We need quick justice and we need strong justice — much quicker and much stronger than we have right now. Because what we have right now is a joke and it's a laughingstock. And no wonder so much of this stuff takes place. And I think I can speak for plenty of other countries, too, that are in the same situation."

Trump followed this statement with a Tweet:



Trump then switched from advocating the suspect be sent to Guantánamo Bay, to advocating he receive the death penalty.



Donald J. Trump @realDonaldTrump · Nov 1

NYC terrorist was happy as he asked to hang ISIS flag in his hospital room. He killed 8 people, badly injured 12. SHOULD GET DEATH PENALTY!

35K 43K 173K



Donald J. Trump @realDonaldTrump · Nov 2

Would love to send the NYC terrorist to Guantanamo but statistically that process takes much longer than going through the Federal system...

13K 14K 70K



Donald J. Trump @realDonaldTrump · Nov 2

...There is also something appropriate about keeping him in the home of the horrible crime he committed. Should move fast. DEATH PENALTY!

25K 17K 85K

Attacks on Courts, and Judges Personally, for Staying Immigration Executive Orders

On Friday, February 3, 2017, Washington U.S. District Court Judge James Robart [issued a decision](#) temporarily staying enforcement of Donald Trump's January 27 [executive order](#) limiting immigration from seven predominantly Muslim countries and halting the admission of refugees from anywhere. On February 9, the Ninth Circuit denied the government's request for a stay of the district court's order. Trump issued a revised version of the [immigration executive order](#) on March 6, 2017, which narrowed the scope to six countries and exempted green card and visa holders, among other changes. On March 15, 2017, a federal judge in [Hawaii](#) temporarily blocked enforcement of the order nationwide, followed by a March 16 order by a federal judge in [Maryland](#). On May 26, the Fourth Circuit, sitting *en banc*, upheld the stay of the travel ban.

Trump has made a series of tweets and public statements attacking the deciding judges personally, questioning the authority of federal courts to review his orders, suggesting the court is biased, and suggesting that the judges and court system would be to blame for future terrorist attacks.

Comments Concerning March 6 Executive Order

On June 3, 2017 and again on June 5, 2017, following a terrorist attack in London over the weekend, the President tweeted the following statements:



Donald J. Trump
@realDonaldTrump

Following

In any event we are EXTREME VETTING people coming into the U.S. in order to help keep our country safe. The courts are slow and political!

RETWEETS LIKES
12,286 49,964



6:44 AM - 5 Jun 2017

15K 12K 50K



Donald J. Trump
@realDonaldTrump

Following

The Justice Dept. should ask for an expedited hearing of the watered down Travel Ban before the Supreme Court - & seek much tougher version!

RETWEETS LIKES
9,654 38,391



6:37 AM - 5 Jun 2017

8.7K 9.7K 38K



Donald J. Trump ✓
@realDonaldTrump

Following

The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.

RETWEETS 9,907 LIKES 40,750



6:29 AM - 5 Jun 2017

↩ 7.4K ↻ 3.8K ❤ 41K 📧



Donald J. Trump ✓
@realDonaldTrump

Following

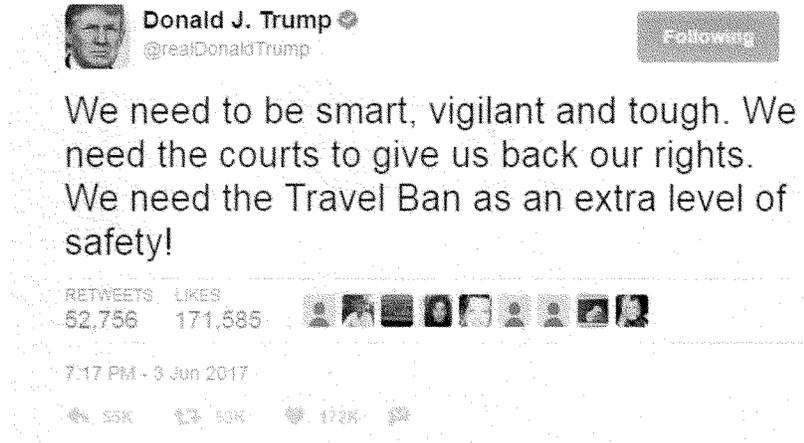
People, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!

RETWEETS 13,640 LIKES 51,226



6:25 AM - 5 Jun 2017

↩ 11K ↻ 14K ❤ 51K 📧



He has also said the following statements over the course of the last few months at public events, speeches, and television interviews:

"We're also taking decisive action to improve our vetting procedures. The courts are not helping us I have to be honest. It's ridiculous. Somebody said I should not criticize judges. Okay, I'll criticize judges. To keep criminals and terrorists the hell out of our country, we are keeping these promises and many, many more."

"Moments ago I learned that a district court in Hawaii, part of the much overturned Ninth Circuit Court. And I have to be nice, otherwise I'll be criticized for speaking poorly about our courts. I'll be criticized by these people, among the most dishonest people in the world,...for speaking harshly about our courts. I could never want to do that."

"This is an unprecedented judicial overreach. The law and constitution allows the president to suspend immigration when he or she...fortunately it won't be Hillary she, when he or she deems it to be in the national interest of our country."

"I know you aren't skeptical people. You don't think this was done by a judge for political reasons do you? This ruling makes us look weak, which we no longer are, believe me."

"We are going to fight this terrible ruling...we're going to win...we're going to keep our citizens safe."

"People are screaming break-up the Ninth Circuit...that Ninth Circuit, you have to see, take a look at how many times they have been overturned with their terrible decisions. Take a look. And this is what we have to live with."

Comments Concerning January 27 Executive Order



Donald J. Trump
@realDonaldTrump

Following

72% of refugees admitted into U.S. (2/3 -2/11) during COURT BREAKDOWN are from 7 countries: SYRIA, IRAQ, SOMALIA, IRAN, SUDAN, LIBYA & YEMEN

RETWEETS 20,222 LIKES 69,065



6:55 AM · 12 Feb 2017

18K 20K 50K



Donald J. Trump
@realDonaldTrump

Following

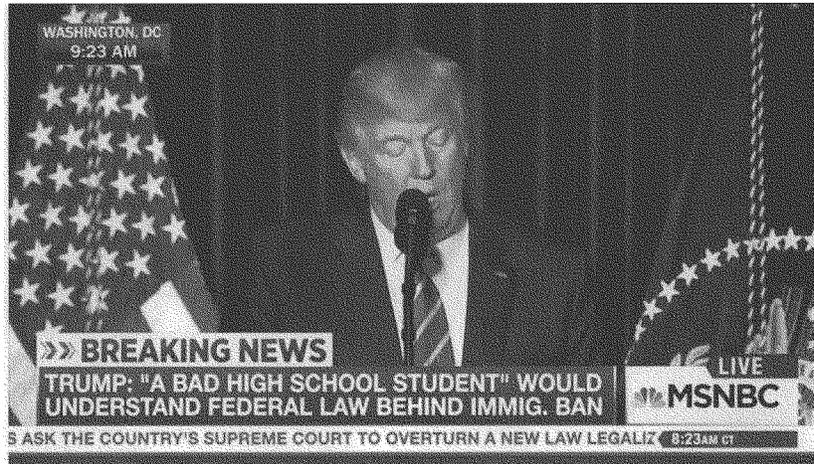
Our legal system is broken! "77% of refugees allowed into U.S. since travel reprieve hail from seven suspect countries." (WT) SO DANGEROUS!

RETWEETS 22,526 LIKES 96,997



7:12 AM · 11 Feb 2017

33K 23K 97K



Bradd Jaffy

✓ [@BraddJaffy](#)

Trump: "If these judges wanted to, in my opinion, help the court in terms of respect for the court, they'd do what they should be doing"

[10:29 AM - Feb 8, 2017](#)

344

519 people are talking about this

"I don't ever want to call a court biased, so I won't call it biased...But courts seem to be so political."



Donald J. Trump
@realDonaldTrump

Following

I will be speaking at 9:00 A.M. today to Police Chiefs and Sheriffs and will be discussing the horrible, dangerous and wrong decision.....

RETWEETS 10,712 LIKES 72,329

8:04 AM · 8 Feb 2017

16K 11K 72K



Donald J. Trump
@realDonaldTrump

Following

I will be speaking at 9:00 A.M. today to Police Chiefs and Sheriffs and will be discussing the horrible, dangerous and wrong decision.....

RETWEETS 10,712 LIKES 72,329

8:04 AM · 8 Feb 2017

16K 11K 72K



Donald J. Trump
@realDonaldTrump

Following

The threat from radical Islamic terrorism is very real, just look at what is happening in Europe and the Middle-East. Courts must act fast!

RETWEETS 32,664 LIKES 144,845

9:45 PM · 6 Feb 2017

👍 39K 🔄 33K ❤️ 145K



Donald J. Trump
@realDonaldTrump

Following

I have instructed Homeland Security to check people coming into our country VERY CAREFULLY. The courts are making the job very difficult!

RETWEETS 28,569 LIKES 147,217

3:42 PM · 5 Feb 2017

👍 37K 🔄 25K ❤️ 147K



Donald J. Trump
@realDonaldTrump

Following

Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!

RETWEETS: 29,437 LIKES: 138,689

3:39 PM - 5 Feb 2017

👍 50K 🗨️ 20K 💬 73K



Donald J. Trump
@realDonaldTrump

Following

The judge opens up our country to potential terrorists and others that do not have our best interests at heart. Bad people are very happy!

RETWEETS: 28,536 LIKES: 130,690

7:48 PM - 4 Feb 2017

👍 52K 🗨️ 20K 💬 73K



Donald J. Trump
@realDonaldTrump

Following

Why aren't the lawyers looking at and using the Federal Court decision in Boston, which is at conflict with ridiculous lift ban decision?

RETWEETS 18,071 LIKES 98,048



6:37 PM · 4 Feb 2017

24K 18K 98K



Donald J. Trump
@realDonaldTrump

Following

Because the ban was lifted by a judge, many very bad and dangerous people may be pouring into our country. A terrible decision

RETWEETS 29,789 LIKES 138,188



4:44 PM · 4 Feb 2017

54K 30K 138K



Donald J. Trump
@realDonaldTrump

Following

What is our country coming to when a judge can halt a Homeland Security travel ban and anyone, even with bad intentions, can come into U.S.?

RETWEETS

LIKES

33,532

149,985



7:44 PM - 4 Feb 2017

🔄 47% 📄 34% 📧 19%



Donald J. Trump
@realDonaldTrump

Following

The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!

RETWEETS

LIKES

33,911

160,825



8:12 AM - 4 Feb 2017

🔄 47% 📄 34% 📧 19%

Comments Following Barcelona Terrorist Attack

Following a terrorist attack in Spain, Trump made the following tweets on August 18. Trump argued his travel ban would prevent terrorist attacks, but for Democrats "us[ing] the courts" to preclude his agenda.



Donald J. Trump
@realDonaldTrump



The Obstructionist Democrats make Security for our country very difficult. They use the courts and associated delay at all times. Must stop!

8:55 AM - Aug 18, 2017

27,204 23,325 97,943



Donald J. Trump
@realDonaldTrump



Radical Islamic Terrorism must be stopped by whatever means necessary! The courts must give us back our protective rights. Have to be tough!

9:06 AM - Aug 18, 2017

35,377 37,434 143,567

Attacks on Courts for Blocking Sanctuary City Executive Order

On Tuesday, April 25, California U.S. District Judge William Orrick III granted a preliminary injunction, blocking the implementation of Donald Trump's [executive order](#) withholding federal funds from "sanctuary cities"—those that limit how they cooperate with the federal government to deport immigrants lacking legal status.

Following the ruling, Trump made a series of tweets criticizing the courts and Judge Orrick. Although Trump's comments referenced the Ninth Circuit, it was the U.S. District Court, which sits within the Ninth Circuit, that issued the relevant order.



Donald J. Trump
@realDonaldTrump

Following

First the Ninth Circuit rules against the ban & now it hits again on sanctuary cities-both ridiculous rulings. See you in the Supreme Court!

RETWEETS

16,703

LIKES

63,059



6:20 AM - 26 Apr 2017

17K

17K

63K



Donald J. Trump
@realDonaldTrump

Following

Out of our very big country, with many choices, does everyone notice that both the "ban" case and now the "sanctuary" case is brought in ...

RETWEETS

9,871

LIKES

44,514



6:30 AM - 26 Apr 2017

6.2K

9.6K

45K



Donald J. Trump 
@realDonaldTrump

Following

...the Ninth Circuit, which has a terrible record of being overturned (close to 80%). They used to call this "judge shopping!" Messy system.

RETWEETS 12,128 LIKES 51,502



6:38 AM - 26 Apr 2017

 12K  12K  52K

The White House also issued a [statement](#), saying "the rule of law suffered another blow, as an unelected judge unilaterally rewrote immigration policy for our Nation." It continued: "This San Francisco judge's erroneous ruling is a gift to the criminal gang and cartel element in our country, empowering the worst kind of human trafficking and sex trafficking, and putting thousands of innocent lives at risk." Finally, it closed by calling the decision "yet one more example of egregious overreach by a single, unelected district judge."

On April 26, Trump [gave an interview](#) in which he said he has "absolutely" thought about breaking up the Ninth Circuit. He continued: "Everybody immediately runs to the 9th Circuit. And we have a big country. We have lots of other locations. But they immediately run to the 9th Circuit. Because they know that's like, semi-automatic." He also said: "You see judge shopping, or what's gone on with these people, they immediately run to the 9th Circuit," and that "what's going on in the 9th Circuit is a shame."

Calls for U.S. Supreme Court Justice Ginsburg's Resignation

During the 2016 presidential campaign, U.S. Supreme Court Justice Ruth Bader Ginsburg made [comments](#) calling Donald Trump, then the presumptive Republican presidential nominee, "a faker" and stating "I can't imagine what the country would be – with Donald Trump as our president." Donald Trump responded in a series of tweets describing Justice Ginsburg as an "incompetent judge" and calling for her resignation.



Donald J. Trump
@realDonaldTrump

Following

Justice Ginsburg of the U.S. Supreme Court has embarrassed all by making very dumb political statements about me. Her mind is shot - resign!

RETWEETS 11,210 LIKES 34,402



12:54 AM - 13 Jul 2016

👍 3.5K 🗨️ 1.7K ❤️ 34K



Donald J. Trump
@realDonaldTrump

Following

Even the @NYTimes and @WashingtonPost Editorial Boards condemned Justice Ginsburg for her ethical and legal breach. What was she thinking?

RETWEETS 5,329 LIKES 17,537



6:27 PM - 13 Jul 2016

👍 1.5K 🗨️ 5.3K ❤️ 17K



Donald J. Trump
@realDonaldTrump

Following

Is Supreme Court Justice Ruth Bader Ginsburg going to apologize to me for her misconduct? Big mistake by an incompetent judge!

RETWEETS 5,571 LIKES 20,561



8:28 PM - 13 Jul 2016



Accusations that U.S. District Court Judge Curiel Is Biased

In response to U.S. District Court Judge Gonzalo O. Curiel's orders in a class action lawsuit against Trump University, then-presidential candidate Trump made a number of statements [attacking Judge Curiel](#) as biased because of his "Mexican heritage" and appointment by a Democratic president.



Donald J. Trump
@realDonaldTrump

Following

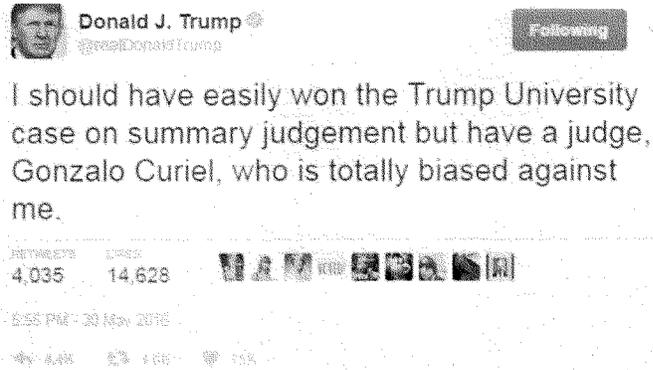
Even though I have a very biased and unfair judge in the Trump U civil case in San Diego, I have thousands of great reviews & will win case!

RETWEETS 2,999 LIKES 10,933



12:54 PM - 7 Jun 2016





Donald Trump said on [CNN](#): "I've been treated very unfairly by this judge. Now, this judge is of Mexican heritage, I'm building a wall!" Trump continued: "He's a member of a society where – you know – very pro-Mexico and that's fine, it's all fine, but I think – I think – he should recuse himself."

Trump's Rhetoric About Courts Prior to Running for President

Donald Trump's tweets prior to announcing his presidential candidacy display similar rhetoric targeting individual judges and the judiciary. Select examples are provided below.



Donald J. Trump
@realDonaldTrump

Following

Mexico's court system corrupt. I want nothing to do with Mexico other than to build an impenetrable WALL and stop them from ripping off U.S.

RETWEETS

1,333

LIKES

1,011



7:55 PM - 5 Mar 2015

479

1.1K

1.0K



Donald J. Trump
@realDonaldTrump

Following

Oscar Pistorius only gets five years in prison for killing his girlfriend. Ridiculous decision! Judge couldn't even read her own writings.

RETWEETS: 1,629 LIKES: 665



5:05 AM - 21 Oct 2014

🔄 287 📄 135 ❤️ 665



Donald J. Trump
@realDonaldTrump

Following

If Justice Roberts had done the right thing and voted against ObamaCare, our country would be in a lot better shape right now! TOTAL TURMOIL

RETWEETS: 373 LIKES: 291



10:33 PM - 10 Nov 2013

🔄 157 📄 173 ❤️ 291



Donald J. Trump 
@realDonaldTrump

Why do we always know how the four liberals are going to rule
but have to think about which side the Republican judges will go.

12:09 PM · Jun 27, 2013

145 RETWEETS 97 LIKES



Follow Up Questions for the Record for Brett M. Kavanaugh
Submitted by Senator Richard Blumenthal
September 14, 2018

1. In my questions for the record, I asked whether you believe contraceptives are abortion-inducing drugs. You replied that “that was the position of the plaintiffs in” *Priests for Life v. HHS*, but you did not answer my question, which called for your beliefs. I have never heard of a nominee refusing to answer a question of basic medical science. Therefore, I ask you again:
 - a. **Do you believe contraceptives are abortion-inducing drugs?**
 - b. **If yes, which ones?**
 - c. **What is the basis for this belief?**

2. In your response to one of my questions, you referred to *Planned Parenthood v. Casey* as “precedent on precedent.” I am unfamiliar with this phrase.
 - a. **What do you mean by “precedent on precedent”?**
 - b. **Is “precedent on precedent” simply precedent *about* precedent?**
 - c. **If a Supreme Court opinion is upheld in an opinion that constitutes “precedent about precedent,” is it therefore settled law?**

3. In my questions for the record, I asked several questions for the record related to your preparation for your confirmation hearings in 2004, 2006, and 2018. You did not answer them. Instead, you replied that you had answered questions related to the general topic during your live testimony. With respect, I do not see why the fact that you answered related questions during your live testimony eliminates your obligation to answer my straightforward, yes-or-no questions for the record. Therefore, I ask you again:
 - a. **Prior to, or in preparation for, your testimony in 2004, did you review any emails you had received from Manuel Miranda to ensure that you would be able to accurately answer questions about your work with him?**
 - b. **Prior to, or in preparation for, your testimony at your 2006 confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?**
 - c. **Prior to, or in preparation for, your testimony at this year’s confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?**

4. In my questions for the record, I asked a set of questions to determine whether, during the impromptu recess that was called before my questions to you on day 2 of your hearing, you had been given advance notice of what I intended to ask. You replied that you “do not recall that precise recess as affecting or altering my preparation.” Because you answered three of my questions with one short response, and because you do not answer any of them with the yes or no called for by the question, I am unclear on your answer to my question. So that I can understand your answers, please provide a yes or no to each of

the following questions where the questions call for a yes or a no. Where the questions call for names, please provide a list of names. If you cannot recall the answer to any of these questions – which request information regarding your actions just last week – please review your notes and check with anybody who may be able to help you answer.

- a. **Immediately prior to my questioning on the second day of hearings (the first day you answered questions), we took an unexpected recess. During that recess, did anybody discuss with you an email from your time in the Bush Administration in which you wrote that you were “not sure that all legal scholars refer to *Roe v. Wade* as the settled law of the land at the Supreme Court level”?** Please answer yes or no. If so, who?
- b. **During that recess, did anybody help prepare you to answer a question regarding whether *Roe v. Wade* is settled law?** Please answer yes or no. If so, who?
- c. **During that recess, did anybody suggest that I would ask you about abortion, *Roe v. Wade*, or related issues?** Please answer yes or no. If so, who?

**Nomination of Brett M. Kavanaugh
Supreme Court of the United States
Questions for the Record
Submitted September 10, 2018**

QUESTIONS FROM SENATOR BOOKER

1. During last week's hearing, I asked you about your insistence to several members of the Committee that you had "never" taken a position on the constitutionality of criminally investigating or indicting a sitting President, "period." However, you have addressed the constitutionality issue a number of times in your writings and public statements. In particular, you have written:
- "*The Constitution itself seems to dictate*, in addition, that congressional investigation must take place *in lieu of* criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur *only* after the President has left office."¹
 - "During the impeachment ordeal, the president's congressional supporters and foes agreed—*consistent with the Constitution, which appears to preclude indictment of a sitting president*—that the government should consider indicting Bill Clinton after he leaves office."²
 - "If the President does something dastardly, the impeachment process is available. *No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.* Moreover, an impeached and removed President is still subject to criminal prosecution afterwards. In short, *the Constitution establishes a clear mechanism* to deter executive malfeasance; we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions. . . . I think this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations."³

In addition, in 1998, you participated in a panel discussion at the Georgetown University Law Center on the future of the independent counsel statute.⁴ During the discussion the

¹ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2158 (1998) (emphases added).

² Brett M. Kavanaugh & Robert J. Bittman, *Indictment of an Ex-President?*, WASH. POST, Aug. 31, 1999, at A12 (emphasis added), available at <https://www.justsecurity.org/wp-content/uploads/2018/07/Brett-Kavanaugh-Indictment-of-an-Ex-President-Washington-Post-1999.pdf>.

³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461-62 & n.35 (2009) (emphasis added) (footnotes omitted).

⁴ *Independent Counsel Statute Future*, C-SPAN (Feb. 19, 1998), <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

moderator asked the panel, “How many of you believe, as a matter of law, that a sitting President cannot be indicted during the term of office?” In response to this query, your hand went up, along with those of several other members of the panel. Next, the moderator asked you, “What is the implication, Brett, of your point if in fact a sitting President cannot be indicted during a term of office?”⁵ You replied:

The implication is that that Congress has to take responsibility for overseeing the conduct of the President in the first instance. *That’s the role I believe the Framers envisioned*, and that’s the role that makes sense if you just look at the last 20 years. It makes no sense at all to have an independent counsel looking at the conduct of the President.⁶

When I asked you about these statements at the hearing, you said that you would consider these issues “with an open mind.”

- a. In light of these statements, do you still maintain that you have “never taken a position” on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.
 - b. At a minimum, do these statements—three of which invoke the Constitution, and one of which invokes the intent of the Framers—send a clear signal about where you stand on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.
2. In your 2006 testimony before the Senate Judiciary Committee for your nomination to the D.C. Circuit, you denied that the Bush White House used political filters to put forward candidates for judicial nominations. Senator Schumer asked you whether you ever would use words such as “too liberal or too conservative” as a filter for nominees. You responded by indicating that you would object only on the basis that someone was “too activist.” You gave similar testimony to this Committee in 2004 as well.⁷

But in an e-mail dated March 9, 2001, a colleague asked you whether a potential judicial nominee was “too liberal to be considered.” You responded, “Far too liberal.”⁸

Do you stand by the statements you gave to this Committee in 2004 and 2006 about ideological filters in the selection process for judicial candidates? Please explain why, in light of your response in this e-mail.

⁵ *Id.*

⁶ *Id.* (emphasis added).

⁷ S. Hrg. 108-878, at 49 (Apr. 27, 2004), <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>.

⁸ REV_00269074 (e-mail dated March 9, 2001).

3. The *Washington Post* reported on March 8, 2017, that you had been considered for the job of Solicitor General, one of the top positions at the Justice Department. The *Post* reported that “representatives of the Trump transition approached” you about the job. The article said that “apparently” the discussions “did not advance very far.”⁹
 - a. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about the Solicitor General position? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.
 - b. What did you discuss in your conversations with those individuals concerning the Solicitor General position?
 - c. Did you express interest in the Solicitor General position under President Trump?
 - d. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about any *other* positions in the Executive Branch under President Trump? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.
 - e. If so, what other positions in the Executive Branch did you discuss with those individuals?
 - f. What did you discuss in your conversations with those individuals concerning any other positions in the Executive Branch?
 - g. During any of the conversations referenced above, did you express or imply your personal support for President Trump?
4. Do you believe it is important that the federal judiciary more accurately reflect the diversity of the United States?
5. You’ve spoken often of your own efforts to hire women and racially diverse law clerks. What efforts have you made to ensure that *law schools* are more diverse?

⁹Robert Barnes, *Trump Nominates D.C. Lawyer Noel Francisco as Solicitor General*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/politics/courts_law/trump-nominates-dc-lawyer-noel-francisco-as-solicitor-general/2017/03/08/c62b0774-040f-11e7-b9fa-ed727b644a0b_story.html.

6. In a December 12, 2001, draft of a speech to the Federalist Society, you wrote:

I can't leave the topic of judicial nominations without one final observation. This President strongly believes—and I share that belief—that federal judicial nominees should be persons of the highest reputation, having a sound understanding of the limited role of the judiciary and who represent the diversity of America. *I am sure that some will say that this last requirement—diversity—is not appropriate, that quality is determined not by external characteristics but by internal discipline and training. The President—and I—would agree heartily with that premise.* But at the same time, he recognizes that quality can be found in many colors and that those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve.¹⁰

- a. What did you mean when you said “diversity . . . is determined not to by external characteristics but by internal discipline and training”?
 - b. What did you mean by “those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve?”
7. You have repeatedly touted the diversity of the law clerks whom you have hired. Do you believe that diversity, including with respect to race and gender, is an important goal in law clerk hiring?
8. I understand that you have actively tried to recruit a wide pool of law clerk *applicants*, including by speaking at Black Law Students Associations and encouraging members to apply. Have you ever used race or gender as a consideration in *hiring* law clerks?
9. The Bush Administration frequently described the diversity of the individuals the President selected as judicial nominees. To your knowledge, was race or gender ever used as a factor in (1) your and/or other White House staff's initial selection of potential judicial candidates for President Bush's consideration; and/or (2) President Bush's ultimate decisions in nominating judges?

¹⁰ REV_00137649 (document draft dated Dec. 12, 2001) (emphasis added).

10. During your time in the Bush White House Counsel's office, a colleague e-mailed you to ask about the propriety of including individuals' ethnicity in a database of potential candidates to serve on various presidential boards and commissions.¹¹ You responded that this was permissible, but you said that "in a perfect world, no one would keep track."¹²
- a. Please explain why "in a perfect world, no one would keep track."
 - b. Please explain why, in this context, you advocated against keeping track of racial diversity, but the administration kept track of and publicized the diversity of its judicial nominees, and you yourself have referenced and publicized the racial and gender diversity of your law clerks.
 - c. Please explain why keeping track of ethnicity in this context is consistent with a view that race should not be used as a factor in personnel decisions.
11. During your nomination hearing, I quoted from an e-mail in which you stated that the Department of Transportation regulations at issue in *Adarand v. Mineta*¹³ "use a lot of legalisms and disguises to mask what in reality is a *naked racial set-aside*."¹⁴
- a. Do you still believe that efforts to promote minority-owned businesses are "naked racial set-aside[s]"?
 - b. Do you believe that efforts to promote student body diversity at institutions of higher education are "naked racial set-aside[s]"?
12. You said in another of your e-mails about *Adarand* that the Solicitor General should independently come to his own conclusion about whether to defend the constitutionality of Department of Transportation's program.¹⁵ But you also stated that this arrangement was "admittedly not my ideal of how a unitary executive should work."¹⁶ Under your "ideal of how a unitary executive should work," would the President and/or his White House attorneys instruct the Solicitor General about what position(s) to take in cases challenging the constitutionality of federal laws or programs?

¹¹ REV_00135177 (e-mail dated Nov. 12, 2001).

¹² REV_00135177 (e-mail dated Nov. 13, 2001).

¹³ 534 U.S. 103 (2001).

¹⁴ REV_0028956 (e-mail dated Aug. 8, 2001) (emphasis added).

¹⁵ REV_00125572 (e-mail dated Mar. 26, 2001).

¹⁶ *Id.*

13. During your nomination hearing, I also quoted from an e-mail in which a colleague of yours referred to a “school of thought” within the Bush Administration that “if the use of race renders security measures more effective, then perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as *Korematsu v. United States*.”¹⁷ In response, you said you “generally favor effective security measures that are race-neutral.”¹⁸ But you said there was still an “interim question”—with which you and your colleagues “need[ed] to grapple”—of what to do before such a system could be developed.¹⁹ The subject line of these e-mails was “Racial Profiling.”²⁰

During your time in the White House Counsel’s office, did you ever support—in e-mails, internal memoranda, or internal conversations—the use of racial profiling as a security measure? If records of such support exist, please include them with your response.

14. In the brief that the Bush Administration filed in *Grutter v. Bollinger*, the Solicitor General stated that “[m]easures that ensure diversity, accessibility and opportunity are important components of government’s responsibility to its citizens.”²¹ Do you personally agree with that statement?
15. Do you personally agree that *diversity* is an “important component[] of government’s responsibility to its citizens”?
16. On February 17, 2001, a colleague of yours at the Bush White House sent you an e-mail about potential candidates for the U.S. Court of Appeals for the Fifth Circuit. Your colleague described one candidate from Louisiana as “pretty good on finally ending all the busing.” From what is available in this document, it appears that you did not respond directly to this comment.²² “Busing” evidently refers to efforts to counter the persistent legacy of segregation in our schools.
- a. What was your reaction to a White House colleague who praised a prospective judicial nominee as “pretty good on finally ending all the busing”?
 - b. Why would being “pretty good on finally ending all the busing” be considered a positive attribute for a prospective judicial nominee for the Bush White House?

¹⁷ REV_00328554 (e-mail dated Jan. 17, 2002).

¹⁸ REV_00328552 (e-mail dated Jan. 17, 2002).

¹⁹ *Id.*

²⁰ *Id.*

²¹ Brief for the United States, *Grutter v. Bollinger*, No. 02-241, 2003 WL 176635, at *8 (filed Jan. 17, 2003).

²² REV_00174567 (e-mail dated February 19, 2001).

- c. You've indicated that you believe *Brown v. Board of Education* was one of the great moments in the Court's history. Did you view busing efforts to integrate schools negatively?
17. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.²³ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.²⁴ These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.²⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²⁶
- a. Do you believe people of color are disproportionately represented in our nation's jails and prisons?
- b. What role do you believe the judiciary should play in addressing the racially disparate impact the criminal justice system has in American society?
18. The Eighth Amendment to the Constitution forbids "cruel and unusual punishment."²⁷
- a. What is the standard for judging whether a punishment is cruel and unusual?
- b. Do you believe placing someone in a pillory is prohibited as "cruel and unusual" pursuant to the Eighth Amendment?
- c. Do you believe branding an individual is "cruel and unusual" punishment proscribed under the Eighth Amendment?
- d. Do you believe placing an individual in solitary confinement is "cruel and unusual" punishment prohibited under the Eighth Amendment?

²³ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

²⁴ *Id.*

²⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

²⁶ *Id.* at 8.

²⁷ U.S. CONST. amend. VIII.

- e. You are a self-proclaimed originalist. At the time of our nation's founding, placing someone in a pillory was not considered "cruel or unusual." How do you square your mode of statutory and constitutional interpretation with a "claim that punishment is excessive is judged not by the standards prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."²⁸
- f. On June 20, 2002, you replied to an e-mail with the subject line: "Next Justice Watch."²⁹ In the e-mail you discussed the *Atkins v. Virginia* decision, which was just handed down. You wrote, "Applying the original meaning of cruel and unusual' would lead to one of two standards: (i) 'cruel and unusual' means 'cruel and illegal,' meaning that no statutorily authorized punishment is 'cruel and unusual'; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality."³⁰ Do you still believe that applying the original meaning to "cruel and unusual" means "cruel and illegal," meaning that no statutorily authorized punishment is "cruel and unusual"; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality"?
19. In capital punishment cases, the race of the criminal defendant and of the victim plays a significant role in whether a defendant ultimately receives the death penalty. According to the American Civil Liberties Association, people of color account for 43 percent of total executions since 1976 and 55 percent of individuals currently awaiting execution.³¹ In our meeting on August 23, 2018, we talked about racial disparities in the use of capital punishment and you spoke about how the jury selection process might partially account for the disproportionate rate of executions of people of color.
- a. Based on current data, do you believe that racial disparities still exist in the application of the death penalty?
- b. In *Gregg v. Georgia*, the Supreme Court said that the use of capital punishment is unconstitutional if it is "inflicted in an arbitrary and capricious manner."³² Do you believe that the disproportionate application of the death penalty on African Americans is arbitrary and capricious?
20. According to the Constitution Accountability Center, "the U.S. Chamber of Commerce went 9-1 at the Supreme Court in the 2017-2018 Term, its best record in six years. Since

²⁸ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

²⁹ REV_00147341 (e-mail dated June 20, 2002).

³⁰ REV_00147342 (e-mail dated June 20, 2002).

³¹ ACLU, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (last visited Sept. 7, 2018).

³² *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

2006, the Chamber has won more than 70% of its cases at the Supreme Court, compared to 43% and 56% during comparable periods during the Burger and Rehnquist Courts.”³³ Do you believe those statistics damage the American people’s perception of the Supreme Court as a fair arbiter of justice? If not, please explain.

21. You dissented in *SeaWorld of Florida v. Perez* arguing that the Department of Labor’s finding was arbitrary and capricious because it departed from longstanding administrative precedent that it not “regulate participants taking part in the normal activities of sports events or entertainment shows.”³⁴
- a. Is SeaWorld a corporation operating in the entertainment industry?
 - b. Does the Department of Labor regulate the entertainment industry?
 - c. The general duty clause of the Occupational Safety and Health Act provides: “Each employer [] shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.”³⁵ Do you believe that the general duty extends to the entertainment industry?
 - d. You posed the following question: “When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants?”³⁶
 - i. Do you believe it is paternalistic for the Department of Labor to regulate the coal mining industry?
 - ii. Do you believe it is paternalistic for the Department of Labor to regulate the logging industry?
 - iii. Do you believe it is paternalistic for the Department of Labor to regulate the film industry?
 - iv. Do you believe it is paternalistic for the Department of Labor to regulate SeaWorld?

³³ Brian R. Frazelle, *Corporations and the Supreme Court: A Banner Year for Business as the Supreme Court’s Conservative Majority Is Restored—October Term 2017*, CONST. ACCOUNTABILITY CTR. (July 2018), https://www.theusconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored.

³⁴ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2004).

³⁵ *Id.* at 1207 (citing 29 U.S.C. § 654(a)(1)).

³⁶ *Id.* at 1217.

- e. You also wrote: “To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities.”³⁷
- i. Do you believe that fearless, courageous, and tough people do not expect their employer to “furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.”? If not, please explain.
- f. Do you think it is unreasonable for employees—regardless of what industry they work in—to expect to go home safely at night?

22. Do you believe it is paternalistic for the government to work to ensure—to the best extent practical and reasonable—that employees work in a safe environment?

23. In *Garza v. Haragan*, you said several times that the government was somehow acting out of an interest to place this young woman in a better environment where she could “make the decision” about whether to have an abortion.³⁸

Putting aside for a moment the fact that the government had been looking for a sponsor for many weeks and could not find one, what is troublesome here is that this young woman had *already made* her decision. She had received a bypass from a judge in Texas against having to obtain parental consent, and she was found to be mature enough to make her own choice. She made her choice, and her pregnancy was advancing each day against her will.

- a. Why did you write your opinion as though she hadn’t decided what to do with her own body?
- b. You wrote that everyone agreed, for purposes of this case, that Jane Doe had a right under *Roe* and *Casey* to obtain an abortion and that her status as undocumented did not diminish that right.

If this case involved a 17-year-old American citizen who was being held in a juvenile detention facility, and the authorities running the facility imposed multiple obstacles that forced the young woman to wait for several weeks before

³⁷ *Id.* at 1218.

³⁸ *Garza v. Haragan*, 874 F.3d 735, 754-55 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

obtaining an abortion, is there any set of circumstances in which you might have found this was permissible under *Roe* and *Casey*?

- c. In your dissent in the *SeaWorld* case, you wrote that the Occupational Safety and Health Administration “paternalistically decide[d]” that trainers needed to “be protected from themselves.”³⁹

When the government seeks to restrict women’s access to health care services—or to bar that access altogether—on the grounds that the restrictions are for the women’s own good, why isn’t that paternalistic?

24. In your dissent in *Garza*, you argued that the en banc majority was establishing “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”⁴⁰ You also stated that “[t]he majority’s decision represents a radical extension of the Supreme Court’s abortion jurisprudence.”⁴¹

- a. However, the Supreme Court’s decision in *Bellotti v. Baird* held that minors may fulfill alternative procedures to bypass a state’s parental consent requirement.⁴² An opinion by one of your D.C. Circuit colleagues made exactly this point⁴³ and countered your assertion that the court was creating “radical” “new right.” You did not cite *Bellotti* in your dissent. Why did you decline to heed or even address the Supreme Court’s precedent in *Bellotti* in your opinion in *Garza*?
- b. In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court (in an opinion joined by Justice Kennedy) explained that the “correct legal standard” for the undue burden test is to “weigh[] the asserted benefits against the burdens.”⁴⁴ Your dissent in *Garza* does not appear to weigh the potential harms to Jane Doe resulting from a further delay against any claimed benefits from that delay, as *Whole Woman’s Health* requires. Why did you not adhere to precedent in this regard?

³⁹ *SeaWorld*, 748 F.3d at 1217.

⁴⁰ *Id.* at 752 (Kavanaugh, J., dissenting) (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.” (footnote omitted)).

⁴³ *Id.* at 737 (Millett, J., concurring) (emphasis added).

⁴⁴ 136 S. Ct. 2292, 2310 (2016).

25. On several occasions in late 2001 and early 2002, you expressed enthusiasm for John Yoo as a candidate for a judgeship on the United States Court of Appeals for the Ninth Circuit.⁴⁵
- a. What was the basis of your support for Mr. Yoo?
 - b. What insights did you have as to whether he would be a good judge?
26. Knowing what you know now about Mr. Yoo's role in drafting the infamous August 1, 2002, memorandum for the Office of Legal Counsel authorizing abusive interrogation techniques (as well as his role in drafting other related memoranda), do you still think that Mr. Yoo would have made a good judge?⁴⁶ Please do *not* respond simply by stating that you disagree with the August 1, 2002, memorandum's conclusions.
27. You also expressed enthusiasm in early 2002 for the prospect that Mr. Yoo could serve as the General Counsel for the Central Intelligence Agency.⁴⁷ Knowing what you know now about Mr. Yoo, do you think he would have performed that job responsibly?
28. On September 17, 2001, you wrote an e-mail to Mr. Yoo under the subject line "4A issue." You asked Mr. Yoo if there were "[a]ny results yet on the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"⁴⁸

According to a report by the Department of Justice's Inspector General, Mr. Yoo drafted a memorandum that day "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential terrorists."⁴⁹ Mr. Yoo expanded upon that memorandum on October 4, 2001, and President Bush formally authorized what became known as the "Stellar Wind" program on the same date.⁵⁰ Alberto Gonzales, who was the White House Counsel at this time, subsequently stated that he believed that the September 17 and October 4 memoranda by

⁴⁵ REV_00206814 (e-mail dated Nov. 29, 2001); REV_00210698-99 (e-mails dated Jan. 10, 2002).

⁴⁶ U.S. Dep't of Justice, Office of Legal Counsel, *Standards for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download>.

⁴⁷ REV_00210698 (e-mail dated Jan. 10, 2001).

⁴⁸ REV_00023540 (e-mail dated Sept. 17, 2001).

⁴⁹ OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *A REVIEW OF THE DEPARTMENT OF JUSTICE'S INVOLVEMENT WITH THE PRESIDENT'S SURVEILLANCE PROGRAM 25* (July 2009), available at [https://www.aclu.org/sites/default/files/field_document/71-](https://www.aclu.org/sites/default/files/field_document/71-6_exhibit_e_4.20.16.pdf)

6_exhibit_e_4.20.16.pdf.

⁵⁰ *Id.* at 25, 28.

Mr. Yoo “described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions ‘covered’ the Stellar Wind program.”⁵¹

During your 2006 testimony before the Senate Judiciary Committee, you had the following exchange with Senator Leahy:

SENATOR LEAHY. What was your reaction—as Staff Secretary, you see virtually every piece of paper that goes to the President; is that correct?

MR. KAVANAUGH. On many issues, yes, Senator. Not everything, but on many issues.

SENATOR LEAHY. Did you see documents relating to the President’s NSA warrantless wiretapping program?

MR. KAVANAUGH. Senator, I learned of that program when there was a *New York Times* story—reports of that program when there was a *New York Times* story that came over the wire, I think on a Thursday night in mid-December of last year.

SENATOR LEAHY. You had not seen anything, or had you heard anything about it prior to the *New York Times* article?

MR. KAVANAUGH. No.

SENATOR LEAHY. Nothing at all?

MR. KAVANAUGH. Nothing at all.⁵²

At your hearing last week before the Senate Judiciary Committee, you made similar representations.

- a. What was your understanding of the Bush Administration’s activities, or of any proposed or hypothetical activities, that prompted you to write your e-mail on September 17, 2001? (If you are concerned that a response might contain classified information, then please consult with the appropriate classification authorities. Please note, as well, that most aspects of the Stellar Wind program have been declassified.)
- b. Did Mr. Yoo respond to your September 17, 2001, e-mail, either by e-mail or by phone? If he responded by e-mail, please produce that e-mail. If he responded by phone, please summarize what he said.

⁵¹ *Id.* at 28.

⁵² S. Hrg. No. 109-435, at 42-43 (May 9, 2006), <https://www.congress.gov/109/chrg/shrg27916/CHRG-109shrg27916.htm>.

- c. Did you ever read Mr. Yoo's September 17, 2001, memorandum, his October 4, 2001, memorandum, or any drafts thereof? If so, please provide the dates or dates, to the best of your recollection, on which you read any such memoranda.
- d. Did Mr. Yoo ever describe the contents and/or conclusions of any such memoranda to you? If so, please provide the date or dates, to the best of your recollection, on which this occurred. A statement that you were not "read into" the Stellar Wind program is not a complete answer to the above questions.
- e. In light of the e-mail you sent to Mr. Yoo dated September 17, 2001, do you still stand by your statements to this Committee—both in 2006 and last week—about your knowledge of the warrantless-wiretapping program under President Bush?
- f. If you stand by your previous statements, please explain why your exchange with Mr. Yoo concerning "the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence" does not pertain to the warrantless-wiretapping program carried out under President Bush.

29. In *Klayman v. Obama*, you wrote an opinion concurring in your colleagues' decision to deny rehearing en banc of Mr. Klayman's emergency petition, which sought review of a panel's decision to stay the district court's order pending appeal.⁵³ In your opinion concurring in the denial of rehearing, you stated that the bulk collection of Americans' telephone records "is entirely consistent with the Fourth Amendment."⁵⁴

Your colleagues' order had already stayed the district's court's partial injunction below, and you agreed that Mr. Klayman's petition should *not* be reheard. Additionally, when you wrote your opinion on November 20, 2015, the program that was the subject of Mr. Klayman's challenge was set to expire in just a matter of days pursuant to the USA FREEDOM Act, Pub. L. No. 114-23 § 109(a).

- a. Given these circumstances, did you find it *necessary* to write a separate opinion defending the constitutionality of this program?
- b. If writing this opinion was not *necessary*, why did you do it?

30. In your opinion in *Klayman*, you concluded in just one paragraph that, even if the collection of millions of Americans' phone records constituted a "search" for Fourth

⁵³ *Klayman v. Obama*, 805 F.3d 1148, 1148-1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc).

⁵⁴ *Id.* at 1148.

Amendment purposes, a warrant for such collection would not be required under the so-called “special needs” doctrine. You further stated that “[t]he Government’s program for bulk collection of telephony metadata serves a critically important special need—preventing terrorist attacks on the United States.” To support this assertion, you cited the entirety of the *9/11 Commission Report*, which is over 500 pages long.⁵⁵

- a. What specific portion of the *9/11 Commission Report* did you rely upon for your assertion that the *bulk* collection of telephony metadata (as distinct the *targeted* collection of telephony metadata) helps to prevent terrorist attacks?
 - b. If you did not rely on the *9/11 Commission Report* to support that assertion, what other data, reports, and/or statements by government officials or other parties? Please list the data, reports, and/or statements by government officials or other parties on which you relied.
31. You also authored a concurrence in the denial of rehearing en banc in *Al-Bihani v. Obama*.⁵⁶ Your opinion (in the D.C. Circuit’s slip opinion format) was 87 pages long. In it, you argued that international law does not constrain the President’s wartime detention authority. However, you agreed with your colleagues on the very first page of your opinion that resolving the question of whether international law constrains the President’s detention authority was not necessary to decide the case.⁵⁷ Additionally, the government itself argued that “[t]he authority conferred by the [2001 Authorization for Use of Military Force] is informed by the laws of war,” and it repeatedly cited principles of international law in its brief.⁵⁸ Given these circumstances, why did you find it appropriate to write this lengthy opinion arguing that international law should play no role in construing the scope of the President’s wartime detention authority?
32. Please explain whether you believe that your opinions in *Klayman* and *Al-Bihani* are consistent with principles of judicial restraint.
33. When we met in my office, I asked if you would be willing to provide a list of topics on which you authored substantive memoranda while serving as Staff Secretary for President Bush. You said you would take this request under consideration. Please

⁵⁵ *Id.* at 1149; see *The 9/11 Commission Report* (2004).

⁵⁶ 619 F.3d 1, 9-53 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of reh’g en banc).

⁵⁷ *Id.* at 9 (“The premise of Al-Bihani’s plea for release is that international-law norms are judicially enforceable limits on the President’s war-making authority under the AUMF. Even accepting that premise, Al-Bihani cannot prevail in this case.”).

⁵⁸ Brief for Appellees at 22, *Al-Bihani v. Obama*, No. 09-5051, 590 F.3d 866 (filed Sept. 15, 2009); see *id.* at 24-25, 30-31, 40-42.

provide a list of all subject areas in which you authored memoranda advising the President for or against any:

- a. Proposed legislation;
- b. Proposed constitutional amendment(s);
- c. Proposed White House policy initiative(s); and/or
- d. Proposed policy initiative(s) within the Executive Branch.

34. While serving as Staff Secretary, did you ever provide substantive input with respect to:

- a. President Bush's decision to support a constitutional amendment banning same-sex marriage; and/or
- b. Any speeches that President Bush gave about this subject?

If so, please describe the nature of any such input.

35. In his State of the Union address in January 2004, delivered while you were Staff Secretary, President Bush suggested he might support a constitutional amendment banning same-sex marriage.⁵⁹

- a. Were you involved in any way in the drafting of President Bush's 2004 State of the Union address? This includes authoring or editing memoranda, authoring or editing any drafts of the address, and any other relevant input.
- b. Were you involved in any way in the drafting of the line above from that address?
- c. Did you voice any objections internally to this statement?

36. In February 2004, shortly after he delivered the State of the Union address, President Bush formally declared his support for a constitutional amendment banning same-sex marriage.⁶⁰

⁵⁹ *Transcript of State of the Union*, CNN (Jan. 20, 2004), <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.6/index.html> ("If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process.").

⁶⁰ *Transcript of Bush Statement*, CNN (Feb. 24, 2004), <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.transcript> ("Today, I call

- a. Were you involved in any way in the drafting of any part of this speech? This includes authoring or editing memoranda, authoring or editing any drafts of the speech, and any other relevant input.
 - b. Did you voice any objections internally to this decision?
37. While serving as Staff Secretary, did you ever provide substantive input with respect to:
- a. The 2005 Detainee Treatment Act,⁶¹ and/or
 - b. President Bush's signing statement made in connection with that statute?
38. You were serving as Staff Secretary to President Bush when Hurricane Katrina hit. You have acknowledged traveling with President Bush to New Orleans and the Gulf Coast in the wake of the storm.⁶²
- a. When did you become aware of the disproportionate impact that Hurricane Katrina would have, or had had, on communities of color?
 - b. What was your role as Staff Secretary in support President Bush during the Administration's response to Hurricane Katrina?
 - c. From your vantage point as Staff Secretary, did you think the Bush Administration performed adequately in responding to the impact of Hurricane Katrina, particularly with regard to communities of color affected by the storm?
 - d. Did you urge Bush Administration officials to take any steps to redress the impact of Hurricane Katrina that were not ultimately taken?
 - e. Did you oppose or otherwise disagree with any particular measures regarding the Bush Administration's response to Hurricane Katrina?
 - f. As the Bush Administration responded to Hurricane Katrina, did you ever advocate for or against any race-conscious remedy?

upon the Congress to promptly pass and to send to the states for ratification an amendment to our Constitution defining and protecting marriage as a union of a man and woman as husband and wife.”).

⁶¹ Pub. L. No. 109-148, div. A, tit. X (2005).

⁶² Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTER. INST. 5 (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

39. In a report authored by the White House Transition Project, you provided detailed descriptions of the role of the Staff Secretary.⁶³ You described the Staff Secretary as responsible for coordinating a rigorous fact-checking process for speeches by the President, and you stated that you would often personally “take questions back to the President for resolution about the wording of specific proposals or decisions.”⁶⁴

On November 7, 2005, as Congress was considering legislation that would ban torture and cruel, inhuman, or degrading treatment of detainees, President Bush gave an address in Panama City in which he stated, “We do not torture.”⁶⁵

Please describe what steps you took in order to fact-check that statement.

⁶³ See generally Kathryn Dunn Tenpas & Karen Hult, White House Transition Project, *The Office of the Staff Secretary* (Report No. 2017-3), <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf>.

⁶⁴ *Id.* at 13.

⁶⁵ Deb Riechmann, *Bush Declares: ‘We Do Not Torture,’* WASH. POST (Nov. 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700521.html>.

**Nomination of Judge Brett Kavanaugh to be
Associate Justice of the United States Supreme Court
Questions for the Record
Submitted September 10, 2018**

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?
 - a. Would you consider whether the right is expressly enumerated in the Constitution?
 - b. You indicated that you would consider whether the right is deeply rooted in this nation's history and tradition. What types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?
 - c. Would you consider whether the right has previously been recognized by Supreme Court or a court of appeals?
 - d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?
 - e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).
 - f. What other factors would you consider?
2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?
 - a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?
 - b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?
 - c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?
 - d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?
3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?
 - a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?
 - b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

- c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.
4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.
- When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?
 - What is the role of sociology, scientific evidence, and data in judicial analysis?
5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.
- Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?
 - How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”?
- Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited September 9, 2018).
- Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?
 - Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?
 - What sources would you employ to discern the contours of a constitutional provision?
6. You have been highly critical of *Morrison v. Olson*, 487 U.S. 654 (1988), on both policy and constitutional grounds.
- Which provisions of the independent counsel statute at issue in that case caused you to call the law a “constitutional travesty,” and why did you object to those provisions so strongly?
 - Why did you single out *Morrison* as a case you would overrule?

- c. Please explain why you believe the independent counsel statute should have been struck down.
 - d. Do you think the for-cause removal provision of the independent counsel statute was unconstitutional?
 - e. Do you believe that the Constitution requires the President to be able to remove any Executive Branch official at will?
7. You repeatedly turned to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in response to my questions about *Morrison v. Olson*. You said that *Humphrey's Executor* was "an important precedent of the Supreme Court that [you] have applied many times and reaffirmed." Do you believe that *Humphrey's Executor* was correctly decided?
8. In a 2017 speech at the American Enterprise Institute, you praised Chief Justice Rehnquist's approach to substantive due process cases, both in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and more generally.
- a. Do you agree that Justice Rehnquist's approach in substantive due process cases focused on whether asserted constitutional rights were deeply rooted in history and tradition?
 - b. Do you believe that this is the sole test for determining whether a right should be protected under the Fourteenth Amendment's Due Process Clause?
 - c. Which substantive due process rights that are currently protected under Supreme Court precedent can be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.
 - d. Which substantive due process rights that are currently protected under Supreme Court precedent cannot be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.
9. During my last round of questions with you, I asked you about Chief Judge Rehnquist's approach to identifying liberty interests protected by the Fourteenth Amendment's Due Process clause in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the so-called *Glucksberg* test. During that round of questioning, and in response to the questions of other Senators, you seemed to suggest that this test is the exclusive governing test according to Supreme Court precedent. You further seemed to suggest that this approach had been endorsed by Justice Kagan during her confirmation hearing and by Justice Kennedy, given that he joined the majority in *Glucksberg*. However, Justice Kennedy wrote in the majority opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), which Justice Kagan joined: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566-567."
- a. Do you agree that the Supreme Court declined to apply the *Glucksberg* test in critical substantive due process decisions subsequent to *Glucksberg* that were written by Justice Kennedy, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)?

- b. Given the approach to substantive due process in these two recent cases, why did you repeatedly suggest that the *Glucksberg* test is the appropriate, or only, approach to deciding substantive due process?
 - c. *Obergefell* explicitly rejected that the *Glucksberg* test was the sole test for identifying liberty interests protected by the Due Process Clause. The Court stated that the *Glucksberg* “approach may have been appropriate for the asserted right there involved (physician-assisted suicide),” but “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” In light of this statement, do you agree that it is inaccurate to characterize *Glucksberg* as the governing test for assessing liberty interests under substantive due process? Why or why not?
 - d. Why did you not refer to any of these more recent cases when discussing substantive due process?
 - e. Do you believe these more recent substantive due process cases (*Lawrence*, *Obergefell*) were correctly decided?
10. Recent Supreme Court cases addressing capital punishment under the Eighth Amendment and the privacy of same-sex intimacy under the Fourteenth Amendment have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record, as well as relevant U.S. case law and practices. *See Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Do you agree that foreign court decisions and foreign practices of democratic countries that follow the rule of law are appropriate to consider and cite in opinions interpreting the Constitution?
11. Chief Justice Warren wrote that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This doctrinal standard explicitly calls on the Court not to limit its Eighth Amendment analysis to the meaning of “cruel and unusual punishments” when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Applying *Trop*’s evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.
- a. In your view, what is meant by the Eighth Amendment’s prohibition against “cruel and unusual punishments”?
 - b. Does the phrase “cruel and unusual punishments” have the same meaning from the Eighth Amendment’s ratification in 1791 until now, or has our understanding changed?
 - c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes “cruel and unusual punishments”?
 - d. If it were permissible at the time of the Founding to execute eight-year-old children, would a commitment to originalism as the exclusive theory of constitutional interpretation mean that it would be similarly permissible to execute eight-year-old children today?
12. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures.

- a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?
 - b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?
 - c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?
13. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. Please describe every pro bono matter you worked on over the course of your career.
14. The U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from civil actions involving claims "arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. As a judge on the U.S. Court of Appeals for the D.C. Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to come before you.
- a. Please describe any legal instruction (including at law school and afterwards) you have had in patent law.
 - b. Please describe any legal instruction (including at law school and afterwards) you have had in other areas of intellectual property law.
 - c. Please describe any experience you have had working on intellectual property issues since graduating law school.
 - d. Please list any speeches or public presentations in which you have discussed intellectual property law.
15. Are patents property rights?
16. Are federal copyrights property rights?
17. Please describe the sources and methods you believe a judge should use in order to determine whether a claimed invention in a patent is an abstract idea that is not patent eligible.
18. Do you believe it is unduly burdensome for an individual inventor in possession of an issued U.S. patent to prevent infringement by a large corporation? Why or why not? If yes, what steps should be taken to make enforcement easier?
19. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. "Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to 'provide nationwide uniformity in patent law.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97-312, p. 20 (1981)).

- a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?
 - b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?
 - c. Resolving circuit splits is often viewed as one of the Supreme Court's core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?
20. During your nomination hearing, you referred to the "reliance interest" that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?
21. How frequently do you communicate with Judge Kozinski? If the frequency of your communications has changed over time, please provide estimates for different time periods.
- a. At least 15 women have accused Judge Kozinski of sexual harassment. Do you believe that Judge Kozinski treated women inappropriately?
 - b. During the entire course of your relationship with Judge Kozinski, did you ever witness him engaging in inappropriate behavior? Please explain any such incident(s).
 - c. Did you ever see Judge Kozinski mistreat a law clerk or law clerk candidate? Please explain any such incident(s).
 - d. Did Judge Kozinski ever use demeaning language when discussing women?
 - e. Did anyone ever raise concerns with you about Judge Kozinski's behavior? Who? When?
 - f. Did your clerkship spot with Judge Kozinski become available when another student resigned or was fired from his clerkship with Judge Kozinski? If so, please explain your understanding of the circumstances around the former clerk's departure.
 - g. It has been reported that Judge Kozinski had a sexually explicit email list, called the Easy Rider Gag List. Did you ever receive an email from this list? If it is necessary to refresh your recollection, please review your email accounts before answering this question.
 - h. Have you conducted a search of your email accounts and/or correspondence with Judge Kozinski in an effort to provide an accurate response to the preceding question? If not, why not?
 - i. Judge Kozinski also had a personal website with explicit postings. When did you first become aware of Judge Kozinski's personal website?
 - j. At any time, did you provide information related to an inquiry regarding Judge Kozinski's behavior?

22. Which cases, theories, or legal issues were you asked about during the judicial selection process for the D.C. Circuit and for the Supreme Court (including conversations with the White House or outside advisors)? Please provide a comprehensive response.
23. President Trump published an initial list of names from which he would select future Supreme Court nominees in May 2016. You were not on that initial list. Between that time and November 2017, when you were added to the list, what actions, if any, did you take to have your name added?
 - a. Did you speak to anybody about being added to the list? If yes, please list with whom you spoke and what you discussed.
 - b. Did you agree to give any speeches in order to be added to the list?
 - c. Did you select the subject matter of your speeches in order to be added to the list?
 - d. Did the possibility of being added to the list impact your decisions in any cases before you?
24. In my office, you confirmed that the Third Circuit decided *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), while you were clerking for Judge Stapleton. Did you work on this case? Please seek permission to answer this question if necessary.
25. In the speech you gave on the night your Supreme Court nomination was announced, you said that “[n]o president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination.”
 - a. Who wrote that line of your speech?
 - b. How do you know that this is a true statement?
 - c. Did you do any research to verify those assertions?
 - d. When did you first meet Leonard Leo, and how frequently do you communicate with him?
26. On what legal or other basis did you advise Ken Starr that he should demand a public apology from President Clinton as one condition of giving him “breaks” in questioning him?
27. You told me that you drafted the “grounds” section of the Starr report, which contained perjury allegations. Has your interpretation of what constitutes perjury changed since you drafted the Starr report?
28. If a judge provides intentionally false testimony to Congress on an issue of significance, is impeachment the appropriate remedy?
29. In my office, we spoke about how important it is for the President of the United States to be truthful in everything he says.
 - a. Please explain why it is so important for the President to be truthful.
 - b. Does President Trump tell the truth?
 - c. Has President Trump made any statements that you would condemn?
 - d. You recounted an episode in the White House where President Bush was criticized for a statement that was, in your words, “literally true but misleading in context.” Please

review the transcript of your hearing and identify any statements that you made that were literally true but misleading in context.

30. In a March 27, 2001 email that you wrote while serving in the White House Counsel's Office, you referred to your "ideal of how a unitary executive should work." Please explain your ideal of how a unitary executive should work.
31. Why did you testify during your hearing that you have "never taken a position on the constitutionality of indicting or investigating a sitting President" when, in the *American Spectator* in 1999, you described as "constitutionally dubious" the "transfer of investigative responsibility" from Congress to a criminal prosecutor?
32. During your hearing, Sen. Whitehouse asked you if the President must comply with a grand jury subpoena.
 - a. Does the President have to comply with a grand jury subpoena?
 - b. If your answer is anything other than "yes," do you believe this question is not controlled by the holding in *United States v. Nixon*, 418 U.S. 683 (1974)?
 - c. Please identify any case law where a federal court has distinguished between a trial court subpoena and a grand jury subpoena.
33. At your hearing, you testified that your past criticism of *United States v. Nixon*, 418 U.S. 683 (1974), was taken out of context. Here is what you said at the roundtable where you discussed *United States v. Nixon*:
 - "Maybe *Nixon* was wrongly decided."
 - "*Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. . . . And the Court said, 'We're going to take away that right.' Maybe the tension of the time led to an erroneous decision."
 - "There should be more focus on the merits of *Nixon* than there has been."
 - "Should *United States v. Nixon* be overruled[?] . . . [M]aybe so."

You made many statements critical of *Nixon*, and you articulated a rationale in support of your criticisms – specifically, the theory of the unitary executive that Justice Scalia articulated in his dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), which you have cited approvingly many times as a sitting judge. Given all of your statements, reproduced above, why did you assert that your criticism of *Nixon* was taken out of context?

34. During the hearing, I stated, "[At] Georgetown, [on] a panel in 1998 you wrote it makes no sense at all to have an independent counsel investigate the President, if the President were a sole subject of investigation, nobody should investigate that. Is that your view, if there is evidence that what President committed crime no one should investigate it?" You replied, "That's not what I said, Senator." In a recording of that panel, at approximately the one-hour-and-20-minute mark, you state, "If the president were the sole subject of a criminal investigation. I would say, no one should be investigating that. That should be turned over

immediately to the Congress. Most criminal investigations involve multiple subjects however, so the criminal investigation goes forward. But if it ever gets to a point where the president is the sole subject, the Congress needs to take the lead.” Independent Counsel Structure & Function, February 19, 1998, *available at* <https://www.c-span.org/video/?101055-1/independent-counsel-structure-function>.

- a. Please explain your testimony during the hearing and why you denied stating this.
 - b. Please answer the question whether it remains your view that if the President is the sole subject of an investigation, no prosecutor or law enforcement officials should investigate it.
35. Please explain how your testimony that you have not opined on the constitutionality of indicting a President is consistent with your prior writings that “the Constitution itself seems to dictate” that criminal prosecution occur only after the President has left office.
36. You characterized your approach in *Garza v. Hargan*, 874 F. 3d 735 (D.C. Cir. 2017), as simply trying in good faith to apply Supreme Court precedent. Yet your approach in that case appears to be inconsistent with Supreme Court precedent in at least two ways.
- a. How is your approach consistent with *Bellotti v. Baird*, 443 U.S. 622 (1977), given that J.D. had already obtained a judicial bypass in state court and had met all of the requirements under state law to have an abortion?
 - b. Why did you not apply the Court’s holding in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which requires a reviewing court to balance the burden imposed by an abortion restriction (such as an additional required delay) against the benefit of the restriction?
 - c. What does it say about your view about a woman’s right to make her own decisions about her health care when you required J.D. to wait at least another 11 days to have an abortion, when federal officials had already delayed her access to reproductive services almost seven weeks?
 - d. Given that federal officials had already made J.D. wait almost seven weeks to obtain an abortion, why did you characterize J.D.’s constitutional claim as seeking a right to “abortion on demand”?
 - e. Under what circumstances do you believe a women’s right to choose to have an abortion is not “abortion on demand”?
 - f. In your view, is there any point at which delaying a minor’s right to abortion services becomes an undue burden on that right?
37. Please respond to Judge Millett’s concern that the interpretation of the law in your dissent in *Garza v. Hargan* 874 F. 3d 735 (D.C. Cir. 2017), “would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone’s ‘network’ an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures.”
38. In your dissent in *Priests for Life v. Department of Health and Human Services*, 772 F.3d 229 (2014), you wrote that “when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government

has substantially burdened” the exercise of religion. Did you intend to include any action, irrespective of how burdensome it is to take that action?

39. The Supreme Court has not recognized a constitutional right to health care protected under the liberty provision of the Due Process Clause. However, Congress passed the Affordable Care Act, which protects health care access regardless of preexisting conditions. Is it constitutional for Congress to prohibit insurers from denying individuals coverage based on preexisting conditions?
40. In your 2011 dissent in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), you explained that you would have struck down D.C.’s firearms registration requirements, concluding that “[r]egistration of all lawfully possessed guns . . . has not traditionally been required in the United States and even today remains highly unusual.” Please cite any other circuit court decisions that have interpreted the Supreme Court’s *Heller* decision in this way.
41. Does the government have a compelling interest in eradicating discrimination against racial minorities, women, or LGBT individuals sufficient to justify denial of federal funding to schools that discriminate against any such individuals based on sincerely held religious beliefs?
42. Why did you author a concurrence in *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015)?
43. In your concurrence to the denial of rehearing en banc in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), you opined that courts have no role in interpreting an ambiguous statute with reference to international law unless Congress makes a clear statement that they must do so. Has the Supreme Court ever agreed with this view?
44. In *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), you joined the majority’s opinion extending sovereign immunity to private military contractors sued in conjunction with abuses at Abu Ghraib. Chief Judge Garland’s dissent noted that the majority lacked any statutory or judicial authority for extending sovereign immunity to private military contractors. Please respond to this critique.
45. Why did you decline to join the analysis in the concurrence in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), which recognized the importance of the Voting Rights Act of 1965?
46. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), when you explicitly stated that the Court’s decision did not apply to certain types of speech by foreign nationals related to U.S. elections, did you anticipate that foreign entities would cite these limitations in future litigation?
47. In *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381 (D.C. Cir. 2017), you dissented from the D.C. Circuit’s decision to deny rehearing en banc. In your dissent, you noted that the First Amendment offers broad editorial discretion to Internet Service Providers. However, the only party that raised a First Amendment argument

would never have been bound by the FCC's net neutrality rule because the provision did not apply to a broadband provider unless it held itself out as a neutral, indiscriminate conduit to any Internet content of a subscriber's own choosing. Why did you find it appropriate to address a point that was not necessary to resolve the case?

48. Did you ever meet with law enforcement, volunteer information, provide documents, or cooperate in any way with the investigation into Manuel Miranda's theft of documents from Senate Judiciary Committee Democrats in any way?
 - a. If not, why did you decline to come forward to offer to assist the investigation, given your frequent communications with Manuel Miranda regarding judicial nominations and the likelihood that he shared stolen information with you?
 - b. Were your documents searched for information relevant to the investigation? If not, why not?
49. Have you had any communications with William Burck since your nomination was announced?
 - a. Did you have any involvement in the document production being overseen by William Burck in relation to this hearing?
 - b. If you did have involvement in the document production being overseen by William Burck, please describe your role.
 - c. Were there others involved in the document review process being overseen by William Burck? If yes, who were they and what was their role?
50. Are you aware of who paid for the in the document production being overseen by William Burck? If yes, who paid for it? What was the approximate amount of the expense?
51. Did you see any of the documents from the document production being overseen by William Burck prior to their release by the Senate Judiciary Committee? If yes, what documents did you see? If yes, were any of the documents that you saw designated "Committee Confidential" when you viewed them?
52. As Staff Secretary, did you create documents?
 - a. Did you revise or add your views to other documents before they went to the President?
 - b. Please provide a list of the most substantive contributions that you made as White House Staff Secretary.
 - c. Are there documents that you created or contributed to during your time as White House Staff Secretary that bear on any of the issues that were discussed in the hearing?
 - d. Please provide a list of all of the signing statements you contributed to in any way while in the White House.
53. During our private meeting, you defended the refusal by Senate Republicans to request and release your Staff Secretary records from your time in the White House of President George W. Bush based on what you called "nominee precedent."
 - a. Please explain whether and why you stand by your defense of the current refusal by Senate Republicans to request and release your Staff Secretary records.

- b. Do you agree that your Staff Secretary records will eventually become public, at which time one will be able to determine whether you were truthful during your Supreme Court confirmation hearing?
54. Given that, pursuant to the Presidential Records Act, documents from your time in the Bush White House will be released in the coming years, please answer the following questions regarding your Staff Secretary documents:
- a. Are there going to be emails or other documents that pertain to torture?
 - b. Are there going to be emails or other documents that pertain to detainee treatment?
 - c. Are there going to be emails or other documents that pertain to rendition?
 - d. Are there going to be emails or other documents that pertain to ballot initiatives on marriage, the 2003 Proclamation of Marriage Protection Week, the May 17, 2004 Statement calling for a constitutional amendment barring marriage equality, or the July 12, 2004 Statement of Administrative Policy on S.J. Res. 40 also known as the "Federal Marriage Amendment"?
 - e. Are there going to be emails or other documents that pertain to Plan B contraception?
 - f. Are there going to be emails or other documents that pertain to CIA operative Valerie Plame?
55. When you worked in the White House Counsel's Office on judicial nominations, did the Bush administration have a preference for nominees inclined to end busing orders designed to racially integrate schools?
56. During your time in the White House, several senior staff members were using Republican National Committee and campaign email addresses and servers that did not preserve their emails, as required by law.
- a. Did you have any email addresses during your time in the White House other than your official White House email address?
 - b. Did you use any other email addresses other than your official White House email address to conduct official business? If so, please provide it.
57. Did you prepare for these hearings?
58. Assuming you prepared for these hearings, how many preparation sessions did you have? Approximately how long did you spend preparing?
59. During any part of your preparation for these hearings, were there any individuals from the White House present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.
60. During any part of your preparation for these hearings, were there any individuals from the Department of Justice present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

61. During any part of your preparation for these hearings, were there any individuals from any other part of the Executive Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.
62. During any part of your preparation for these hearings, were there any individuals from Congress (including both Members and staffers) present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.
63. During any part of your preparation for these hearings, were there any individuals from the Judicial Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.
64. During any part of your preparation for these hearings, were there any individuals from outside of the federal government present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.
65. During any part of your preparation for these hearings, were you given guidance on what questions you should not answer? If yes, what was the guidance?
66. During any part of your preparation for these hearings, were you shown documents?
 - a. How many documents were you shown?
 - b. Have all of these documents been produced to the Senate Judiciary Committee?
 - c. Are all of these documents publicly available?
 - d. Will you agree to produce any documents that haven't been given to the Senate Judiciary Committee and make them publicly available?
67. Has the testimony that you have provided during this hearing been 100 percent truthful?
68. Has the testimony that you have provided during this hearing been 100 percent accurate?
69. At any point during this hearing, did you answer a question a certain way to avoid disclosing relevant information?
70. Is anyone helping you to provide answers to these written questions?
71. If anyone is helping you to provide answers to these written questions, please provide their names, how they are helping you, and who is compensating them for their work on your answers.
72. Have you read and verified the answer to each one of these questions?
73. Is the answer to each one of these questions 100 percent accurate?

**Written Questions from Senator Richard J. Durbin to Judge Brett Kavanaugh
September 10, 2018**

For questions with subparts, please respond to each subpart separately.

1. You worked as White House Staff Secretary from July 2003 through May 2006. You have described this time as “formative” and “most instructive to your judging.” You have said in numerous speeches that your duties as Staff Secretary involved substantive policy work. You said you “participated in the process of putting legislation together,” “identif[ied] potential constitutional issues in legislation,” and “worked on drafting and revising executive orders.” In your 2006 hearing, you told then-Chairman Specter that you gave President Bush advice on signing statements, including “identifying potential constitutional issues in legislation.”

Beginning in 2004, I offered numerous amendments in the Senate to bar cruel, inhuman, or degrading treatment of detainees. Senator McCain picked up the banner and—over a veto threat from the Bush Administration—the Senate passed the McCain Torture Amendment in October 2005 by a 90-9 vote. On December 30, 2005, President Bush issued a signing statement claiming the authority to override the McCain Torture Amendment.

- a. **In my office I asked you about this signing statement and you said you remember seeing it and thinking that Senator McCain wouldn’t be happy. Why did you think Senator McCain wouldn’t be happy?**
 - b. **Did you provide any comments or express any views, verbally or in writing, regarding the December 30, 2005 signing statement on the McCain Torture Amendment, including comments or views on “potential constitutional issues”?**
 - c. **If so, what comments or views did you provide?**
 - d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the December 30, 2005 signing statement?**
2.
 - a. **Did you provide any comments or express any views, either verbally or in writing, about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**
 - b. **If so, what comments or views did you provide?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

3. On October 18, 2004, then-OMB Director Josh Bolten and then-National Security Advisor Condoleezza Rice sent a letter stating the Administration's objection to an earlier version of the McCain Torture Amendment which was included as a provision in the 9/11 Commission Intelligence Reform legislation. The provision was removed because of the Administration's objections.
 - a. **Did you review or provide comments or views, either verbally or in writing, on this letter?**
 - b. **If so, what comments or views did you provide?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this letter?**
4. On October 5, 2005, just prior to the Senate vote on the McCain Torture Amendment, then-White House spokesperson Scott McClellan issued a veto threat, saying the amendment "would limit the president's ability as commander-in-chief to effectively carry out the war on terrorism."
 - a. **Were you involved in any discussions about this veto threat?**
 - b. **Did you review the language of this veto threat and/or provide comments or views, either verbally or in writing, on the language?**
 - c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this veto threat?**
5. Three Office of Legal Counsel memos issued in May 2005 by Steven Bradbury concluded that waterboarding and other abusive techniques do not constitute torture or cruel, inhuman or degrading treatment. You were not asked at your 2006 hearing about the Bradbury torture memos because their existence had not been publicly revealed yet. I asked you in my office if you were involved in any discussions on the Bradbury memos. You said that you did not remember discussions on the Bradbury memos but that you wouldn't rule anything out.
 - a. **Did you have any involvement with these Bradbury memos during your tenure as Staff Secretary?**
 - b. **Did you participate in any discussions or review any documents regarding these Bradbury memos during your tenure as Staff Secretary?**
 - c. **Can you state with certainty that there are no documents in the National Archives regarding the Bradbury torture memos that you wrote, edited, reviewed, or approved while you were Staff Secretary?**
6. The Committee has been denied access to any documents from the National Archives from your tenure as Staff Secretary, leaving a 35-month black hole in your record. Numerous

issues you were involved with as Staff Secretary have not come before you as a judge. So we do not have any insight from your judicial record about your views on those issues.

Do you believe the American people should, at minimum, be permitted to see documents from your Staff Secretary tenure regarding issues that have not come before you in any case since you were appointed to the D.C. Circuit?

7. Last week, in a response to a question from Senator Tillis about your record on LGBTQ issues, you noted that you have not been involved in any cases concerning LGBTQ issues on the D.C. Circuit. However, you have acknowledged that you worked on these issues during your service in the White House Counsel's Office and as Staff Secretary.

For example, we know from news reports that you met with a delegation of Log Cabin Republicans in 2003. You told Senator Tillis last week that you were there as a representative of the Bush White House and discussed judicial nominations and "other issues." But no documentation related to this meeting has been provided to the Committee from your White House records.

In fact, the only public document we've received through the Burck production process that touches on LGBTQ rights appears to be an email with a subject line reading "Gay marriage issues." However, the only email text included in the document was a reply from Alberto Gonzales to you, asking if you were interested in playing a round of golf at Andrews Air Force Base with Jim Haynes. The Committee did not receive any other emails from this chain.

Additionally, when we met in my office, you acknowledged that during your time as Staff Secretary, you "would have been involved in the process" related to President Bush's endorsement of a constitutional amendment to ban same-sex marriage in 2004. You also said that you did "help implement" the President's conclusion to support the amendment. The Committee has not received any documents related to your work and opinions on the amendment.

- a. **During your time in the White House, did you express any views, either verbally or in writing, on whether or not same-sex marriage is a right guaranteed by the Constitution? If so, please describe the views you expressed.**
- b. **Is it possible that there are documents containing your views on whether or not same-sex marriage is a right guaranteed by the Constitution in the National Archives?**
- c. **During your time in the White House, did you offer any advice or analysis, either verbally or in writing, related to President Bush's 2004 endorsement of a constitutional amendment to ban same-sex marriage? If so, please describe the advice or analysis you offered.**

- d. **Is it possible that there are documents containing your advice or analysis related to President Bush's 2004 endorsement of a constitutional amendment to ban same-sex marriage in the National Archives?**
 - e. **During your time in the White House, did you express any views, either verbally or in writing, on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans? If so, please describe the views you expressed.**
 - f. **Is it possible that there are documents containing your views on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans in the National Archives?**
 - g. **Is it possible that there are documents in the National Archives that contain your advice, analysis, or opinions on any other issues involving the rights of LGBTQ Americans?**
8. You told me in my office that the Partial Birth Abortion Ban Act of 2003 would have come across your desk as Staff Secretary.
- a. **While you were Staff Secretary, did you write, edit, review or approve any documents, emails, or speeches regarding this legislation? If so, please describe them.**
 - b. **You testified in 2006 that your work as Staff Secretary included "identifying potential constitutional issues in legislation." Did you provide comments or views regarding potential constitutional issues with this legislation?**
 - c. **During your time in the White House, did you ever provide comments or views on the constitutionality of abortion or legislative restrictions on abortion?**
 - d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the constitutionality of abortion or of legislation restricting abortion?**
9. While you were Staff Secretary:
- a. **Did you write, edit, review or approve any documents, emails or speeches regarding the war in Iraq? If so, please describe all of your involvement in this issue.**
 - b. **Did you provide any comments or views on the factual predicate or legal authorization for the war in Iraq? If so, please describe your comments or views.**

- c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the factual predicate or legal authorization for the war in Iraq?**

10. While you were Staff Secretary:

- a. **Did you write, edit, review or approve any documents, emails, or speeches regarding the abuse of detainees at Abu Ghraib prison? If so, please describe all of your involvement in this issue.**
- b. **Did you ever provide comments or views, verbally or in writing, on the abuse of detainees at Abu Ghraib prison? If so, please describe these comments or views.**
- c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the abuse of detainees at Abu Ghraib prison?**

11. When we met in my office you told me that it is already public record that President Bush consulted you on his choices for Supreme Court nominees. On July 9, *The New York Times* reported that in 2005 you participated in some of the sessions preparing Supreme Court nominee Harriet Miers for her confirmation process. (Peter Baker, “*A Conservative Court Push, Decades in the Making, With Effects for Decades to Come*,” July 9, 2018.) According to the *Times*, you were “[a]mong those who argued against her nomination from within the White House.” The *Times* said “Mr. Kavanaugh instead favored the selection of Justice Alito, then an appeals judge and a known and trusted figure within the conservative legal community.”

- a. **Please describe all of your involvement in Harriet Miers’ Supreme Court nomination.**
- b. **Did you participate in sessions to help prepare Ms. Miers for her confirmation process? If so, please describe each session in which you participated.**
- c. **Did you write, edit, review or approve any documents, emails, or speeches regarding the nomination of Ms. Miers to the Supreme Court? If so, please describe them.**
- d. **Did you ever provide comments or views, verbally or in writing, raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Alito? If so, please describe your comments or views.**
- e. **What were your concerns about Ms. Miers’ nomination?**
- f. **Is it possible that there are documents containing your comments or views raising concerns about Ms. Miers’ nomination, advocating for then-Judge**

Samuel Alito's nomination, or comparing Ms. Miers to then-Judge Samuel Alito in the National Archives?

- g. Did you favor nominating then-Judge Alito over Ms. Miers?**
- h. Were you involved in editing, writing or reviewing Ms. Miers' October 27, 2005 statement announcing her decision to withdraw her nomination or President Bush's statement that same day announcing his acceptance of her withdrawal? If so, please describe your involvement in detail.**

12. Please describe the full extent of your involvement in each of these litigation matters while you were working in the White House, including whether you participated in any discussions or wrote, edited, reviewed or approved any documents, emails or speeches regarding these matters:

- a. The Supreme Court's *Roper v. Simmons* decision and associated lower court litigation.**
- b. The Supreme Court's *U.S. v. Booker* decision and associated lower court litigation.**
- c. The Supreme Court's *Hamdi v. Rumsfeld* decision and associated lower court litigation.**
- d. The Supreme Court's *Rasul v. Bush* decision and associated lower court litigation.**
- e. Is it possible that there are documents containing your comments or views on these litigation matters in the National Archives?**

13.

- a. Please describe the full extent of your involvement in questions about warrantless surveillance of Americans while you were working in the White House.**
- b. Can you state with certainty that there are no documents in the National Archives that contain your comments, views, or correspondence about warrantless surveillance?**

14. On May 10, 2006, you responded to a written question I sent you about your legal experience. Your response discussed policy issues you worked on as Staff Secretary. You said:

The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President has also made a variety of public decisions and policy proposals related to those subjects that

also have come through the Staff Secretary's office for review and clearance.

- a. **What specific energy policy matters did you work on while you were Staff Secretary?**
 - b. **What specific labor policy matters did you work on while you were Staff Secretary?**
 - c. **What specific communications policy matters did you work on while you were Staff Secretary?**
 - d. **What specific environmental policy matters did you work on while you were Staff Secretary?**
 - e. **Is it possible that there are documents containing your work product, comments or views on these policy issues in the National Archives?**
15. **If there are documents in the National Archives that contain your comments or views about the matters discussed in questions 1 through 14, do you agree that the American people should be allowed to review any such documents prior to a Senate vote on your nomination?**
16. On May 10, 2006 you submitted written responses to written questions that Senator Feingold and I sent you for your D.C. Circuit confirmation hearing. You provided the following commitment to me in response to one of my written questions: "If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*." **Will you make this same commitment now, as you seek confirmation to the Supreme Court?**
17. **Do you agree with President Trump's statement to Bloomberg News on August 30 that Special Counsel Mueller's investigation is "an illegal investigation"?**
18. **Should a president comply with a grand jury subpoena?**
19. Your 2009 Minnesota Law Review article represents a dramatic evolution of your views on presidential investigations since your days working for Independent Counsel Ken Starr. **How often do your views evolve, and are there other contexts where your views have evolved since earlier in your career?**
20. **What does the Constitution say on the question of whether a sitting president can be indicted?**
21. **Can members of the President's immediate family be indicted?**

22. Last year you gave a speech at the American Enterprise Institute about Chief Justice Rehnquist, whom you described as a “judicial hero.” You said during the question-and-answer session that: “[O]ne of the things people recognized about Rehnquist was he played the long game. He saw where he wanted the law to go, and he was willing to make incremental steps to try to convince his colleagues so he could get five justices to that position.”
- a. **Is it appropriate for a Supreme Court Justice to play the long game to move the law where the Justice wants it to go?**
 - b. **Is a Supreme Court Justice serving as a neutral umpire if the Justice sees where he or she wants the law to go and is willing to make incremental steps to try to convince his or her colleagues to get to that position?**
 - c. **Is it judicial activism for a Supreme Court Justice to see where he or she wants the law to go and make incremental steps to try to convince his colleagues to get to that position?**
 - d. **Have you ever seen where you wanted the law to go and made incremental steps to get your colleagues to that position? If so, please provide examples.**
 - e. **When discussing Chief Justice Rehnquist’s dissent in *Roe v. Wade*, you said in your speech that he was “stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” In your view, which rights fall into this “general tide of freewheeling judicial creation”?**
23. You gave a speech on February 1, 2018, to the Heritage Foundation in which you criticized the use of canons of statutory interpretation when judges find text to be ambiguous. You noted that because Chief Justice Roberts in *NFIB v. Sebelius* found the Affordable Care Act’s individual mandate to be ambiguous, he applied the constitutional avoidance canon to uphold the ACA as a tax. You said in your speech, “a case of that magnitude should not turn on such a question.”

You repeatedly told the Committee that it is inappropriate for you to opine on matters that could come before you. However, you felt perfectly comfortable signaling to President Trump that you disagreed with Chief Justice Roberts, even though more challenges to the Affordable Care Act are pending.

- a. **Why do you believe Chief Justice Roberts was wrong to apply the constitutional avoidance canon in upholding the Affordable Care Act’s constitutionality in *NFIB v. Sebelius*?**
- b. **Why was it appropriate for you to express this opinion in your speech to the Heritage Foundation in February?**

- c. **More challenges to the constitutionality of the Affordable Care Act are likely to come before the Supreme Court soon. How can we trust you to approach these cases with an open mind when you've already made clear your opposition to applying the constitutional avoidance canon in cases of this magnitude?**
24. **According to your originalist understanding of the Constitution, does the Second Amendment provide for a fundamental right to self-defense outside of the home? To be clear, I am asking what your understanding is of the original meaning of the Constitution on this matter.**
25. As we discussed at your hearing, when President Trump announced your nomination at the White House, the first thing you said in your statement was: "Mr. President, thank you. Throughout this process, I have witnessed firsthand your appreciation for the vital role of the judiciary."
- Prior to your making this statement, were you aware that:
- a. **President Trump had claimed that there should be no judges and no due process for asylum seekers at the border?**
 - b. **President Trump had criticized a federal judge for jailing Paul Manafort for witness tampering?**
 - c. **President Trump had repeatedly criticized federal judges who ruled against him in litigation over his travel ban?**
 - d. **President Trump had made racist comments about a federal judge's Mexican heritage?**
 - e. **In 2017 then-Judge Gorsuch called President Trump's treatment of federal judges "demoralizing"?**
26. **How do you square your statement about President Trump's "appreciation for the vital role of the judiciary" with President Trump's routine disparagement of the role of the federal judiciary?**
27. In the *White Stallion* case you claimed that the word "appropriate" required consideration of industry costs because "that's just common sense and sound government practice." **How can someone who claims to be a textualist use their subjective view of "common sense and sound government practice" to define a word?**
- 28.
- a. **While you were working in the White House, did you ever express a view that particular Supreme Court precedents ought to be overturned?**

- b. **If so, when and to whom did you express these views and regarding which precedents did you express them?**
 - c. **Did you ever debate whether Supreme Court nominees who you were vetting (John Roberts, Harriet Miers, Samuel Alito) might seek to overrule precedents? Is it possible that there are documents in the National Archives that might reflect this?**
29. **Are children seeking asylum entitled to a hearing, due process, and legal representation? Or is President Trump correct that sending children fleeing persecution back to their home countries without a hearing before a judge is the appropriate outcome?**
30. In a 2010 speech, you said that while you were working as Staff Secretary, “I saw regulatory agencies screw up. I saw how they might try to avoid congressional mandates. I saw the relationship between independent agencies and executive agencies and the President and White House and OMB.” **What specifically did you see as Staff Secretary that shaped your views on independent agencies? Are there documents in the National Archives regarding what you saw that shaped your views?**
31. Business and labor both seem to agree that if you are confirmed to the Supreme Court, you would tilt the Court even further in a pro-business direction.

The Chamber of Commerce has urged your swift confirmation. The White House said, “Judge Kavanaugh protects American businesses from illegal job-killing regulation.” Shortly after your nomination, the employer-side law firm Fisher Phillips put out a legal alert saying, “If confirmed, will Justice Kavanaugh be kind to employers? The answer: you may rely on it.”

AFL-CIO Richard Trumka said about you, “Judge Kavanaugh routinely rules against working families, regularly rejects employees’ right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent.”

You have a track record of favoring corporations in cases involving safe working conditions, unions, worker privacy, and consumer protections. There may be outlier cases in your record, which is to be expected given you have taken part in over 2,700 cases. But both business and labor think you’re a safe bet to be sympathetic to the positions of businesses over workers.

- a. **Are you proud of your pro-business reputation?**
- b. **How do you square your pro-business reputation with the claim that you are an originalist and textualist who is a neutral umpire, not a judicial activist?**

32. **Do you agree that nominees who claim to be textualists and originalists should be able to explain the textual meaning and originalist understanding of constitutional provisions in response to confirmation hearing questions?**
33. The Foreign Emoluments Clause in Article I, Section 9, Clause 8 of the Constitution provides that "...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State."
- a. **What does the text of this clause mean, and what was the Framers' originalist understanding of it?**
 - b. **Even though there is current litigation about the Emoluments Clause, do you agree that such litigation should not preclude a nominee from explaining the text and original understanding of the Clause, which have not changed since the Founders' time?**
- 34.
- a. **Did Judge Kozinski ever send you emails to your White House email address?**
 - b. **Did Judge Kozinski ever send you emails with sexually inappropriate jokes or pictures?**
 - c. **Do any of the 102,000 pages of documents over which Mr. Bill Burck has attempted to claim "constitutional privilege" contain correspondence between you and Judge Kozinski?**
 - d. **Have you referred any clerks to Judge Kozinski or advised any individuals to apply for clerkships with Judge Kozinski? If so, how many and when?**
35. **Should judges who engage in the kind of sexually harassing behavior that Judge Kozinski allegedly engaged in resign?**
36. The Supreme Court established the exclusionary rule more than a century ago in the 1914 *Weeks* decision. In 1961, in the landmark case *Mapp v. Ohio*, the Court held that the exclusionary rule applies to the states. The Court said, "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments." It is no exaggeration to say that the 4th Amendment rights of all Americans would be endangered without the exclusionary rule because if there is no consequence for an illegal search, there is no deterrent to violating the 4th Amendment.
- But in a 2017 speech at the American Enterprise Institute, you praised Justice Rehnquist's opposition to the exclusionary rule and his call to overrule *Mapp v. Ohio*. While you did not explicitly call for eliminating the exclusionary rule, your speech makes clear that you approved of Justice Rehnquist, who, in your words, "righted the ship of constitutional jurisprudence."

Was it appropriate for you, as a lower court judge, to show support for overruling *Mapp v. Ohio* – a landmark Supreme Court precedent for more than half a century?

37. On July 22, 2013, in the case *Abdal Razak Ali v. Obama*, a Guantanamo detainee seeking habeas relief filed a motion asking you to recuse yourself, stating: “Judge Kavanaugh has created the appearance of impropriety with respect to the adjudication of issues concerning Guantanamo detainees (and in particular, issues which bear directly on Petitioner’s present circumstances) because of his prior government employment as a legal advisor in the White House which may have direct bearing on the circumstances of this case.” This recusal motion was denied the next day, in a one sentence order stating: “Upon consideration of appellant’s motion for recusal pursuant to 28 U.S.C. § 455(a), it is ordered that the motion be denied.”
- a. **Question 14 in your Senate Judiciary Questionnaire asked you to “Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte.” You were then asked to identify each such case, and for each case provide “your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.” Why did you fail to include the *Abdal Razak Ali v. Obama* recusal motion in your answer to question 14 of your Questionnaire?**
 - b. **Have you omitted any other motions to recuse you on any other case from your Senate Judiciary Questionnaire?**
 - c. **Why did you decline to recuse yourself in this case?**
38. You were also asked in Question 14(b) of your Senate Judiciary Questionnaire to state: “Whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.”

You chose to simply ignore that question, so I will ask again now.

- a. **Do you believe Supreme Court Justices are governed by disqualification standards in 28 United States Code, Section 455?**
- b. **Do you believe Supreme Court Justices are governed by disqualification standards in the Code of Conduct for United States Judges?**
- c. **Will you follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court? If not, please**

explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.

39. In 2003, I introduced S. 1709, the SAFE Act, bipartisan legislation to reform the Patriot Act, particularly the controversial Section 215. On January 28, 2004, then-Attorney General John Ashcroft sent a letter to then-Senate Judiciary Committee Chairman Orrin Hatch stating, "If S.1709 is presented to the President in its current form, the President's senior advisers will recommend that it be vetoed."

- a. **Please describe your involvement in this veto threat.**
- b. **Is it possible that there are documents containing your comments or views on this veto threat in the National Archives or in the possession of other federal agencies?**

40. In 2005, when the Patriot Act was up for reauthorization, I negotiated with then-Senate Judiciary Committee Chairman Arlen Specter a new standard for Section 215 orders to protect innocent Americans while giving the government broad authority to obtain information connected to suspected terrorists or spies. The Republican-controlled Senate approved this reform on a unanimous vote, but it was removed in conference due to the Bush Administration's objections.

- a. **Please describe with specificity your involvement in the Patriot Act reauthorization.**
- b. **Is it possible that there are documents containing your comments or views on Patriot Act reauthorization in the National Archives?**
- c. In the 2015 D.C. Circuit case *Klayman v. Obama*, several U.S. citizens filed a lawsuit alleging that the Section 215 program, which was being used for the NSA's bulk collection of innocent Americans' telephone data, was illegal. The program was enjoined by the district court. Some of the plaintiffs were denied standing to sue, and they filed a petition for the D.C. Circuit to re-hear the case en banc. The D.C. Circuit denied the petition in a one-sentence order.

You felt compelled to write a lengthy concurrence arguing that the NSA program was constitutional, even though that question was not before the court. You argued that the bulk collection of telephone data served a "critically important special need – preventing terrorist attacks on the United States." This was despite a Privacy and Civil Liberties Oversight Board report that said: "we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation."

Why did you feel the need to go out of your way to write this concurrence?

41. On April 13, 2016 you took part in a panel discussion at Marquette Law School. You discussed a proposal you worked on in the Bush White House for judicial nominees to get a vote within 180 days of their nomination. You said, “I’m a little biased on this because I helped work on it.”

It is perhaps understandable that a person would be biased in support of a proposal that he or she worked on. However, if a sitting judge admits to even a little bias regarding matters the judge worked on before becoming a judge, it raises concerns about the judge’s impartiality on such matters. This further demonstrates the need to disclose your full White House record.

In order to alleviate concerns about such bias, please provide a list of all proposals you helped work on while you were at the Bush White House.

42. **Prior to your hearing, were you shown any documents that had been designated by Chairman Grassley as “committee confidential” (a designation to which Committee Democrats never agreed)? If so, please identify each specific document you were shown and the date on which you were shown it.**
43. **How many times in 2018 did you communicate with Bill Burck or with a person acting on Burck’s behalf for purposes of producing documents for your confirmation process? Please list the dates, participants, and contents of each such communication.**
44. **Which Senators helped you prepare for your Supreme Court confirmation hearing by participating with you in moots or other practice sessions?**
45. You cited the so-called “Ginsburg Rule” multiple times during your hearing to explain why you insisted on limiting your substantive answers to our questions. However, at her nomination hearing, Justice Ginsburg answered many questions with candor.

For example, in response to a question about abortion rights, Justice Ginsburg said this:

But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

And in response to a question on the Equal Rights Amendment, Justice Ginsburg responded with the following:

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion

announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th Amendment was passed, I think that is the case.

- a. **Do you think that those responses were improper under judicial canons?**
- b. **If the first response was not improper, do you agree with Justice Ginsburg's statement that the decision of whether or not to bear a child is a decision that a woman must make for herself?**
- c. **If the second responses was not improper, do you agree with Justice Ginsburg's statement that the Equal Rights Amendment should be added to the U.S. Constitution?**

46. As a judge on the D.C. Circuit, you are bound to follow the Code of Conduct for United States Judges. As you know, the Code is made up of a number of canons. These canons include upholding the integrity and independence of the Judiciary; avoiding impropriety and the appearance of impropriety in all activities; performing the duties of the office fairly, impartially, and diligently; engaging in extrajudicial activities that are consistent with the obligations of judicial office; and refraining from political activity.

The Supreme Court has refused to formally adopt the Code of Conduct for United States Judges or promulgate its own ethics code.

According to Chief Justice Roberts' 2011 annual year-end report, in 1991, the Supreme Court justices did adopt "an internal resolution in which they agreed to follow the Judicial Conference regulations [on gifts and outside income] as a matter of internal practice." While this was an encouraging step, the lack of transparency and enforcement is troubling.

- a. **Will you commit that, if confirmed to the Supreme Court, you will continue to follow the Code of Conduct for United States Judges?**
- b. **Do you believe that the Supreme Court should adopt an official code of conduct?**

47. In 2014, Justice Kennedy testified to Congress that "solitary confinement literally drives men mad." He raised the issue again in a powerful concurring opinion in the 2015 *Davis v. Ayala* case, which involved an inmate who had been on California's death row for 25 years. He noted the following:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.

He went on to note that “the judiciary may be required... to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

What is your reaction to Justice Kennedy’s statements about solitary confinement?

48. In the 2012 *South Carolina v. United States* case, you were on a three-judge panel considering a preclearance challenge to a new, expanded South Carolina voter ID law. As you know, prior to 2013, preclearance was the process that the Department of Justice used to review changes to voting laws in certain jurisdictions with a history of voting discrimination.

You wrote the opinion, holding that the law was not in violation of the Voting Rights Act (VRA) and that South Carolina could move forward with implementation after the 2012 election.

In your opinion, you noted that “many states—particularly in the wake of the voting system problems exposed during the 2000 elections—have enacted stronger voter ID laws.” However, we’ve also seen that many of these voter ID laws have a concerning, and often discriminatory, impact on voters.

For example, a 2016 analysis of data from the annual Cooperative Congressional Election Study found the following: “The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines.” They found that among Latino voters, “turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states.”

What is your response to the evidence that strict identification laws harm minority voters?

49. Your colleagues on the panel in the *South Carolina v. United States* case issued a concurrence that discussed the “vital function” that the preclearance process played in this case. The concurrence went on to note the following:

Without the review process... [the law] certainly would have been more restrictive.... The Section 5 [preclearance] process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the law] demonstrates the continuing utility of Section 5 of the Voting Rights act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.

Unfortunately, the Supreme Court gutted the VRA in the 2013 *Shelby County v. Holder* case by striking down the formula that determined which jurisdictions were subject to Section 5 preclearance. However, they did not find the preclearance provision itself to be unconstitutional.

Why did you refrain from joining this concurrence?

50. Was President Trump correct in stating that three to five million people voted illegally in the 2016 election?

51. In *Doe ex rel. Tarlow v. District of Columbia*, you examined the circumstances under which the D.C. Department of Disability Services could approve elective surgeries for a patient with intellectual disabilities who has been found to lack the mental capacity to make healthcare decisions. You held that the Department need not consider the known wishes of a patient, but rather could make a decision in the best interests of the patient.

The Bazelon Center for Mental Health Law has noted that your opinion “raises serious concerns about [your] views on the rights and abilities of people with disabilities to determine the course of their own lives.” The Center went on to note that the opinion “is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.”

Why did you decide that the perspectives and wishes of the individuals in this case could be completely ignored by the D.C. government?

52. When we met in my office, we talked about the 2011 *Seven-Sky* case, in which you dissented from a decision upholding the Affordable Care Act. In a footnote, you criticized the ACA and argued that, “Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

This is a truly breathtaking claim of presidential power. I think you recognize that because you told me in our meeting that you “could have been clearer” and “explained it better” in the later *Aiken County* case.

But if you had been writing for the majority in *Seven-Sky*, your opinion would be binding law in the DC Circuit and President Trump would have a free pass to ignore laws that he doesn’t like. For someone like you who claims to be a textualist to be so careless with his words is concerning.

a. Do you understand the consequences of using your words so loosely?

b. Do you stand by your *Seven-Sky* dissent?

53. Last Thursday, when questioned by Senator Leahy about the stolen material you received from Manny Miranda, you said that you “obviously recall the emails—or have seen the emails.”

a. Were you referring to having recently seen emails that were given to the Committee through the Bill Burck production process?

- b. After you were nominated by President Trump, did you receive or review any of the emails or documents that were given to the Committee through the Bill Burck production process? Please describe any instances in which you received or reviewed these emails or documents, other than those instances in which Committee members shared emails or documents with you during their question rounds at the hearing.**

- 54. Last Wednesday, Senator Booker asked you about an email you sent in which you wrote “the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple—and grapple now—with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.”
 - a. During your time in the White House, did you ever provide views, verbally or in writing, on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities?**

 - b. Is it possible that there are documents (in addition to the email referenced here) containing your views on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities in the National Archives?**

**Questions for the Record from Senator Richard J. Durbin to
A.J. Kramer, Federal Public Defender for the District of Columbia
September 10, 2018**

For questions with subparts, please respond to each subpart separately.

1. Please describe the appointment and reappointment process for the Federal Public Defender for the District of Columbia.
2. When were you last reappointed as Federal Public Defender?
3. When will you next be considered for reappointment as Federal Public Defender?
4.
 - a. Did Judge Kavanaugh sit on the Criminal Justice Act Panel Committee that considered your last reappointment?
 - b. If so, why did you not disclose this information to the Committee in your testimony in support of Judge Kavanaugh's nomination?
 - c. Are you concerned that this could appear to be a conflict of interest?
5. In your testimony you described your professional interactions with Judge Kavanaugh. Please provide a detailed description of your social interactions with Judge Kavanaugh, including, for example, any sporting activities you may have engaged in together and any sporting events you may have attended together.
6. You testified, "Judge Kavanaugh treats all litigants fairly, no matter how unsympathetic they might be, and his overriding commitment is first and foremost to the rule of law" (emphasis added).
 - a. How can you make such a sweeping statement when you acknowledged, "I do not recall reading any of Judge Kavanaugh's opinions in civil cases"?
 - b. In fact, you do not know if Judge Kavanaugh has treated all litigants fairly, do you?
7. Your testimony includes several broad assertions about Judge Kavanaugh's behavior and state of mind. For example, you testified:

But even when Judge Kavanaugh rules against a criminal defendant, he does so because he believes that the best view of the law requires that result. He is always evenhanded and extremely well prepared at oral argument, engaging in thorough questioning of both sides at argument, a practice which shows that he reads every brief with an open mind, cover to cover. He also goes out of his way to be fair to the losing party in his opinions, taking great pride in making every litigant feel like they've been heard.

- a. How can you testify to what Judge Kavanaugh “believes” and what he “takes great pride in”?
 - b. What is the factual basis for stating that Judge Kavanaugh is “always evenhanded and extremely well prepared at oral argument” (emphasis added)?
 - c. In fact, you do not know if Judge Kavanaugh is always evenhanded and extremely well prepared, do you?
8. Did you use any official resources in preparing your testimony, including personnel?
 9. Did anyone assist you in preparing your testimony? If so, please provide the name of each individual who did so.
 10. Did anyone review your testimony before you submitted the final version? If so, please provide the name of each individual who did so.

**Nomination of Brett Kavanaugh to be Associate Justice of the Supreme Court
Questions for the Record
Submitted September 10, 2018**

QUESTIONS FROM SENATOR FEINSTEIN

1. You have referred to *Roe v. Wade* as “settled law.”
 - a. **Can the Supreme Court overrule a longstanding decision even if it is considered settled law?**
 - b. **Was *Aboud v. Detroit Board of Education* (1977) settled law before 2016?**
 - c. **Was *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) settled law before 2006?**
 - d. **Was *Michigan v. Jackson* (1986) settled law before 2008?**
 - e. **Was *Austin v. Michigan Chamber of Commerce* (1990) settled law before 2009?**
2. When we met in my office, I raised concerns about your potentially being the fifth vote to overturn *Roe*. You said that it is important to be aware of the real-world implications of Court decisions. However, you have never lived in a world where women did not have safe, legal reproductive care.
 - a. **Please explain your understanding of what it means for a woman to be able to control her reproductive life.**
 - b. **What is your understanding of how women are being affected in states in which access to reproductive care has been curtailed?**
3. If *Roe v. Wade* were overruled, and the decision whether to permit abortions was left to the states:
 - a. **Should there be an exception on abortion bans to protect the health or life of the mother?**
 - b. **Would an abortion ban without such an exception be constitutionally permissible?**
 - c. **Should there be an exception on bans on abortion in cases of rape and incest?**
 - d. **Would an abortion ban without such an exception be constitutionally permissible?**
4. In a 2017 speech at the American Enterprise Institute, you described Justice Rehnquist as your “first judicial hero.” You said that Justice Rehnquist “clearly wanted to overrule

Roe and Casey and did not have the votes.” You also praised Justice Rehnquist for “stemming the tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” (9/18/2017 Speech at AEI – From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist).

- a. **What are the judicially created “unenumerated rights” you were referring to?**
5. In that same speech, you also said: “In case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. Agree with Rehnquist analysis. Rehnquist makes a good point here. Rehnquist destroys the majority’s reasoning here. At that time, in 1987, Rehnquist had been on the Court for 15 years, almost all of it as an associate justice. And his opinions made a lot of sense to me. In class after class, I stood with Rehnquist. That often meant in the Yale Law School environment of the time that I stood alone. Some things don’t change.”
 - a. **Which Justice Rehnquist dissents did you agree with in law school?**
 - b. **Was Justice Rehnquist’s dissent in *Roe v. Wade* one of the dissents with which you agreed in law school?**
 - c. **If so, has your view changed since then?**
 - d. **Was your statement that you “stood alone” and “some things don’t change” an acknowledgement that your views are outside the mainstream?**
 6. You have called Justice Scalia one of your “heroes” in a number of speeches over the years. In one of these speeches from 2016, you praised Justice Scalia’s view that “courts have no legitimate role . . . in creating new rights not spelled out in the Constitution.” You asked the audience to think about Justice Scalia’s dissent in *Casey* on abortion. (6/2/2016, “Remembering Justice Scalia,” George Mason University). In *Casey*, Justice Scalia said “the issue is whether [the right to abortion] is protected by the Constitution of the United States. I am sure it is not.” (*Casey*, at 980).
 - a. **Is the right to decide whether to continue a pregnancy a Court created right?**
 - b. **What “new rights not spelled out in the Constitution” do you believe the Court has created?**
 7. Even if *Roe v. Wade* is not completely overruled, the “undue burden” test from *Planned Parenthood v. Casey* might be applied in a manner that severely restricts access to reproductive care.
 - a. **What’s the practical difference to women if *Roe* is not overruled but gutted?**
 - b. **What has been the practical impact of the undue burden test on women’s access to reproductive care in states with strict limits on abortion?**

8. In an interview with CNN, Senator Graham said about you and *Roe*, “there is a process to overturn a precedent and I think he understands that process.” (Graham on CNN State of the Union, 9/2/18).
- a. **Was *Roe* discussed at your mock hearings in preparation for your nomination hearing?**
 - b. **What were you advised to say?**
9. One of your former law clerks wrote that when it comes to “enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh.” (Sarah E. Pitlyk, *Judge Brett Kavanaugh’s Impeccable Record of Constitutional Conservatism*, National Review (July 3, 2018))
- a. **Is that an accurate assessment of your record? If not, how would you qualify the statement?**
10. In your opening statement on Tuesday, September 4, you said you would “interpret the Constitution as written, informed by history and tradition.” As you know, the history and tradition of this country has disfavored women, minorities, Native Americans, immigrants, LGBT people, individuals with disabilities, and many more.
- a. **When you said “history and tradition,” to whose history and tradition were you referring?**
 - b. **How does your view of “history and tradition” take into account the fact that classes of people have historically been disfavored?**
 - c. **Does the “history and tradition” of the United States include the decision on who to marry?**
 - d. **Does the “history and tradition” of the United States include a woman’s right to use contraceptives?**
 - e. **Does the “history and tradition” of the United States include a woman’s right to choose whether to terminate a pregnancy?**
11. In *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the Supreme Court held that states cannot prohibit the use contraceptives because doing so would violate a constitutional right to privacy. Senator Harris asked whether you believed that *Griswold* and *Eisenstadt* were correctly decided. You responded that you have “no quarrel” with Justice White’s concurrence in *Griswold*.
- a. **Is *Griswold* settled law?**
 - b. **Is *Eisenstadt* settled law?**

- c. **What did you mean when you said you have “no quarrel” with Justice White’s concurrence in *Griswold*? Did you mean you agree with his concurrence, or something else?**
12. **Does a pharmacist have a constitutional right to refuse to fill a prescription for contraception on the basis of the pharmacist’s religious beliefs?**
13. You testified: “Being a good judge means paying attention to the words that are written, the words of the Constitution, the words of the statutes that are passed by Congress. Not doing what I want to do, not deferring when the executive rewrites the laws passed by Congress, but respect for the laws passed by Congress, respect for the rule of law, the words put into the Constitution itself.”
- a. **Where in the text of the First Amendment text are businesses mentioned?**
- b. **What in U.S. history demonstrates that the founding fathers intended the First Amendment to recognize religious beliefs of companies and businesses?**
14. The Affordable Care Act (ACA) plays a vital role for millions of Americans in this country. Thanks to the ACA, people across the nation can no longer be denied coverage by insurance companies because of preexisting conditions. Families throughout the country enjoy the security and certainty that comes with having quality health coverage. Jackson Corbin made precisely these points in his testimony on September 7, when he said: “If you destroy protections for pre-existing conditions, you will leave me and all the kids and adults like me without care or without the ability to afford our care — all because of who we are.” (Corbin Testimony at p. 3)
- a. **Do you believe Congress has the authority to enact legislation that prevents discrimination based on health status?**
- b. **At any point before or after your nomination to the Supreme Court, has anyone from the Trump Administration discussed with you your views on the Affordable Care Act or Congress’s ability to regulate the health insurance market more generally? If so, who and what was discussed?**
- c. **During your nomination hearing, you spoke frequently of the fact that you were aware of or considered “real-world consequences” of judicial decisions. Have you ever experienced being denied coverage for a preexisting condition? Have you ever been denied health insurance? Have you or your family ever been uninsured?**
- d. **If not, what steps have you taken to understand what it would be like if the Affordable Care Act were struck down?**
15. In a September 2017 speech at the American Enterprise Institute (AEI), you praised decisions authored by Chief Justice Rehnquist striking down federal statutes on the grounds that they were beyond Congress’s Commerce Clause power. One of those

decisions, *United States v. Lopez*, found the Gun-Free School Zones Act unconstitutional. The other, *United States v. Morrison*, held that parts of the Violence Against Women Act (VAWA) providing a federal civil remedy for victims of gender-motivated violence were unconstitutional. At AEI you said that these two decisions “were critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power.”

- a. **Why was it “critically important” for the Supreme Court to strike down gun restrictions?**
 - b. **Why was it “critically important” for the Supreme Court to strike down the ability for victims of sexual violence to sue for civil damages in federal courts?**
 - c. **In light of your emphasis on considering real-world consequences, what do you believe are the real-world consequences of your narrow view of the Commerce Clause?**
 - d. **Specifically, what has been the impact of striking down that section of the Violence Against Women act?**
 - e. **What has been the impact of striking down the Gun Free Schools Act?**
16. You also connected *Lopez* and *Morrison* to the Supreme Court’s 2012 decision concerning the Affordable Care Act, *NFIB v. Sebelius*, saying: “Although it is not often the first thing discussed about [*NFIB v. Sebelius*], we do remember that a five-justice majority said that the Commerce Clause did not give Congress authority to require citizens to purchase a good or service.” (*From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Speech at AEI (Sept. 18, 2017))
- a. **Why did you think it is important to highlight that decision?**
 - b. **Do you believe the Court was correct in *NFIB v. Sebelius* in concluding that Congress does not have authority under the Commerce Clause to regulate health care?**
17. In your dissent in *Seven-Sky v. Holder*, a 2011 case concerning the constitutionality of the Affordable Care Act’s individual mandate, you wrote the following: “Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.” (*Seven-Sky v. Holder*, 661 F.3d 1, 50 n. 43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))
- a. **On what basis did you conclude that the President is the ultimate arbiter of whether a law “that regulates private individuals” is constitutional?**
 - b. **Where in the Constitution is the President given this authority?**

- c. Has this conclusion ever been adopted by a majority in any Supreme Court decision? If so, which decision?**
- d. Is there any constitutional limit on the ability of a President to undermine or otherwise refuse to enforce duly enacted legislation?**
18. You have expressed opinions in the past about immunity of sitting presidents from investigation, indictment, and prosecution. Although you were asked about these issues during your hearing, your answers were unclear. Accordingly, please answer the following questions with a simple yes or no:
- a. Do you believe that the Constitution prohibits the criminal investigation of a sitting president?**
- b. Do you believe that a sitting president can be required to respond to a grand jury subpoena consistent with the Constitution?**
- c. Do you believe that the Constitution prohibits the indictment of a sitting president?**
- d. Do you believe that the Constitution prohibits the prosecution of a sitting president?**
19. You have written that “the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even before a charge or trial.” (*In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013))
- a. Do you believe the President’s pardon authority is subject to any limits?**
20. In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court said it is “settled” that a President’s conduct – before or while in office – can be investigated. The Court cited *U.S. v. Nixon* and said that a court may require a President to cooperate in the investigation of possible misconduct.
- a. Was *Clinton v. Jones* correctly decided?**
- b. Have any Supreme Court rulings called it into question?**
21. You have stated: “it makes no sense at all to have an independent counsel looking at the conduct of the President.” (Georgetown Panel – Independent Counsel Statute Failure, Feb. 19, 1998)
- a. Do you stand by that statement?**
22. You have argued that “an independent counsel should never be appointed to prosecute the President because a sitting President should not be subject to criminal indictment.” (The President and the Independent Counsel, Georgetown Law Journal, July 1998)

a. Do you stand by that statement?

23. You have said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that at all.” (Independent Counsel Structure & Function, Georgetown Law Journal Symposium, Feb. 19, 1998.)

a. Do you stand by that statement?

24. During my questioning, I pointed out that when you worked in the Office of Independent Counsel Ken Starr investigating President Clinton, you argued for aggressive questioning of the President. But you have also taken the opposite position. For example, in a panel discussion in 1998, you said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that. That should be turned over immediately to the Congress.” (Video, *Independent Counsel Structure & Function*, Georgetown Law Journal Symposium (Feb. 19, 1998))

In your response, you indicated that the events of September 11, 2001, were what caused you to change your mind about investigating the President. You said: “What changed was September 11th. That is what changed. So after September 11th, I thought very deeply about the presidency, and I thought very deeply about the independent counsel experience, and I thought very deeply about how those things interacted.”

But you said that “no one should be investigating” the President on February 19, 1998—three-and-a-half years before September 11, 2001.

a. What changed your mind before September 11th when you argued against the President being the sole subject of a criminal investigation in 1998?

25. As discussed above, in February 1998, after you had left the Independent Counsel’s Office, you publicly expressed serious concerns about having an independent counsel conduct an investigation into a sitting President. You stated that Congress should be the body investigating the President. Yet you returned to work for the Independent Counsel in April or May 1998.

a. Why did you return to work for the Office of the Independent Counsel?

26. You have said that the president should have “absolute discretion” to decide when to appoint a special prosecutor, and that any such prosecutor should be nominated by the President and confirmed by the Senate. (Georgetown University Law Center, Feb. 19, 1998)
- a. If the president is a possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**
- b. If the president’s close associates are the possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**

27. During your White House tenure, many of President Bush's signing statements specifically asserted that he would interpret laws "consistent with the constitutional authority of the President to supervise the unitary executive branch" and would disregard laws he deemed inconsistent. I asked you during your hearing about one such statement that President Bush issued regarding the Detainee Treatment Act of 2005, reserving the President's right to disregard that law's ban on torture if it interfered with his constitutional authorities as President. (Signing Statement, H.R. 2863, Dec. 30, 2005)
- a. **You said at your hearing that this signing statement would have crossed your desk when you were Staff Secretary, and you recalled that "there was debate" about it. What position did you take in that debate?**
 - b. **At that time, what did you know about interrogation techniques being used on detainees or combatants or about memos written by the Office of Legal Counsel regarding interrogation techniques?**
 - c. **Was the Bush Administration planning to disregard any of the provisions of the Detainee Treatment Act?**
 - d. **Did the Bush Administration ever disregard requirements of the Detainee Treatment Act of 2005?**
28. You have written in opinions, and said in public appearances, that the President may decline to enforce a law that he thinks is unconstitutional "even if a court has held or would hold the statute constitutional." (*Seven-Sky v. Holder*, 661 F.3d 1 (2011))
- a. **Did President Bush ever exercise this authority?**
 - b. **If so, what was your role in advising on this authority when it was exercised?**
 - c. **Do you still believe the President has this authority?**
 - d. **Are there any limits to the President's authority to decline to enforce a law he thinks is unconstitutional?**
 - e. **If the President and the Supreme Court disagree, which branch's interpretation is controlling?**
29. The Committee has an email from your time in the White House where Deputy National Security Adviser Steve Hadley asks for your review of talking points defending the Administration's position on torture. The talking points read: "the President has never considered authorizing torture under any circumstances." (Email from Harriet Miers to Brett Kavanaugh, Fw: let me know when you get this...thx (June 12, 2004)). This email asking for your input was sent four days after the *Washington Post* reported on legal memos justifying the use of brutal enhanced interrogation techniques
- a. **Did you respond to this email? Did you provide any feedback on these talking points? If so, what was your response or feedback?**

- b. **At that time, what did you know about these memos or the interrogation techniques being considered by the United States?**
 - c. **If you did not know about the OLC memos or the interrogation techniques, why were you being asked to review talking points?**
 - d. **The talking points stated that the Bush Administration “has never considered authorizing torture.” Did you believe it was accurate at the time?**
 - e. **Knowing what you know today, do you believe that this was accurate?**
30. On November 1, 2001, President Bush issued Executive Order 13233, which significantly restricted and slowed the release of records under the Presidential Records Act by giving sitting and former presidents the ability to delay the release of records indefinitely. (It has since been rescinded.) Some of the limited number of documents we have received from your time in the White House Counsel’s Office suggest that you were involved with this executive order.
- a. **Please describe the nature and extent of your work or advice on this executive order or related issues.**
 - b. **What is the justification for withholding from public view presidential records that are not protected by a legitimate claim of executive privilege?**
 - c. **The Presidential Records Act was enacted in 1978 to enhance the public’s access to presidential records. Do you believe President Bush’s executive order served that purpose?**
31. Congress has established several independent agencies, such as Security Exchange Commission and Federal Communications Commission, which are important for enforcing our laws and safeguarding Americans’ rights. Congress requires the President to have good cause to remove the heads of these agencies to insulate them from political interference. You objected to this limit on the President’s power and struck down the “for cause” requirement in a case involving the Consumer Financial Protection Bureau. (*PHH Corp. v. CFPB*, 839 F.3d 1 (2016))
- The *en banc* D.C. Circuit disagreed and overturned your decision, holding that the CFPB’s for-cause provision was constitutional under *Humphrey’s Executor v. United States*, a 1935 Supreme Court decision that established the constitutionality of independent agencies.
- a. **In light of this, how can you contend that your opinion was consistent with *Humphrey’s Executor*?**
 - b. **The CFPB was designed to protect consumers. How did your opinion in this case protect consumers?**
 - c. **What is the real-world impact of this decision?**

- d. What do you believe would be the real-world impact of allowing a President to fire heads of independent agencies at will?**
32. You wrote in your dissent that the CFPB's single-Director structure "threatens individual liberty more than the traditional multi-member structure does."
- a. What individual liberty is threatened?**
 - b. Does the individual liberty you are referencing refer to financial services providers?**
 - c. Where in the statute is this interest for financial service providers outlined?**
 - d. Where in the Constitution is there language applying individual liberty rights to companies?**
33. The *en banc* majority decision in *PHH* stated that *Morrison v. Olson* "remains valid and binding precedent."
- a. Do you agree with that statement?**
34. Throughout his administration, President George W. Bush frequently issued signing statements reserving the right not to enforce laws or portions of laws he believed encroached on the President's constitutional authority. According to Professor Peter Shane, in President Bush's first six years in office, he "raised nearly 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his 42 predecessors combined." (Peter M. Shane, *Madison's Nightmare: Executive Power and the Threat to American Democracy* (2009))
- a. During your time in the White House Counsel's office, were you involved in any of these statements?**
 - b. Which ones and what was your involvement?**
35. Jay Bybee was nominated for an open seat on the Ninth Circuit and confirmed to that position by the Senate in March 2003, during your time in the White House Counsel's office.
- a. Did you recommend him for the seat? If so, why?**
 - b. What role did you play in his confirmation process?**
 - c. At the time, were you aware of Mr. Bybee's view on executive authority or the "unitary executive"?**
 - d. Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos that he had authored or signed regarding the power to transfer terrorists, interrogation of**

combatants or detainees, or the sharing of grand jury information under the PATRIOT Act)?

- e. Did you learn about the existence of any of these memos before his confirmation by the Senate? If not, when did you first become aware of these memos?
- f. Do you believe that the Senate should have known about these memos and had access to all information relevant to Mr. Bybee's involvement in these issues before it confirmed him? If not, why not?
- g. Do you believe the Senate, in considering your nomination, is entitled to all information relevant to your possible involvement in these issues? If not, why not?
- h. Has the Committee been provided all documents relevant to your knowledge or involvement in post-9/11 terror policies and programs?
- i. Same question for:
 - i. warrantless surveillance?
 - ii. interrogation of combatants and detainees?
 - iii. transfer of terrorists or combatants (including rendition)?
 - iv. detention of combatants?
 - v. military tribunals or commissions?

36. Emails provided to the Committee indicate that John Yoo also was considered as a potential nominee for the 9th Circuit.

- a. Did you recommend Mr. Yoo as a nominee for the Ninth Circuit? If so, why?
- b. At the time, were you aware of Mr. Yoo's view on executive authority or the "unitary executive"?
- c. Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos regarding warrantless surveillance, the power to detain combatants, or the interrogation of combatants or detainees)? If not, when did you first become aware of these memos?
- d. Did you ever recommend Mr. Yoo for any other positions within the Administration? If so, when, what positions, and why did you recommend him? For each such position, please also indicate whether you knew, at the

time, of his views of executive authority or involvement in Office of Legal Counsel memos related to surveillance, interrogation, or detention.

- e. **When Mr. Yoo withdrew his name from consideration as a possible nominee to the Ninth Circuit, you asked “why?? . . . he was my magic bullet.” What did you mean? How was Mr. Yoo a “magic bullet”? Why did he withdraw?**
37. You worked extensively on judicial nominations while you were in the White House Counsel’s office.
- a. **As part of the judicial nomination process, did you consider or discuss whether a potential nominee would help the president as a member of the judiciary? If so, please identify the specific candidates or nominees and why they were viewed as helpful to the president.**
38. In 1994, I was the author of the federal Assault Weapons Ban (AWB) which contained a sunset provision. As the sunset approached, I worked to renew the legislation — in 2003, 2004, and again in 2005. You were at the White House during that time, serving in the role of Staff Secretary.
- a. **While serving in the Bush White House, did you meet with—or discuss the renewal of the assault weapons ban with—the NRA or any other advocacy group? Please describe those meetings and/or discussions, including who you met or spoke with.**
 - b. **What did the NRA or other advocacy groups request?**
 - c. **At the White House, did you ever discuss or work on the assault weapons ban and/or other Second Amendment issues? If so, what was the nature of your work and/or discussions? I am not asking if you were the primary person, I am asking if you worked on the issue at all.**
 - d. **If you did not work on the assault weapons ban or other Second Amendment issues, were you ever consulted on these issues?**
 - e. **Did you ever discuss whether President Bush should support renewal of the assault weapons ban? If so, what was your view?**
 - f. **What was your view on the constitutionality of the assault weapons ban at the time you served in the White House?**
 - g. **If your view has changed, how has it change?**
39. Also during your time as Staff Secretary, the National Rifle Association strongly backed a landmark lawsuit against the District of Columbia related to the District’s handgun ban. The lawsuit in that case, *District of Columbia v. Heller*, commenced in 2003.

- a. **Did you ever discuss this lawsuit with the NRA or any other advocacy group? If so, which group and what was your position?**
 - b. **What was your view on the decision to file the lawsuit at the time it was filed?**
40. During your hearing, I asked you about assault weapons being in “common use.” You stated: “Semiautomatic rifles are widely possessed in the United States. There are millions and millions and millions of semiautomatic rifles that are possessed so that seemed to fit common use and not being a dangerous and unusual weapon.”
- a. **What was the source for your statement that there are “millions and millions and millions of semiautomatic rifles that are possessed”?**
 - b. **Do you believe that people commonly utilize assault weapons? If so, what is the evidence for that assertion?**
41. In your dissent in the D.C. Circuit’s *Heller* case, you analogized assault weapons to semiautomatic rifles, which you then said were like semiautomatic handguns. Assault weapons like the AR-15, however, are just civilian versions of M-16s.
- a. **From a constitutional perspective, what makes an AR-15 more like a semiautomatic handgun than like an M-16?**
42. In 2003, while you were in the White House Counsel’s office, the Supreme Court decided to hear two cases involving the University of Michigan’s efforts to increase racial diversity on campus—*Grutter v. Bollinger* and *Gratz v. Bollinger*. The Bush Administration filed briefs in these cases arguing that the University of Michigan’s programs were unconstitutional.
- a. **What was your view on whether the Bush Administration should oppose the University of Michigan’s efforts to increase racial diversity on campus?**
 - b. **Did you support an argument that only race-neutral programs can be used to try to achieve racial diversity on campus?**
43. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), Chief Justice Roberts wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”
- a. **Do you agree with Chief Justice Roberts’s statement?**
 - b. **Do you believe that a majority of the Court supported this statement?**
44. In 2012, you wrote the majority opinion in *South Carolina v. United States*, which allowed South Carolina’s voter ID law to go into effect. The other two judges on the panel wrote a concurring opinion that highlighted the critical importance of the Voting Rights Act. The concurring opinion said that the Voting Rights Act had played a “vital

function” in keeping the voter ID law from being “more restrictive” and that the Voting Rights Act has “continuing utility” in “detering problematic, and hence encouraging non-discriminator, changes in state and local voting laws.”

a. Why didn’t you join the concurring opinion?

b. What did you disagree with in the concurring opinion and why?

45. Section 2 of the Voting Rights Act prohibits drawing election districts in a manner that is meant to dilute the voting power of minorities. In 1982, Congress strengthened Section 2 to allow plaintiffs to prove a violation of the Voting Rights Act where a local electoral practice had the effect of denying to racial or language minorities an equal opportunity to participate in the political process. That same year, the Supreme Court held in *Thornburgh v. Gingles* that plaintiffs could also bring a challenge under Section 2 alleging that legislative maps were drawn in a way that infringed on racial minorities’ rights to vote.

a. Do you consider *Gingles* to be settled law?

b. Is it correct law?

46. In the 2003 case *Lawrence v. Texas*, the Supreme Court held that states may not intrude into the bedrooms of same-sex couples. Justice Kennedy’s majority opinion explained that laws prohibiting intimacy between same-sex couples are unconstitutional because states “cannot demean their existence or control their destiny by making their private sexual conduct a crime.”

Justice Scalia—a justice whom you have described as a “hero” and a “role model”—dissented. He argued that the government had the authority to ban intimate sexual activities between consenting gay adults. He wrote: “Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive.”

a. Do you agree with Justice Kennedy’s opinion or Justice Scalia’s?

b. Is *Lawrence* settled law? Is it correct law?

c. *Lawrence* overruled *Bowers v. Hardwick* (1986). Was *Bowers* settled law before it was overruled?

d. Can a business legally fire an LGBT employee to “protect” other employees from the LGBT employee’s “lifestyle”?

e. In your White House role, did you provide any legal or policy advice concerning the Court’s *Lawrence* decision? If so, what did you advise?

47. In a 1971 case called *Lemon v. Kurtzman*, the Supreme Court established a three-factor test to decide whether a government's action violates the Establishment Clause. Several Supreme Court justices have suggested that the Court should abandon the *Lemon* test in favor of a test that accommodates more government aid to religion and more of a religious presence in government.
- a. **Is *Lemon* settled law? Is it correct law?**
 - b. **Do you support the continued application of the *Lemon* test, or do you favor a different test? If so, please explain what you view as the appropriate test and how it addresses entanglement between religion and government?**
48. The Office of Independent Counsel Ken Starr has been described as “notoriously leaky” because of how often its attorneys spoke to the press about the investigations into President Clinton and First Lady Hillary Clinton. (Josh Gerstein, *‘Brett was involved’: Inside Supreme Court nominee’s work for Bill Clinton probe*, Politico (July 22, 2018)). In your response to the Senate Judiciary Questionnaire, you acknowledged that you spoke to reporters “on background as appropriate or as directed.” (Kavanaugh SJQ at 41).
- a. **While working in the Office of Independent Counsel, did you ever speak with reporters about any of the Office’s investigations into President Clinton or Hillary Clinton (including your investigation into the death of Vince Foster) while those investigations were ongoing?**
 - b. **If so, what type of information did you provide to reporters?**
 - c. **Did you ever provide any reporters—or anyone else—with information learned through grand jury proceedings or witness interviews?**
 - d. **Have you ever provided any information to the press in violation of a statutory or ethical obligation to keep such information confidential?**
49. In March 1995, while working in the Office of Independent Counsel Ken Starr, you wrote a memo pushing to broaden the investigation to cover a “full-fledged investigation of [Vince] Foster’s death.” (Kavanaugh Memo to Starr, 3/24/95). By that time, three separate investigations had concluded that Mr. Foster committed suicide, and as you admitted in your memo, the Independent Counsel might lack prosecutorial jurisdiction over any crime uncovered in relation to that death. You nonetheless pursued the allegation that Mr. Foster was murdered, and the theory that he had an affair with Hillary Clinton, for three more years.
- a. **What specific evidence led you to question the conclusion that Mr. Foster had committed suicide and decide, instead, that a “full-fledged” investigation of Mr. Foster’s death was still warranted? Please identify the source(s) for the evidence that justified this conclusion.**
 - b. **Did you rely on allegations generated by conservative right-wing media outlets in deciding to pursue a “full-fledged” investigation of Vince Foster’s**

death? For example, did Chris Ruddy, Ambrose Pritchard-Evans, Hugh Sprunt, Reed Irvine, or Rush Limbaugh provide you with any information about Mr. Foster before you made the decision to re-investigate his death? If so, what specific information did they provide and what weight was it given?

- c. In a June 1995 memo, you wrote that “we have asked numerous witnesses about Foster’s alleged affair with Mrs. Clinton.” (Kavanaugh Memo to Starr et al. re: “Summary of Foster Meeting on 6-15-05”, 6/16/95.) Did you lead or participate in this questioning? Were you present during the questioning? Did you object to any of the questions that were asked?
- d. Webster Hubbell has stated that Office of Independent Counsel attorneys investigating the death of Vince Foster asked him a number of sexual questions in early 1995, including specifically asking if Hillary Clinton and Vince Foster had engaged in an affair. (Jane Mayer, *Dept. of Inquiring Minds: The Webster Hubbell investigation: Was it about sex?* The New Yorker (Aug. 9, 1999)). Did you participate in the questioning Mr. Hubbell? If so, what was your role? If you were present, did you object to any of the questions that were asked?
- e. Did you ever speak with reporters about the investigation into whether Mr. Foster had committed suicide or had been murdered?
- f. Did you ever speak with reporters about the investigation into whether Hillary Clinton and Vince Foster had engaged in an affair?

50. Your Starr-investigation era files from the National Archives include a number of complete files devoted to articles from Christopher Ruddy and others who were strong proponents of the Vince Foster murder conspiracy theory. For example, NARA File no. 70105096, labeled “Foster Death—Articles by Ruddy,” is 195 pages long. It includes articles entitled “Foster’s Death Site Strongly Disputed,” by Ruddy, and a partial transcript from a Rush Limbaugh Radio Broadcast entitled “Foster Note a Forgery.” A separate file, NARA File No. 70105100, includes what appears to be a summary analysis of the film “The Death of Vincent Foster: What Really Happened?” and an extended report from Hugh Sprunt entitled “The official record contradicts the Foster suicide conclusion,” which appears to have been faxed to your office on September 27, 1995.

- a. How often did you or others working on your behalf speak with or otherwise interact with each of the following individuals: Ambrose Pritchard-Evans; Hugh Sprunt; Reed Irvine; and Rush Limbaugh?
- b. Were any of these individuals a source for your investigation? If so, what specific information did they provide and what actions did you take in response?

51. A November 13, 1995 memorandum from Starr deputy Hickman Ewing to File, subject line “Chris Ruddy,” states that “At noon, Saturday, November 4, 1995, I checked my Little Rock voicemail. Brett Kavanaugh had called at 5:50 p.m. on Friday, November 3

leaving a voicemail to the effect: “I got a voicemail message from Ruddy. He said he had talked to [a witness]. He said that [the witness] was disappointed by the way he was treated in the grand jury. He said he was treated as a suspect. Ruddy knows some of the questions that Brett Kavanaugh asked. Why did Brett ask [the witness] if the guy in the park grabbed his genitalia. Brett said on the voicemail to me, ‘I didn’t ask him that. *I did ask him about sexual advances by the other man in the park. John Bates and I want you to call Ruddy—at least get him off the [sexually explicit] part. I am worried about that.*” (Memo from Ewing to File re: “Chris Ruddy,” (Nov. 13, 1995) (emphasis added)). Hickman Ewing followed your directions and called Ruddy back the day that he received your voice mail (November 4).

- a. **Was the Independent Counsel office seeking to influence Mr. Ruddy’s articles?**
 - b. **In a July 15, 1995 memorandum welcoming a new investigator to your team, you recommended that the investigator familiarize himself with the investigation using a number of sources, including “the Ruddy articles.”** (Memo from Kavanaugh to Clemente re: “Vince Foster” (July 15, 1995)). **Did you and your team consider Chris Ruddy to be a source for your investigation? Please explain any steps taken in response to information provided by Mr. Ruddy.**
 - c. **How does your direction to Mr. Ewing to discuss grand jury information with a journalist—i.e., your direction that he discuss with Mr. Ruddy the questions asked of a grand jury witness—comply with grand jury secrecy requirements? Please provide legal support for your position.**
52. In 1998, Ken Starr stated that it was appropriate for attorneys with the Independent Counsel’s office to speak to the media in order to defend its ongoing investigation from attacks made by the Clinton Administration. (Adam Clymer, *Starr Admits Role in Leaks to Press*, New York Times (June 14, 1998)).
- a. **Is this a valid reason to discuss an ongoing investigation with reporters?**
 - b. **At the time, what was the Department of Justice’s policy regarding public discussion of an ongoing investigation?**
 - c. **What is your personal view on whether prosecutors should discuss an ongoing investigation with reporters?**
 - d. **Do you believe that your discussions with reporters during your time in the Starr Independent Counsel Office about the Vince Foster investigation were appropriate? Were they fair?**
53. Between March and August of this year, President Trump attacked Robert Mueller’s work in at least 127 tweets. The number of such attacks has sharply increased since May.

a. Do you believe that it would be appropriate for Mr. Mueller or members of his team to discuss details of the investigation in light of these attacks?

54. In 2006, the Department of Justice fired numerous U.S. Attorneys for political reasons, in a process that has been described as “chaotic and spiked with petty cruelty.” (Amy Goldstein, *E-Mails Reveal Tumult in Firings and Aftermath*, Washington Post (Mar. 21, 2007)).

According to the Department of Justice report on the dismissals, “the process to remove the U.S. Attorneys originated shortly after President Bush’s re-election in November 2004,” at which time you were serving as White House Staff Secretary. (U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, at 16 (Sept. 2008)). The report indicates that beginning in early 2005, Deputy White House Counsel David Leitch, Department of Justice official Kyle Sampson, and White House Counsel Paralegal Colin Newman engaged in email discussions in which Sampson suggested replacing fifteen to twenty percent of all U.S. Attorneys who may not have been “loyal Bushies.” (*Id.* at 17).

Sampson first circulated a proposed U.S. Attorney target list in March 2005, after Alberto Gonzales became Attorney General. (*Id.*) You had served under Gonzales in the White House Counsel office. Sampson circulated this list to Associate White House Counsel Dabney Friedrich, at the request of White House Counsel Harriet Miers, on March 23, 2005. (*Id.* at 22). Sampson and Monica Goodling, who was appointed as Counsel to the Attorney General in October 2005 and as DOJ White House Liaison in April 2006, regularly interacted with the individuals at the Executive Office of the Presidency, including with Sara Taylor, a top aide to Karl Rove, regarding U.S. Attorney target lists from March 2005 until the U.S. Attorneys were removed in December 2006. (*Id.* at 22-67).

The DOJ OIG “found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys.” (*Id.* at 325-26). It further concluded that “the White House was more involved than merely approving the removal of Presidential appointees” for at least three U.S. Attorneys, but was unable to fully determine what role the White House played in all removals because White House officials, including Karl Rove and Harriet Miers, declined to participate in the DOJ OIG investigation. (*Id.* at 337-38).

- a. Please describe any interactions you had with Kyle Sampson, Monica Goodling, or any other Department of Justice official regarding the dismissal of U.S. Attorneys.**
- b. Please describe any interaction you had with Karl Rove, Sara Taylor, Dabney Friedrich, David Leitch, Colin Newman, Harriet Miers, or any other White House official regarding the dismissal of U.S. Attorneys.**

c. Did you ever receive or comment on any list of proposed U.S. Attorneys targeted for dismissal or replacement?

55. During your time in the White House there were also reports that White House officials were actively involved in politicized hiring by the Department of Justice. (Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, New York Times (July 29, 2008)). In fact, according to the Department of Justice's Inspector General, officials at the White House developed a method—taught through a seminar and distributed in a document called “The Thorough Process of Investigation”—for searching the Internet to determine a candidate's political leanings. Through this process, DOJ officials used search terms to screen applicants using terms like “abortion,” “homosexual,” “Florida recount,” or “guns.” (U.S. Department of Justice Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, at 20 (July 28, 2008)). The DOJ Inspector General's report on this issue concluded that Department of Justice officials used the results of these searches to improperly discriminate against candidates for career positions at DOJ. (*Id.* at 20, 135).
- a. **Did you ever discuss screening job applicants to determine political affiliation or ideology? If so, when, who was involved, and what was discussed?**
 - b. **Were you involved in developing any methods for screening job applicants based on political affiliation or ideology? If so, when, who was involved, and what methods were developed?**
 - c. **Were you aware of or did you attend any seminars or training sessions where screening job applicants based on political affiliation or ideology was discussed? If so, what was your involvement?**
 - d. **Were you aware of or did you assist in preparing the document entitled “The Thorough Process of Investigations,” or any other document discussing screening job applicants based on political affiliation or ideology? If so, what was your involvement?**
 - e. **When did you first become aware that candidates were being screened based on political affiliation or ideology? What did you do when you learned about this? Did you ever object to this practice? If so, when? Are your objections memorialized in any way?**
 - f. **Were you involved in hiring decisions that took into account the political affiliation or ideology of any candidate? If so, please explain the position being filled and why such considerations were taken into account.**
56. After the U.S. Attorney scandal was made public, it became apparent that a number of White House officials communicated with each other and with Department of Justice officials using Republican Party-affiliated e-mail accounts. For example, J. Scott Jennings, the White House deputy director of political affairs, used a “gwb43.com” email

address to discuss replacing one U.S. Attorney. (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials' E-Mails*, Washington Post (March 27, 2007)).

Some have suggested that Karl Rove actually directed the firing of U.S. Attorneys so that the fired attorneys could be replaced with political picks. (Dan Froomkin, *The Rovian Theory*, Washington Post (March 23, 2007)). However, because Rove primarily conducted his official business using an RNC-based email address, official investigations were unable to fully assess his role in the scandal. (*See id.* (noting that “According to one former White House official familiar with Rove’s work habits, the president’s top political adviser does ‘about 95 percent’ of his e-mailing using his RNC-based account.”)).

A 2007 House Oversight and Government Reform Interim Staff Report concluded that “at least 88 White House officials had RNC e-mail accounts. (Committee on Oversight and Government Reform, *The Use of RNC E-Mail Accounts by White House Officials* (June 18, 2007)). Some have suggested that Bush White House officials strategically used these political email accounts to keep particular information secret. Notably, in a 2003 email, Jennifer Farley, a deputy in the White House Office of Intergovernmental Affairs, told Jack Abramoff aide Kevin Ring that “it is better to not put this stuff in writing in [the White House] ... email system because it might actually limit what they can do to help us, especially since there could be lawsuits, etc.” (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials' E-Mails*, Washington Post (March 27, 2007)).

- a. **Did you ever use a non-government email address during your time in the White House, including any email address from the rncq.org, gwb43.com, georgewbush.com, or any other email affiliated with a political candidate or organization, or registered to a political campaign? (If so, please identify those accounts.)**
- b. **Can you affirmatively state that you did not use any non-government account to conduct official business during your time in the White House?**
- c. **Did Karl Rove or any other White House official ever consult with you regarding the use of any non-government email address?**
- d. **When did you first learn that Mr. Rove was using a non-government email address for official business? What did you do when you learned this? When did you learn that emails on Mr. Rove’s non-governmental accounts had been deleted? Had anyone advised Mr. Rove that these emails should be preserved and, if so, when was this conveyed to him?**
- e. **Did you play any role in the investigation of the use of non-government emails by White House officials? If so, please describe your role.**
- f. **On April 11, 2007, the White House acknowledged that emails to and from White House officials were lost or deleted between 2001 and 2007 because “White House policy did not give clear enough guidance” on the use of official email, rather than private, and that “the oversight of that [guidance]**

was not aggressive enough.” (Dan Froomkin, *Countless White House E-Mails Deleted*, WASHINGTON POST (Apr. 12, 2007)). **Please describe your role in developing and enforcing White House policy on the use of email.**

57. In the aftermath of the attacks on September 11, 2001, you were closely involved in crafting the legislation related to the limitation of airlines’ liability and the creation of a compensation fund for victims. Ultimately, the compensation fund model that was used paid victims’ families an average of approximately \$1.8 million.

- a. **At any point in the process, did you express opposition to providing 9/11 victims any form of additional compensation outside of the compensation they would normally be entitled to through already-existing programs like insurance and government benefits?**
- b. **At any point in the process, were you opposed to creating any form of a compensation fund for 9/11 victims?**
- c. **Did you ever propose capping victims’ compensation? Did you suggest capping it at \$250,000? \$400,000? \$500,000?**
- d. **If so, were your proposals to cap victims’ compensation due to legal concerns, policy concerns, or both? What were your specific concerns?**

58. During your hearing, I asked you about the Bush White House’s position that it was up to the Federal Energy Regulatory Commission (“FERC”) to investigate and punish any misconduct by Enron that contributed to the California electricity crisis. You testified that FERC’s role was not in your “area of expertise.” Congressional investigations showed that Enron executives were focused on stacking FERC with appointees who they thought would be friendly regulators for the company.

When you were in the White House Counsel’s office, you were involved in drafting the surveys that the Counsel’s office sent to White House staff about their communications with Enron. One of the survey questions asked whether White House staff members had communications with Enron related to FERC or other government agencies. You argued, unsuccessfully, that this question should be narrowed. In particular, you argued in an April 23, 2002, email that any communications disclosed “should be issues-oriented so as not to include appointments.”

- a. **Were you aware at the time you made these arguments that President Bush had appointed a chairman of FERC and another FERC commissioner who had been recommended to him by Enron’s Ken Lay?**
- b. **Why was it your view that Congress and the American people should not have information about contacts between the White House and Enron about appointments to the very entities that were responsible for preventing Enron’s corporate misconduct?**

59. You also distributed draft talking points in May 2002 which argued that it was “highly unusual” for Congress to ask questions about presidential appointments because “appointments are at the core of his constitutional power. The confirmation process is, in effect, the Senate’s oversight on that process.”
- a. **Is it your view that congressional oversight of any presidential appointment ends when an appointee is confirmed?**
 - b. **If congressional investigators, in your view, are not entitled to information about the appointments process, then who – if anyone – can investigate and hold the President accountable for corruption in that process?**
60. During your time on the D.C. Circuit, you have written 61 dissents. Out of all the active judges on the D.C. Circuit, you have the highest number of dissents per year of service on the court.
- a. **Have you ever dissented in a case in which the majority ruled against an environmental interest?**
- 61. Do you believe that human activity is contributing to or causing climate change?**
62. The same night you were announced as President Trump’s nominee for the Supreme Court, the White House circulated a fact-sheet about your judicial record. The document stated: “Judge Kavanaugh protects American businesses from illegal job-killing regulation”; “Judge Kavanaugh helped kill President Obama’s most destructive new environmental rules”; “Judge Kavanaugh has led the effort to rein in unaccountable independent agencies”; and Judge Kavanaugh has “overruled federal agency action 75 times.” (Lorraine Woellert, Politico.com, “Trump asks business groups for help pushing Kavanaugh confirmation” (July 9, 2018).)
- a. **Is there anything inaccurate about the White House’s assessment of your record? If so, please explain.**
63. According to press accounts, you woke President Bush in the middle of the night to sign just-passed legislation that would allow a federal court to intervene in a family dispute over end-of-life care for Terri Schiavo. (New York Times, *After Signing Schiavo Law, Bush Says ‘It Is Wisest to Always Err on the Side of Life’*, Mar. 22, 2005))
- a. **What other involvement did you have in the Terri Schiavo matter? Did you provide any advice about the legislation?**
 - b. **Did you agree at the time that it was appropriate for the federal government to intervene? If so, why? What, if any, principles did you propose to limit the ability of the government to intervene in a personal family matter?**
64. In 2007, you authored the opinion in *Doe ex rel. Tarlow v. District of Columbia*. That case was about whether it was constitutional to force individuals with intellectual disabilities to have medical procedures against their will. All that these individuals

wanted was the right to have their wishes at least taken into consideration for major medical decisions.

- a. Does the existence of laws such as the Americans with Disabilities Act and the Individuals with Disabilities Education Act affect whether the rights of individuals with intellectual disabilities are rooted in history and tradition and implicit in the concept of ordered liberty?**

65. Only a small fraction of your White House record was produced to the Committee before your hearing. We have not seen close to six million pages of your total record, including documents from your years as Staff Secretary, which you described as the “most instructive” and “useful” to you as a judge. (Remarks to Inn of Court, May 17, 2010)

- a. Is there anything in the documents that we have not seen that would illuminate your views on or involvement in interrogation, detention, rendition, or warrantless wiretapping?**
- b. Is there anything in the documents that we have not seen that would illuminate your views on privacy rights?**
- c. Is there anything in the documents that we have not seen that would show your involvement in issues related to the Enron scandal?**
- d. Is there anything in the documents that we have not seen that would illuminate your views on the power of the President or the unitary executive theory?**
- e. Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in politicized hiring and firing of lawyers and applicants in the Department of Justice during the Bush Administration?**
- f. Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in the use by approximately 80 Bush White House aides of Republican National Committee email accounts to conduct official business?**

66. We have several documents showing that, while you were in the White House Counsel’s Office, you handled issues related to the Presidential Records Act, including one email in which a colleague referred to you as “Mr. Presidential Records.” (Email from Robert Cobb to Brett Kavanaugh, *speechwriting & laptops* (Feb. 14, 2001))

- a. Given your past experience with these issues, were you consulted about or in any way involved in the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act?**

- b. **When did you become aware of the process to be used to provide your records?**
 - c. **Did you ever communicate with Bill Burck or anyone else at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, about your nomination to the Supreme Court? If so, when, who was present, and what was discussed?**
 - d. **Did you ever communicate with Mr. Burck or anyone else at Quinn Emanuel about the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act? If so, who, when, and what was discussed.**
 - e. **Did you ever communicate with anyone regarding Committee confidential designation for documents related to your record? If so, who, when, and what was discussed.**
 - f. **Did you ever communicate with anyone regarding assertion of constitutional or executive privilege over your record? If so, who, when, and what was discussed.**
 - g. **Did you ever communicate with Mr. Burck about your nomination to the Supreme Court or your confirmation hearings? If so, when, who was present, and what was discussed?**
67. Have you ever communicated with anyone about the potential assertion of executive privilege over documents dating from your tenure in either the White House Counsel's Office or as Staff Secretary? If so, when did those discussions occur, with whom, and what was discussed?
68. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee. Include both those from within the Trump Administration and outside of the Trump Administration.
69. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.
70. At any point before or during your nomination hearing (September 4-7, 2018), did you review or discuss, or were you informed about, any of the documents from your tenure in the White House Counsel's Office that Bill Burck planned to produce or did produce to the Senate Judiciary Committee?
- a. **If so, which documents did you review or discuss? Please provide a list of Bates numbers of all documents that you reviewed, discussed, or received information about.**
 - b. **How many of the documents you reviewed or discussed were designated Committee Confidential? Please provide a list of Bates numbers of all such documents designated Committee Confidential.**

1315

**The Honorable Jeff Flake
Questions for the Record
U.S. Senate Judiciary Committee
“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States”
September 10, 2018**

1. Should a president be able to use his authority to pressure executive or independent agencies to carry out his directives for purely political purposes?

**Senator Chuck Grassley
Questions for the Record**

**Judge Brett Kavanaugh
Nominee, Associate Justice of the Supreme Court of the United States**

1. I'd like to give you a chance to respond to some of the issues raised last week regarding contraceptives and abortion rights.
 - a. When responding to Senator Cruz's question about your opinion in *Priests for Life v. United States Department of Health & Human Services*, you said: "It was a technical matter of filling out a form, in that case with—that—they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were—as a religious matter, objected to." Why did you use the term "abortion-inducing drugs"?
 - b. Senator Blumenthal and others on the Committee asked you about a March 24, 2003 email in which you addressed legal scholars' views of *Roe v. Wade*. Please explain the context of that email. In particular, did you express any personal view in that email on whether *Roe v. Wade* was "settled law"?
2. Last Tuesday, as the Committee recessed for a break, a man approached you and extended his hand as you left the hearing room. Media reports later identified the man as Fred Guttenberg, the father of a shooting victim from Marjory Stoneman Douglas High School in Parkland, Florida. Please explain your reaction to Mr. Guttenberg.
3. During the hearings last week, Senator Leahy asked you about your role in the nomination of Judge William Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Since your hearing, the media has reported on emails you wrote regarding that nomination while in the White House Counsel's Office, as well as the nomination of Judge Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit.

During your time in the White House Counsel's Office, were you the person primarily responsible for handling either of these nominations? If not, did you work with others in the White House Counsel's Office to support these nominations? If you did support these nominations, what sort of work did you perform?

4. Senator Leahy asked you about former Judiciary Committee staff member Manuel Miranda. Senator Leahy asked whether you knew that Miranda took files without authorization from Democrats on the Senate Judiciary Committee. When you received these emails, did you know that some of the materials you received from Mr. Miranda had been taken from the files of Senate Democrats without their authorization?

5. During the hearings last week, Senator Leahy asked you about a September 17, 2001 email you sent to John Yoo, an attorney in the Office of Legal Counsel at the Department of Justice. In the email, you asked about legal research regarding potential surveillance techniques.
 - a. Please explain the context of that email.
 - b. Please explain that email in light of your testimony to the Committee in 2006 regarding the National Security Agency's (NSA) Terrorist Surveillance Program.

1318

Senator Chuck Grassley
Questions for the Record

John Dean
Former White House Counsel, President Richard M. Nixon

1. You testified at length that, in your view, appointing Judge Kavanaugh to the Supreme Court would make “the most pro-presidential powers Supreme Court in the modern era.” Please identify all of the legal scholarship on which you relied to reach this conclusion.

**Senator Chuck Grassley
Questions for the Record**

**Lisa Heinzerling
Professor of Law, Georgetown University Law Center**

1. In response to questioning from Senator Coons about Judge Kavanaugh's opinion in *PHH Corp. v. Consumer Financial Protection Bureau*, you stated, "He would have struck down a major federal statute that was very new that set up the Consumer Financial Protection Bureau in which Congress had made a judgment about the degree of dependence and the structure of the agency" If a majority of the D.C. Circuit had agreed, would Judge Kavanaugh's opinion have led to the invalidation of the entire Consumer Financial Protection Bureau? Or the entire Dodd-Frank Wall Street Reform and Consumer Protection Act?

**Questions for the Record from Senator Kamala D. Harris
Submitted September 10, 2018
For the Nomination of**

Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States

EXECUTIVE POWER

1. On August 15, 1998, when you were working with then-independent counsel Ken Starr to investigate President Clinton, you wrote a memorandum to your colleagues insisting that the President needed to be held accountable because you believed he had (1) “lied to the American people” and (2) tried to taint the independent counsel’s work with “a sustained propaganda campaign that would make Nixon blush.”¹
 - a. Do you still agree that it is a problem for a President to lie to the American people?
 - b. Do you continue to agree that it is a problem for a President to undermine the work and reputation of an independent counsel or a special counsel?
 - c. Do you have any reservations about accepting a nomination from a President who many people believe is untruthful to the public?
 - d. Do you have any reservations about accepting a nomination from a President who has sought to undermine the work and reputation of a special counsel?
2. Multiple members of this Committee, along with many members of the public, have questioned whether you could impartially decide cases relating to special counsel Mueller’s investigation or other matters that could place President Trump in personal legal jeopardy. These questions derive from the views you have previously expressed on presidential investigations and liability, coupled with the fact that the President was presumably aware of these views when he chose to nominate you at a time when he is the subject of the special counsel’s investigation and faces other legal jeopardy. Are those who harbor such concerns about your impartiality being unreasonable?

LGBTQ RIGHTS / ANTI-DISCRIMINATION LAWS

3. Does the Constitution permit a state to pass a law saying stores cannot put a “whites only” sign in their windows?
4. If a store owner does not want to comply with that law and wants to put up a whites only sign, can the store owner say his whites only sign is free speech and so he gets to keep it in his window?

¹ Memorandum from Brett M. Kavanaugh to Judge Starr, *Slack for the President?* (Aug. 15, 1998), available at <https://www.politico.com/f?id=00000165-5810-d47f-a5f5-5a3e9a020001>.

5. If a store owner claims his religious beliefs do not allow him to serve black customers, can the state still make him take down the whites only sign, or does he have a constitutional right to discriminate against black customers?
6. What if a state has a law saying a store cannot put up a “heterosexuals only” sign in the window. Could the store owner say the sign is free speech and so he gets to keep it up?
7. Under your view of the Constitution, could the store refuse to serve gay and lesbian customers because of the store owner’s religious beliefs?
8. Does the right to marry include ensuring that those who have that right may exercise it equally?
 - a. So, if a county or state makes it harder for same-sex couples to marry than for heterosexual couples to marry, are those additional hurdles constitutional?
 - b. If a county or state makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?
9. In deciding how closely to look at discriminatory laws, there are two things the Supreme Court often considers: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group satisfies those two characteristics, the Court has said it should be more suspicious of laws that harm them.
 - a. Is being gay or lesbian an immutable characteristic?
 - b. Have gay and lesbian Americans been subject to discrimination in the past?
 - c. Is being transgender an immutable characteristic?
 - d. Have transgender Americans been subject to discrimination in the past?
 - e. Given that LGBTQ Americans have faced discrimination in the past, do you believe they should be protected by federal antidiscrimination laws?
10. During your hearing, you stated that “[a]ll roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test” for substantive due process.
 - a. How do you square that statement with the Supreme Court’s statement in *Obergefell* that, while *Glucksberg*’s approach “may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy”?

- b. During a speech last year, you stated that “*Glucksberg’s* approach to unenumerated rights was not consistent with the approach of the [Court’s earlier] abortion cases such as *Roe* [and] *Casey*.” Does that remain your view?

JUDGE KOZINSKI

11. Have you ever recommended any individual to clerk for Judge Kozinski? If so, how many individuals have you recommended and at what times did you make those recommendations?
12. In the fall of 2017, at least 15 women came forward to accuse Judge Kozinski of sexual harassment and other workplace misconduct.² You clerked for Judge Kozinski. You worked with him for years on Justice Kennedy’s law clerk hiring process. You worked with him for several years on a book about judicial precedent. And in 2006, you even chose to have him introduce you at your D.C. Circuit confirmation hearing. Yet you said in our one-on-one meeting and again in your testimony before this Committee that you were “surprised to the point of shock” and felt “gut-punched” when you learned about the fall 2017 allegations against him.
- a. One of the charges against Judge Kozinski was that he showed pornography to his law clerks.
- i. Has Judge Kozinski ever shared pornography with you? If so, on what occasion(s) did he do so?
 - ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski sharing pornography with friends, colleagues, or law clerks?
 - iii. Are you aware that in 2008, sexually explicit images that Judge Kozinski had maintained on a private server and shared with friends were inadvertently made public, resulting in a judicial misconduct investigation?³ If so, when did you become aware?
- b. One of the charges against Judge Kozinski was that he made inappropriate sexual comments to his law clerks.

² Matt Zapotosky, *Prominent appeals court Judge Alex Kozinski accused of sexual misconduct*, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.7d32190767bd; Matt Zapotosky, *Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them*, Wash. Post (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.0113cd27f8c9.

³ Scott Glover, *9th Circuit’s chief judge posted sexually explicit matter on his website*, L.A. Times (June 11, 2008), <http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html>.

- i. Has Judge Kozinski ever made comments about sexual matters to you, either in jest or otherwise? If so, on what occasion(s) did he do so?
 - ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski making inappropriate sexual comments to his law clerks?
 - iii. Are you aware of a 2008 L.A. Times story reporting that Judge Kozinski had made inappropriate sexual comments to friends and associates, including his law clerks, over an e-mail listserv?⁴ If so, when did you become aware of the reports?
- c. One of the charges against Judge Kozinski was that he inappropriately kissed, touched, or fondled female law clerks and colleagues.
- i. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski inappropriately kissing, touching, or fondling anyone?
 - ii. Prior to the fall of 2017, had you ever seen video—which has long been available on YouTube—of Alex Kozinski’s appearance on the game show, *The Dating Game*?⁵
 - iii. In the game show appearance, he forcibly kisses a woman on the mouth without her consent. Was that appropriate?
- d. The Judicial Council investigation into Judge Kozinski’s alleged misconduct was terminated when Judge Kozinski announced his resignation from the bench. Do you believe that the allegations against Judge Kozinski should be fully investigated by the federal government?

LEON HOLMES’ NOMINATION

13. Publicly available information indicates that, while you worked in the White House Counsel’s Office, you were involved with the nomination of J. Leon Holmes. He was subsequently confirmed by a 51-46 vote of the U.S. Senate, and he now serves as a Senior United States District Judge of the United States District Court for the District of Arkansas. Holmes was a divisive nominee. Among other things, while Holmes’s nomination was pending, the press reported that Holmes had compared the abortion rights movement to the Nazis, writing: “The pro-abortionists counsel us to respond to [societal] problems by abandoning what little morality our society still recognizes. ... This was attempted by one highly sophisticated, historically Christian nation in our

⁴ Scott Glover, *Judge e-mailed jokes to ‘gag list’*, L.A. Times (Dec. 8, 2008), <http://articles.latimes.com/2008/dec/08/local-me-gaglist8>.

⁵ Kozinski on the Dating Game (and Squiggy, too!), YouTube (posted Nov. 2, 2006), <https://www.youtube.com/watch?v=OdjCdbGueCU>.

century—Nazi Germany.”⁶ While his nomination was pending, it also came to light that he had previously made a false and highly problematic statement about rape, saying: “Concern for rape victims is a red herring, because conceptions from rape occur with the same frequency as snow in Miami.” On April 11, 2003, you received an email forwarding an article describing Holmes’s statement about rape. The email flagged that Senator Pryor had said he would still vote to confirm Holmes, to which you responded “excellent.”

- a. While Holmes’s nomination was pending, were you aware of his statement comparing pro-choice advocates to Nazis?
- b. Can rape lead to pregnancy?
- c. While working in the White House, did you ever recommend that Holmes’s nomination be withdrawn?
 - i. If yes, why?
 - ii. If no, did you have any concerns about pressing forward with Holmes’s nomination after you became aware of his false and offensive statement about rape? Did you convey those concerns to anyone in the White House? Did you have any concerns about pressing forward with Holmes’s nomination after you became aware of his statement about pro-choice advocates? Did you convey those concerns to anyone in the White House?

DISABILITY RIGHTS

14. Senator Duckworth recently wrote an op-ed about how thankful she is that the Americans with Disabilities Act is in place to safeguard the basic rights she relies on to lead a full life. During your confirmation hearing, you agreed with Chief Justice Roberts that you had no basis for viewing Section 2 of the Voting Rights Act as constitutionally suspect. Do you have any basis for questioning the constitutionality of the Americans with Disabilities Act?
15. In *Tarlow v. District of Columbia*, three adult women with intellectual disabilities who received medical services from the District of Columbia brought suit alleging that the District illegally authorized elective medical procedures to be performed on them in violation of their procedural and substantive due process rights guaranteed by the Fifth Amendment. The District, without considering the women’s wishes, forced two of them to have their pregnancies involuntarily aborted, and the third to undergo eye surgery. You ruled that consideration of the wishes of patients who are not and “have never had the mental capacity to make medical decisions for themselves” is not required by due process. In *Buck v. Bell* (1927), the Supreme Court upheld a statute permitting

⁶ Jennifer 8. Lee, *Attack on Judicial Nominee Leads Panel to Delay Vote*, N.Y. Times (Apr. 11, 2003), <https://www.nytimes.com/2003/04/11/us/attack-on-judicial-nominee-leads-panel-to-delay-vote.html>.

compulsory sterilization of a woman believed to have an intellectual disability—rather than “waiting to execute degenerate offspring for crime,” the Court said, “society can prevent those who are manifestly unfit from continuing their kind.”

- a. Is *Buck* still good law?
- b. Was *Buck* correctly decided? On what basis?

16. Just last year, the Supreme Court issued a unanimous opinion in *Endrew F. v. Douglas County School District*, a case about what kind of “educational benefits” the Individuals with Disabilities Education Act (IDEA) requires public schools to provide to students with disabilities. The Court settled the issue by rejecting the Tenth Circuit’s rule (previously applied by Justice Gorsuch) that schools need only provide barely more than *de minimis* benefits, and holding instead that, “[t]o meet its substantive obligation under the IDEA, a school must offer an individualized education program (IEP)] reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court emphasized that schools must provide an IEP that is “appropriately ambitious in the light of” the student’s circumstances, and that while “[t]he goals may differ, . . . every child should have the chance to meet challenging objectives.”

- a. Do you believe this decision was a proper application of prior Supreme Court precedent on the Individuals with Disabilities Education Act?
- b. Do you believe that schools must proactively provide every child with a disability an IEP that rejects the “merely more than *de minimis*” standard and offer every child the chance to meet challenging state academic objectives?
- c. In your view, should the Supreme Court have gone further and adopted the standard urged by Endrew’s parents (i.e., one that would provide a child with a disability “opportunities to achieve academic success . . . substantially equal to the opportunities afforded children without disabilities”)?

REPRODUCTIVE RIGHTS

17. You have given speeches that praise Chief Justice Rehnquist and Justice Scalia and comment favorably on their dissenting opinions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Have you given a speech or published a writing that praises the majority in *Roe*, the controlling opinion in *Casey*, or the opinions of Justices Stevens or Blackmun in *Casey*? If yes, please provide the relevant passage(s).

SPECIAL COUNSEL DISCUSSIONS

18. Between your work for independent counsel Ken Starr and your own research and writing, you have a wealth of knowledge about presidential investigations and related

subjects. This is a time when your expertise is especially relevant and perhaps sought after.

- a. Have you had any contact with Robert Mueller or any members of his special counsel team—including through an intermediary—since March 1, 2017? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.
- b. Since November 8, 2016, have you communicated with Attorney General Sessions, Deputy Attorney General Rosenstein, or anyone else in the U.S. Department of Justice—including through an intermediary—about Robert Mueller’s investigation, special counsel investigations generally, recusals, or any other matters related to President Trump or the 2016 election? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.
- c. Since November 8, 2016, have you communicated with anyone who represents or advises (or has represented or advised) President Trump or the White House—including through an intermediary—about Robert Mueller’s investigation; about any other investigations or legal matters that may implicate President Trump personally; or about presidential investigations, liability, or pardons generally? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

NOMINATION PROCESS

19. Has President Trump, Don McGahn, or anyone else involved in the decision to nominate you, communicated with you about any of the following subjects since November 8, 2016:
 - a. Your views on government regulation and administrative law?
 - b. Robert Mueller and his investigation, any other investigations related to the President, or any other legal matters that may implicate the President personally?
 - c. The President’s pardon power?
 - d. Recusals?
 - e. For all subjects where your answer is yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.
20. On how many occasions have you and President Trump communicated with one another?
(Note: This question encompasses communications in any form and at any time,

including prior to his election and up to the present.) Please describe the nature of the contact, including the timing and substance of the communications.

21. Has anyone offered you advice or assistance in responding to the Questions for the Record? If yes, please identify all such individuals by name and affiliation.

DIVERSITY

22. As a practical matter, do you believe that educational institutions are likely to be able to achieve meaningful racial diversity without recognizing and taking account of race?

VOTING RIGHTS

23. More than fifty years ago (in *Reynolds v. Sims*), the Supreme Court wrote: “Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” Do you agree?
24. The Supreme Court has long held that Section 2 of the Voting Rights Act, as amended in 1982, prohibits states from drawing voting districts that dilute the votes of minorities. Do you accept that interpretation of Section 2 as a matter of statutory *stare decisis*?
25. At your confirmation hearing, Senator Klobuchar asked you whether you believe there is evidence of voter fraud. You refused to answer her question, saying you would only want to answer it based on the record in a particular case. You have previously presided over a case involving the constitutionality of South Carolina’s voter ID law, which was purportedly enacted based on concerns about voter fraud. Based on your experience as a judge, how prevalent is voter fraud?
26. As you know, states that have enacted voter-ID laws have argued that the laws are appropriate because they help combat voter fraud. We have seen sensationalized assertions, including from the President, suggesting that voter fraud is rampant, to the point that elections are being “rigged.” The President has claimed that he won the popular vote for the presidency if you deduct the “millions of people who voted illegally.” The claim is not supported by any verifiable facts. Rather, independent analyses by the non-partisan Brennan Center, leading scholars, and other credible sources have found virtually no confirmed cases of voter fraud in the 2016 election, let alone millions of them. More broadly, every credible study of the issue indicates that voter fraud—and particularly the sort of in-person voter impersonation fraud that photo-ID laws purport to address—is incredibly rare. By one count, between 2000-2014, there were just 31 credible instances of impersonation fraud nationwide out of more than a billion ballots cast. In fact, the President’s claims of massive fraud were contradicted by his own legal team, which argued in response to a recount request filed by Green Party Candidate Jill Stein: “On what basis does Stein seek to disenfranchise Michigan citizens? None really, save for speculation. All available evidence suggests that the 2016 general

election was *not* tainted by fraud or mistake.”

- a. Are you aware of any credible evidence indicating that “millions of people” voted illegally in 2016?
- b. Is it appropriate for the President of the United States to make unsubstantiated, false allegations about the integrity of our electoral system?

EDUCATION

27. Are charter schools fundamentally public schools that must uphold all federal education and civil rights laws as well as state sunshine laws? Please provide a YES/NO response followed by an explanation.

ACCESS TO JUSTICE

28. Do you believe there is a “justice gap” that results in low income Americans having a lack of access to justice?
29. What have you done in your career as a judge and as an attorney to help reduce this “justice gap”?
30. Have you ever represented or litigated a case on behalf of indigent clients? If so, please describe the circumstances of the case and client.
31. Many employers require their workers to give up the right to file lawsuits against their employer in court, as a condition of their getting the job. These kinds of agreements are known as forced arbitration clauses. More than 60 million American workers are bound by these kinds of agreements. Unlike a court proceeding, arbitration is hidden from public scrutiny and usually cannot be reviewed by a court. This means that arbitration keeps the public from learning about employers who violate the law by discriminating against workers, sexually harassing them, or cheating them out of wages. Do you have any concerns that the existence of such arbitration clauses may deny individuals access to the courts to enforce their rights under employment laws?

QUALIFIED IMMUNITY

32. What is the basis for the qualified immunity doctrine? Is it statutorily or constitutionally based?
33. What is the common law basis for the doctrine, if any?
34. Would you agree that it is a judicially created doctrine?
35. Do you have any concerns that the current state of the qualified immunity doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their

peers?

36. Have you reviewed any studies or academic literature on the qualified immunity doctrine to determine whether the doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their peers? If so, please indicate the studies or academic literature and provide a brief description.
37. Do you have any concerns that the qualified immunity doctrine over-insulates state actors from consequences of unconstitutional conduct and therefore incentivizes further unconstitutional conduct? Is that a concern that a Supreme Court justice should take into consideration?
38. According to a law review article by Will Baude, the Supreme Court rules more often for police officers in cases where they assert qualified immunity than for plaintiffs asserting constitutional violations? See Will Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 82-83 (2018). The article states that “nearly all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials.” Baude notes that of the thirty cases applying the standard since it was fully articulated in 1982, only two of them ruled for the plaintiffs. Based on your experience as a judge, what do you believe drives this disparity?
39. Does the Court have a role in addressing issues of police brutality? If so, what is that role?

TEXAS v. JOHNSON

40. At the hearing, you spoke with Senator Cruz about how important our First Amendment is. And you repeatedly lauded Justice Kennedy’s opinion in *Texas v. Johnson*, calling it “one of his greatest opinions.” In *Johnson*, which held Americans have a right to burn the flag under the First Amendment, Kennedy wrote “[i]t is poignant but fundamental that the flag protects those who hold it in contempt.” Do you agree with Justice Kennedy?
41. For a third straight season, NFL players have been demonstrating during the national anthem, kneeling in protest over police brutality and other forms of institutional racism. Do you believe that the First Amendment prevents Congress from passing a law requiring athletes to stand during the national anthem?
42. In 1940, the Supreme Court in *Gobitis* upheld a Pennsylvania law requiring school children to stand and salute the flag at school. Three years later, in *West Virginia v. Barnette*, the Court overruled *Gobitis*—holding that people in the United States have a First Amendment right to refrain from saluting the flag. Justice Jackson wrote: “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

President Trump said about the NFL players' peaceful protest "You have to stand proudly for the national anthem or you shouldn't be playing, you shouldn't be there, maybe you shouldn't be in the country." Do you think it is appropriate for the President to suggest an American citizen should be deported because he or she chose to speak out about racial injustice in our country? Can an American citizen be deported because he or she spoke out about racial injustice?

ENVIRONMENT

43. In 2017, you dissented from the denial of rehearing en banc in *U.S. Telecom Association v. Federal Communications Commission*, a case about the FCC's net neutrality rule. A three-judge panel of your court had upheld the rule. You contended that the panel's decision was wrong, and you unsuccessfully sought to have its ruling reconsidered by the entire D.C. Circuit.
- a. You first argued that the net neutrality rule was a so-called "major rule," and that agencies cannot adopt major rules without clear statutory authorization. What is your understanding of the "major rules" or "major questions" doctrine?
 - b. As a practical matter, the "major questions" doctrine shifts power from administrative agencies to courts. It means that the court does not give the agency any flexibility to construe ambiguous statutes, which can make it impossible for agencies to regulate effectively in an effort to advance statutory goals. Do you acknowledge that the scope—and even the existence of—this doctrine is a matter of controversy among jurists?
 - c. Given your position in *U.S. Telecom*, is it fair to say that you have a more expansive view of the "major questions" doctrine than many of your colleagues? If not, why not? Please provide evidence.
 - d. Since the New Deal, the Supreme Court has given Congress significant leeway to delegate regulatory decisions to expert agencies. Would you agree that your views of the "major questions" doctrine would make it a lot more difficult for agencies to take action and issue regulations?
44. You also asserted in *U.S. Telecom* that net neutrality violates the First Amendment rights of internet service providers by preventing them from exercising editorial control over the content that passes through their networks. Commentators have described your position as one that embraces a very broad and activist conception of corporate speech rights.
- a. Do you believe it is within a judge's role to take an issue like net neutrality out of the political process? Is this not an economic policy matter that is primarily the domain of the political branches, not courts?
 - b. Given that you have already staked out such a clear position on the unconstitutionality of net neutrality, will you commit to recusing yourself from a

case if the Supreme Court were to consider a future First Amendment challenge to net neutrality?

SECOND AMENDMENT

45. In your *Heller II* dissent, you argued that judges must ignore public safety in evaluating gun safety laws under the Second Amendment.
- a. Does your position prioritize the rights of gun owners and gun carriers over the rights of the millions of Americans who live under constant threat of gun violence, including in schools, churches, and in the line of duty?
 - b. Can a judge ever consider the public safety justifications animating a gun safety law when evaluating the law's constitutionality? If so, when?
 - c. Are judges ever permitted to consider the public safety justifications underlying other public safety laws when evaluating their constitutionality? If so, when?

DISSENTS

46. You have the highest dissent rate on your circuit, and one of the highest dissent rates in the federal judiciary. During your tenure on the D.C. Circuit, you have dissented about sixty times. Over the same period, Chief Judge Garland, who is widely regarded as a model of judicial restraint and moderation, has dissented only six times. In other words, your colleagues think you reach the wrong result about ten times as often as Judge Garland. Given that cases and panels on the D.C. Circuit are basically assigned at random, what do you think accounts for this stark disparity?
47. You have dissented, for example, in ten cases involving labor and employment issues. And in all ten of those cases, you would have ruled against workers or labor, splitting with the majority of your colleagues, who ruled the other way. Can you identify *any* instance in which your colleagues ruled against workers or labor and you wrote a dissent concluding that the position taken by workers or labor should prevail?
48. You have dissented in ten cases involving environmental issues, and in all ten of those cases, you would have rejected the position favored by environmental groups, splitting with the majority of your colleagues, who took the pro-environmental position. Can you identify *any* instance in which your colleagues ruled against environmental interests and you wrote a dissent concluding that the environmentalists should prevail?
49. Four more of your dissents involved issues relating to consumer protection. And again, in all four, you chose industry over consumers, splitting from the majority of your colleagues, who would have gone the other way. Can you identify *any* instance in which your colleagues ruled against consumer protection and you wrote a dissent endorsing the pro-consumer, anti-industry view?

50. Ten of your dissents involved criminal law and procedure. And in nine of them, you would have ruled for the government or against the defendant, splitting from the majority of your colleagues, who would have gone the other way. The only exception was a case in which your pro-defendant position also happened to be the pro-gun position. Can you identify *any* other instance where your colleagues ruled for the government or against the defendant and you wrote a dissent concluding the defendant should prevail?

STARE DECISIS

51. When you describe a decision of the Supreme Court as “precedent,” “important precedent,” or “precedent on precedent,” are you making a commitment not to overrule that decision?
52. Justice Thomas testified at his Supreme Court confirmation hearing about the importance of stare decisis, stating, among other things: “There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decisionmaking, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case [incorrect], but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.” Once on the Supreme Court, however, Justice Thomas has repeatedly suggested—in opinions and in public fora—that a constitutional precedent should be overruled when it is wrong, without giving stare decisis any weight. Which of these two competing approaches do you intend to adopt, if you are confirmed to the Supreme Court?

ADMINISTRATIVE AGENCIES

53. The Supreme Court has long held that courts should defer to reasonable agency interpretations of ambiguous statutory provisions. You seem skeptical of that doctrine (the *Chevron* doctrine). For instance, you have said that you prefer not to acknowledge that a statute is ambiguous even when the proper interpretation is a close question. You once suggested that, if you find a statute “60/40 clear,” you regard it as unambiguous. Why not leave those close calls to the expert agencies that have been tasked by Congress with implementing the particular statutes at issue?
54. In a speech last year, you also said that when evaluating an agency rule, a judge should determine what the “best reading” of the underlying statute is—rather than determining whether the statute is ambiguous and deferring to the agency under *Chevron*.
- a. What prevents a judge from imposing his or her own policy preferences in determining the “best reading” of an ambiguous statute?
 - b. Why should the judge’s view of what is “best” be preferable to the view of the agency charged by Congress with implementing the statute?

OTHER

55. In the period since you began your service on the U.S. Court of Appeals for the D.C. Circuit until the present, has any person, organization, corporation, or institution made any gift, loan, promise, or commitment of any kind (financial or otherwise) to you, to your spouse, or to your children in relation to the reduction or elimination of any debt owed by you or by your spouse or your children, including but not limited to credit card debt?

**The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States
Questions for the Record**

Senator Mazie Hirono

1. In response to a question from Senator Feinstein on your position on *Roe v. Wade*, you said *Planned Parenthood v. Casey* is “precedent on precedent,” which in your view “is quite important as you think about stare decisis in this context.” Please explain what you meant by these statements. By the term “precedent on precedent,” did you simply mean that *Casey* discusses “in great detail” when the Supreme Court should and should not overrule its past precedents or did you mean that *Casey* has stronger status as precedent because it reaffirmed *Roe*?
2. When Senator Feinstein asked you whether you believed *Roe v. Wade* was correctly decided, you refused to answer, saying that you “studied very carefully what nominees have done in the past, what I’ve referred to as nominee precedent, and Justice Ginsburg” and that “I need to follow that nominee precedent here.”
 - a. At Justice Ginsburg’s nomination hearing, she said, “It is essential to woman’s equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.” Based on your own standard for “nominee precedent,” her statement falls within the scope of what you can discuss as a nominee. Do you agree with her statement? Yes or no.
 - b. During Chief Justice Roberts’ confirmation hearing, he agreed with the statement in *Casey v. Planned Parenthood* that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” Based on your own standard for “nominee precedent,” his statement falls within the scope of what you can discuss as a nominee. Do you agree with his statement? Yes or no.
3. At your hearing, Senator Feinstein asked you if you agreed with Justice O’Connor, that a woman’s right to control her reproductive life impacts her ability to, “participate equally in the economic and social life of the nation.” You did not answer her. This question does not require you to prejudge any case that could come before the court. It asks only whether you agree about a particular impact of a woman’s right to decide whether and when to have children. Please answer the question.
4. At the hearing, Senator Blumenthal asked you whether you agreed with the President’s statements attacking the Judiciary, including that Justice Ginsburg’s “mind is shot.” When you refused to answer and stated that you decide cases and controversies as a judge, I asked you whether “disagreeing with the President [was] a concern to you when it’s not a case in front of you.” Such a question goes to your ability to be an independent and unbiased Justice. You refused to answer, claiming that you were “[f]ollowing the lead of the judicial canons.” Please explain which specific judicial canon prohibits you from answering that question. How is your refusal to answer my question consistent with your duty to provide

information to the Senate to enable Senators to fulfill their constitutional advice and consent responsibilities?

5. Senator Harris asked you at the hearing whether you believed “there was blame on both sides,” as the President had claimed, regarding an incident in Charlottesville where a rally by white supremacists left a young woman dead. You refused to answer, citing the “principle of the independence of the judiciary.” Please explain how the “principle of the independence of the judiciary” applies in a Senate confirmation hearing for a Supreme Court Justice and how it constrains you from answering this question. Is it your view that statements equating the actions of white supremacists with those protesting against them are simply, as you describe it, a “political controversy,” between Republicans and Democrats?
6. At the hearing, you repeatedly refused to answer hypothetical questions about potential cases, citing to your position “as a sitting judge and as a nominee to the Supreme Court.” However, since becoming a judge in 2006, you have regularly volunteered strongly-worded opinions on a variety of topics, including gun control, campaign finance, abortion rights, and oversight of the Executive Branch. You have even gone as far as to forecast which of Justice Scalia’s dissents will become law. Please explain how your refusal to answer questions during the confirmation hearing is consistent with your actions and public speaking appearances while you have been a judge.
7. When Senator Leahy asked you whether you believe the President has the power to pardon himself if he becomes the subject of a criminal investigation, you refused to answer and stated that the “question of self-pardons is something I have never analyzed. It’s a question that I have not written about.” In your past writings and speeches, however, you have repeatedly adhered to a very expansive view of Presidential power. In 1999, you called the President, rather than the Attorney General, “the chief law enforcement officer.” In 2013, you wrote that the Constitution gives the President “an extraordinary and unfettered power to pardon,” and further describe his pardon power as “absolute, unfettered, unchecked.” In 2016, you referred to the President’s “raw constitutional power to pardon.”

Please explain how these writings and statements are consistent with what you stated at the hearing. Why isn’t the logical conclusion of these writings and statements that you would consider the scope of the pardon power to include the authority of the President to pardon himself?

8. Why did you treat the case of *Garza v. Hargan* as a “parental consent” case if the young woman in the case had already received a judicial bypass? At your hearing you relied on the fact that the woman was a minor, but that was irrelevant once she received the bypass. The validity of the Texas bypass procedure was not at issue in the case, and so any precedent on such cases was not applicable.
9. At your hearing Senator Hatch asked you how often you spoke on the phone to Judge Kozinski and how often you saw him in person. You only responded that you did not speak to him or see him often. Can you please be specific?

- a. About how many times each year, on average, do you think you saw Judge Kozinski in the years between the end of your clerkship and the public revelations of his misconduct? Please include any annual reunions, conferences, or other meetings, as well as any one-on-one meetings.
 - b. About how many times each year, on average, do you think you spoke to Judge Kozinski in that same period? Please include any conversations about Justice Kennedy clerks or collaborating on books or articles, as well as conversations of a more personal nature.
 - c. Did you and Judge Kozinski email one another during that period of time? How frequently?
 - d. Did you and Judge Kozinski ever text one another? If so, how frequently?
10. Judge Kozinski was quoted as saying he was heartened by having heard from some former clerks after his misconduct was revealed in public. Were you among them? Did you contact him after the revelations were made public? When was the last time you were in contact with him?
 11. You told me at your hearing that you did not remember having received emails from Judge Kozinski sent to the so-called "gag list." Could you look at your email accounts and refresh your memory and tell me whether you in fact received any of those emails containing obscenity and obscene jokes?
 12. At the hearing, I asked you to clarify your misstatement of the holding in *Rice v. Cayetano*. In your response to Senator Tillis, you stated that in *Rice*, the Supreme Court held that the voting structure for the Office of Hawaiian Affairs "was a straightforward violation of the 14th and 15th amendments of the U.S. Constitution." When I asked you where in the *Rice* decision does the Court rely on the 14th Amendment to justify its holding, you avoided answering my question and vaguely responded that "the 14th and 15th Amendments, I think, both prohibit restrictions on voting on the basis of race." Did you incorrectly inform Senator Tillis that the Supreme Court found a violation of the 14th Amendment in *Rice*?
 13. During the hearing, I asked you about an email you wrote in 2002 during your time as an associate White House counsel opining on the constitutionality of programs benefitting Native Hawaiians. As you know, the Senate Judiciary Committee did not receive any documents from the National Archives before the hearing. All of the White House documents we received were filtered and selectively produced by a Republican lawyer, William A. Burck. Moreover, we were denied access to all of the documents of your record during your tenure as Staff Secretary in the White House during the George W. Bush administration.

Given that we have been blocked from accessing more than 90 percent of your White House record, please confirm whether there are any documents that pertain to *Rice v. Cayetano* or Native Hawaiians in the withheld portion of your record as an associate White

House counsel and Staff Secretary. Please also identify any and all such documents that you are aware of.

14. In *Garza v. Hargan*, before the case was decided by the full D.C. Circuit, you authored a panel opinion that would have delayed an immigrant teenager's access to an abortion that was in full compliance with Texas law. When the full court reversed your order, you dissented and wrote that allowing this young woman to exercise her right to choose created "a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand." *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). Based on your statements in *Garza*, particularly the politicized language that you use, and the statements you have made in speeches, why should this be viewed as anything other than a signal that you are willing to overturn *Roe v. Wade*?
15. At your hearing you told Senator Blumenthal that one reason you were put on the November, 2017 version of Donald Trump's list of pre-approved Supreme Court nominees and not the May, 2016 list was because, "Mr. McGahn was White House counsel and the president had taken office," implying that Mr. McGahn had only just had the opportunity to put you on the list. But Mr. McGahn is reported to have been involved in the Trump campaign by May, 2016, so his ability to put someone on the list was nothing new in November, 2017. Could it be that you were placed on this list after you demonstrated your commitment to restricting or eliminating a woman's reproductive rights in your *Garza v. Hargan* decision and your subsequent dissent in that case?
16. At the hearing, you referred to contraceptives as "abortion-inducing drugs," in your discussion with Senator Cruz about your *Priests for Life* dissent. Specifically, you stated that the plaintiffs "said filling out the form would make them complicit in the provision of the abortion-inducing drugs" (emphasis added).
 - a. During the hearing you reiterated that you believe words matter. Regardless of whether the term "abortion-inducing drugs" was used by a party, do you believe that birth control or contraceptives are "abortion-inducing drugs"?
 - b. If you don't believe that birth control or contraceptives are "abortion-inducing drugs," do you believe that your dissent is, in your words, "based on a mistake in premise or a mistake in factual premises" that could justify reconsideration of your opinion?
17. In response to Senator Cruz, you explained that you thought your decision in *Priests for Life* was "an opportunity" to find a "win-win" situation. Do you believe your dissent in that case was a "win-win" situation? Yes or No. If yes, please explain what about your dissent specifically was a "win-win" situation, when your argument would have left female workers without coverage for contraceptives. What information did you have about the practicality of the alternative form you discussed?
18. You agreed with Senator Cruz that in *Priests for Life*, "you sided with" the "little guy"—which you viewed as the employer objecting to having to provide contraceptive coverage to its female workers—"against the almost all-powerful federal government." You then

added, “I think a lot of the religious freedom cases the Supreme Court has had that has been the case.”

- a. In your view, where the “little guy” is the employer, who represents the female workers who are being denied access to the contraceptive coverage that is granted to them under the Affordable Care Act?
- b. Please identify the “little guy” in these recent “religious freedom cases” in the Supreme Court: *Burwell v. Hobby Lobby Stores* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

19. At the hearing, you informed Senator Sasse that “dissents often speak to the next generation.” What messages did you intend to pass on to the next generation in your dissents in the following cases: *Garza v. Hargan*; *Priests for Life v. U.S. Department of Health & Human Services*; and *Agri Processor v. National Labor Relations Board*?
20. At the hearing, I asked you about the reversal of well-established precedent in *Janus* based in part on the “notice” of “misgivings” about that precedent that Justice Alito had provided in a few prior decisions over a six-year period. You simply recited what you called “established” factors that the Court considers in reconsidering its precedent: “whether the prior decision was grievously wrong, whether it is deeply inconsistent with subsequent precedent that’s developed around it, the real-world consequences, the workability of the decision as well as reliance in.”

You did not address whether you believe it is appropriate for a Justice to negate the reliance factor by expressing “misgivings” about a well-established precedent a few times over a few years. By contrast, you told Senator Sasse that “[p]recedent is important for stability and predictability” and that it is important that “the rules are set ahead of time” so that “you’re not making up the rules as you go along in the heat of the moment, which will seem unfair, which will seem like you’re a partisan.” Do you agree that *Janus* changed the rules for how to analyze precedent, particularly the reliance factor? Yes or no. Please explain

21. At the hearing, you referred to *Humphrey’s Executor* as “entrenched” precedent.
 - a. What did you mean by “entrenched” precedent?
 - b. Do you believe that entrenched precedent cannot or should not be overturned?
 - c. Since you shared that you believe *Humphrey’s Executor* is entrenched precedent, do you believe *Roe v. Wade* is entrenched precedent?
22. At your hearing you told Senator Cornyn that, “*Plessy* was wrong the day it was decided.” What other cases do you believe were wrongly decided? If you refuse to answer this question, please explain why you could say that to Senator Cornyn, but you won’t answer my question.

23. At the hearing, you repeatedly refused to answer questions about hypothetical situations, particularly from Democratic Senators, but you did not hesitate to answer questions about hypothetical situations from Republican Senators. You refused, for example, to answer Senator Leahy's question about whether you believe the President can pardon someone in exchange for a promise from that person to not testify against the President, claiming you could not answer a hypothetical question because there was no record, briefs, or arguments from the parties. By contrast, when Senator Sasse asked you "a hypothetical" about whether you believe the President is immune from civil or criminal liability for killing someone while driving drunk, you did not hesitate to respond, "no" and then provide your explanation. You also answered Senator Lee's question about a hypothetical situation involving the nondelegation doctrine. Please explain your basis for differing responses to questions involving hypothetical scenarios.
24. When Senator Klobuchar asked you whether you believe there's evidence of voter fraud, you did not answer her question. She cited to studies reported by the Brennan Center and the Washington Post and informed you that those studies found no evidence of widespread voter fraud. The Washington Post article by Professor Justin Levitt reported finding only 31 credible allegations of voter fraud from 2000 through 2014 out of more than 1 billion ballots were cast. The Brennan Center reported that "fraud by voters at the polls is vanishingly rare." You also stated that you have looked at Professor Hasen's election law blog, but you did not provide an answer, claiming that you wanted to "see a record" with respect to a particular case.
 - a. Please answer the question about voter fraud generally instead of in the context of a potential future case. Do you agree with the findings of the Brennan Center and the Washington Post article referenced by Senator Klobuchar?
 - b. Are you aware of any credible reports of voter fraud significant enough to affect any election?
 - c. Do you believe the President's claim that "millions and millions of people" voted fraudulently in the 2016 presidential election? If yes, what is the basis for that belief?
25. In reply to Senator Feinstein's question about your dissent in *SeaWorld of Florida v. Perez*, you said you were following "precedent of the Labor Department." You also stated that you decided that the Department of Labor could not regulate the workplace safety of SeaWorld because the Department would not regulate "the intrinsic qualities of a sports or entertainment show."
 - a. What did you mean by "precedent of the Labor Department"?
 - b. Do you always follow "precedent" of federal agencies?
 - c. Please explain how the workplace safety measures you argued against in *SeaWorld* are "intrinsic" to the killer whale shows at *SeaWorld* when SeaWorld self-imposed similar safety measures for its shows with the killer whale who had killed the trainer.

26. At the hearing, Senator Feinstein asked you how you would feel about a President who said he could authorize worse than waterboarding. You responded, "Senator, I'm not going to comment on and I don't think I can, sitting here."
 - a. On what basis did you refuse to answer this question?
 - b. Do you believe the current President may actually authorize torture worse than waterboarding such that the issue may come before the Supreme Court?
 - c. Do you believe a President can authorize waterboarding or torture worse than waterboarding?
27. During the hearing, Senator Sasse asked you if a sitting President is immune from criminal prosecution. You responded by saying a President would not be immune, but that it is "just [a] timing question." In essence, you said that you believe a criminal indictment may have to wait until after the President has left, or been removed, from office. However, our judicial system is filled with statutes of limitations that set a time limit on long after a crime is committed charges must be brought. How do you reconcile your belief that a prosecution against a sitting President may have to wait until after she or he leaves office with these various statute of limitations provisions? In your view, when should the investigation of the criminal conduct take place to avoid stale, lost, or destroyed evidence?
28. During Justice Gorsuch's confirmation hearing, he labeled some of President Trump's attacks on the judiciary "demoralizing" and "disheartening." During Chief Justice Roberts' confirmation hearing, he said that personal attacks on judges are "not appropriate" and "beyond the pale." Senator Blumenthal asked whether you agreed with then-Judge Gorsuch's sentiments, and you did not answer, claiming, "I'm not sure the circumstances." Regardless of the circumstances, do you believe the President's attacks on the judiciary "demoralizing" and "disheartening"? Do you agree with Chief Justice Roberts' comments? If you do, how do you reconcile those statements with your praise of President Trump's "appreciation for the vital role of the American judiciary"?
29. After you were nominated and before the hearing, did you see or discuss any documents that were provided to the Senate Judiciary Committee by Bill Burck? Which documents did you see or discuss? Were any of these documents designated "Committee Confidential" in the version that you reviewed?
30. Senator Leahy asked you about information provided to you by Manny Miranda, who had "regularly hacked into the private computer files of six Democratic Senators" and stolen material from the Democratic Senators. The stolen information he sent you included "highly specific information regarding what [Senator Leahy] or other Democratic senators were planning in the future to ask certain judicial nominees" and information marked "confidential." You claimed that you "[n]ever knew or suspected" because the type of information Manny Miranda provided was "very common." In your preparation for the hearing, did anyone provide you with any information about what the Democratic Senators or staff intended to do similar to the type and format of information that former Republican Senate Judiciary Committee staffer Manny Miranda provided to you when you were working on judicial nominations in the White House?

31. In multiple speeches to law students, including at Federalist Society events, you repeatedly urged students to highly value loyalty. You noted: “[w]ho you work for and who works for you can make or break you. Whenever you are thinking about taking a job or hiring someone, you need to think about whether you want to be associated with that person for years to come, like forever.” You also instructed: “[b]e loyal. Never trash your boss.” You shared your view that “loyalty is a key to advancement in this profession.” President Trump also highly values loyalty. Before he fired FBI Director Comey, the President told him, “I need loyalty, I expect loyalty.”
- a. Has the President ever asked you for your loyalty or suggested or implied that you might owe him anything for nominating you to the Supreme Court?
 - b. Have you discussed your views on presidential pardon power, presidential immunity, or other forms of Executive power with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?
32. The Foreign Emoluments Clause broadly prohibits federal office holders from accepting emoluments from foreign governments unless Congress has consented. It reads as follows:
- No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.
- a. What is an “emolument?”
 - b. Does faithful adherence to the textualist, originalist judicial philosophies you espouse require you to interpret the clause consistent with founding-era dictionaries, which generally defined the term broadly to include any “profit” or “advantage?”
 - c. Do you believe that the President qualifies as a “Person holding any Office of Profit or Trust” within the meaning of the Foreign Emoluments Clause?
 - d. Do you believe that, as a general matter, is the Foreign Emoluments Clause judicially enforceable? In other words, if an individual or organization can satisfy the constitutional and jurisprudential standing requirements, is it within the power of the courts to consider such an individual’s or organization’s claims that they have been injured by an officeholder’s violation of the Emoluments Clause?
 - e. If one of the cases alleging President Trump has violated the Emoluments Clause were to reach the Supreme Court, do you believe you could impartially hear that case even though it would involve the man who nominated you to the Supreme Court?
 - f. How would you decide whether your recusal from such a case would be appropriate, and what factors would you consider?
33. You wrote in 2009 in a Minnesota Law Review article that “the political ideology and policy views of judicial nominees are clearly unrelated to their fitness as judges, and those matters therefore appear to lie outside the Senate’s legitimate range of inquiry.”

- a. Do you still believe there are some questions that are legitimate for Senators to ask and others that are not?
 - b. What is the constitutional basis for your assertion that there is a range of legitimate inquiry for a Senator in evaluating a judicial nomination?
34. The National Rifle Association (NRA) has made their support of your nomination clear. Their commercials highlight that there are currently four Justices who favor gun control and four Justices who oppose gun control. They then explain, “President Trump chose Brett Kavanaugh to break the tie.” Are you aware of anyone in the White House or the Department of Justice who have spoken to the NRA regarding your nomination?
 35. In *Heller v. District of Columbia*, you argued that gun laws must have a long history in order to be constitutional under the Second Amendment. Under your view, you would have struck down Washington, DC’s assault weapons ban and gun registration requirement even though—as the majority noted—“[t]he District has banned all semi-automatic firearms shooting more than twelve shots without reloading and has required basic registration since 1932.” In your view, how old must a gun law be to be constitutional under the Second Amendment?
 36. You wrote in *Heller v. District of Columbia* that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles.” In recent years, countless mass shootings have been perpetrated with semi-automatic rifles—not handguns. Moreover, military-style semi-automatic rifles (such as the AR-15) are far more lethal than handguns because they fire bullets at greater velocity. In view of this evidence, do you stand by your statement that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles?”
 37. Your track record shows that your instinct is to defer to the Executive Branch any time it claims it is motivated by national security concerns, regardless of that claim’s merits. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), for example, your dissent argued that all agency actions related to security clearances should be immune from judicial review—even claims presenting evidence of clear racial bias. This sort of blind deference calls to mind the Court’s shameful decisions in *Korematsu v. United States*, 323 U.S. 214 (1944), and, more recently, in *Trump v. Hawaii*, 138 S.Ct. 2392 (2018).
 - a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are those categories?
 - b. Is there a national security exception to the Bill of Rights?
 - c. Under what circumstances should a court look behind the President’s stated justifications?
 - d. In your view, how do courts ultimately determine whether a case involves an issue of national security? If courts are to show blind deference to the Executive Branch’s assertion that national security is at stake, how are we to avoid a second *Korematsu*?
 38. In a speech to the American Enterprise Institute (AEI) in 2017, in tribute to the late Chief Justice William H. Rehnquist, you said:

He advocated for other remedies for police mistakes or misconduct, but he believed that freeing obviously guilty violent criminals was not a proper remedy and, in any event, was surely not a remedy required by the Constitution. Rehnquist of course did not succeed in calling for the overruling of the exclusionary rule, and not many people today call for doing so, given its firmly entrenched position in American law.

Is it your view that Chief Justice Rehnquist should have “succeed[ed]” in overruling the exclusionary rule? In other words, would you like to see the exclusionary rule overturned?

39. In your 2017 AEI speech, you also said of late Chief Justice William H. Rehnquist:

It is fair to say that Justice Rehnquist was not successful in convincing a majority of justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of stare decisis. But he was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.

Which free-wheeling judicially-created unenumerated rights were you referring to? Please be specific in identifying the unenumerated rights.

40. President Trump has weighed in on a woman’s right to choose, and has even promised to appoint “pro-life” Justices to the Supreme Court who will overturn *Roe v. Wade*. During one of the presidential debates, then-candidate Trump said that once he put “two or maybe three” Justices on the Supreme Court, *Roe* would be overturned “automatically.”
- a. Have you promised or suggested to President Trump or any other individual in or associated with his administration that, given the opportunity, you would vote to overturn or undermine *Roe v. Wade* and its progeny?
 - b. Have you discussed your views on abortion, *Roe v. Wade*, the Affordable Care Act, health care, or religious freedom with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?
41. Throughout this hearing, you have repeatedly praised the judicial philosophy of textualism. During Senator Lee’s questioning, you said that “[j]udging is paying attention to the text.” The text of Article II, Section 3 of the Constitution unequivocally states that the President “shall take Care that the Laws be faithfully executed.”

Despite the apparent clear meaning of this words, you have said that “the President may decline to follow the law unless and until a final Court order dictates otherwise.” *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013). You also went out of your way in a dissent to say that, “[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional,

even if a court has held or would hold the statute constitutional.” *Seven Sky v. Holder*, 661 F.3d 1, 50 fn.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

- a. How do you reconcile your position as stated in *Seven Sky* and *In re Aiken County* with the “take care” clause of the Constitution?
 - b. Which text in the Constitution supports your view that the President can decide for himself that a statute is unconstitutional, and can choose not to enforce a law passed by Congress and deemed constitutional by a court?
42. If you are confirmed to the Supreme Court, your views on the Constitution’s “take care” clause may take concrete form in the context of the Affordable Care Act (ACA). Despite providing access to health care of millions of previously uninsured Americans, the ACA has been under assault from the right from the day of its passage. Despite the various attacks, the Supreme Court has upheld the law as constitutional and the ACA has endured. However, President Trump has made no secret of his desire to dismantle the ACA. Under your view of the “take care” clause articulated in *Seven Sky* and *In re Aiken*, can the President ignore his constitutional duty to “take Care that the Laws be faithfully executed” and unilaterally repeal the ACA by choosing not to enforce that law or actively undermine the implementation of the ACA?
43. During an AEI speech, you spoke about the view of the Constitution as a living document, and contrasted it to your own textualism. You said:

In the views of some, the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times. For those of us who believe that the judges are confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we too believe in a Constitution that lives and endures and in statutes that live and endure. But we believe that changes to the Constitution and laws are to be made by the people through the amendment process and, where appropriate, through the legislative process – not by the courts snatching the constitutional or legislative authority for themselves.

- a. If, as you say, you are committed to interpreting the Constitution as it was understood at the time it was written, please explain how you justify deeming segregation and sexual discrimination unconstitutional?
- b. Under your view, how are the bundle of due process rights—the right to marry who you want, the right to love who you want, the right to use contraception in and out of marriage, the right for women to control their own bodies—guaranteed?
- c. How would your views on original intent inform your thinking on a case that involved a direct conflict between precedent and original meaning? For example, suppose *Katz v. United States*, 389 U.S. 347 (1967), came before you today, and suppose the government argued that the Fourth Amendment’s prohibition against warrantless searches and seizures cannot apply to telephone calls, because the Framers of the Fourth

Amendment clearly did not understand a “search” to include wiretapping. How would you approach such a case?

- d. Under your view of originalism, how would you think through a case involving an indictment of a sitting president? Assuming there is no controlling precedent, what sorts of arguments and considerations would you take most seriously?
44. You have been nominated for Justice Kennedy’s seat on the Supreme Court. In *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), Justice Kennedy wrote:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

- a. Do you agree with Justice Kennedy that the Fourteenth Amendment provides a path to protect liberty as a society evolves?
- b. Do you believe that the Fourteenth Amendment protects individual rights regardless of a person’s sexual orientation?
45. A number of cases on reproductive rights coming up through the courts involve narrowing the protections afforded by *Roe* and *Casey*. One is pending now in Hawaii federal district court. In a case called *Chelius v. Azar*, the ACLU of Hawaii is challenging unnecessarily restrictive laws about how and when women can be treated with medical abortion pills. How would you analyze a case where a new burden on the right to choose is being challenged?
46. In a 2016 speech at Catholic University titled “The Judge as Umpire: Ten Principles,” you acknowledged that constitutional adjudication is not always a mechanical process, but often entails an exercise of judicial discretion. After going through your ten principles, you said:

Having said all that, there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision.

- a. What interpretative and decisional tools do you believe should guide this exercise of discretion?
- b. Should a Justice bring his or her own values to bear?
- c. Do the values of the President who nominated Justice carry special weight? If not, whose values count?
- d. What should a Justice do when the values at issue are in tension with each other (*e.g.*, women’s reproductive rights and the right of autonomy versus religious liberty)?

47. At the hearing, I asked you about Chief Justice Roberts' statement in *Trump v. Hawaii* that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" You answered that Chief Justice Roberts was recognizing that *Korematsu* "was no longer good law." In your 1999 amicus brief in *Rice v. Cayetano*, however, you cited *Hirabayashi v. United States*, 320 U.S. 81 (1943), to support your argument. *Hirabayashi*, which was decided the year before *Korematsu*, held that curfews imposed on Japanese Americans during World War II were constitutional. Why did you cite *Hirabayashi* when there are many other Supreme Court cases that state the principle for which you cited *Hirabayashi*? In fact, you included citations to those cases in your amicus brief, which made your citation to *Hirabayashi* repetitive.
48. Two professors, Elliott Ash and Daniel L. Chen, performed an empirical study of all your judicial opinions since 2006. They found the following:
- Compared to other Supreme Court Justices when they were circuit court judges, you rank in the top 1st percentile of partisan dissents (defined by dissents in which the other judges on the panel are appointed by the opposing party).
 - You dissented along partisan divisions at twice the rate of your colleagues.
 - You rank in the top 1st percentile of total number of dissents authored during election season.
 - Specifically, you dissented fifteen percent of the time before presidential elections, whereas other judges in your circuit dissented three percent of the time before presidential elections.
 - You were "extremely polarizing" in how you voted in cases and the language you used in your opinions was more partisan than your colleagues.
 - You justified your decisions with conservative doctrines "far more frequently" than your colleagues.
 - The authors of the study conclude that you are "radically conservative" compared to other federal circuit judges and that you are "highly divisive in [your] decisions and rhetoric."
- a. How do you explain these findings in this data-driven study?
- b. Do you think these findings help to explain why you were nominated for this position by Donald Trump?
49. In 2012, you approved South Carolina's voter ID law under the Voting Rights Act's preclearance regime that required South Carolina to get approval before changing its voting laws. South Carolina initially enacted a restrictive voter ID law that would disproportionately impact African-American voters. But during the preclearance process, South Carolina agreed to implement it in a way that would reduce its negative impact on African-American voters. In a concurring opinion, your colleague Judge Bates observed, "one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here." He explained that "[w]ithout the review process under the Voting Rights Act, South Carolina's voter photo ID law certainly would have been more restrictive."

- a. You were the only judge of the three-judge panel that did not join Judge Bates' concurrence. Why did you decline to affirm the vital role Section 5 of the Voting Rights Act plays in protecting minorities from being disenfranchised?
 - b. Did you disagree with Judge Bates' opinion?
50. Over the objection of all of its Democratic Members, the Senate Judiciary Committee requested only a limited subset of records from your time working in the White House and specifically excluded records during your time serving as Staff Secretary of the White House during the George W. Bush administration. Yet, you said in a speech:

When people ask me which of my prior experiences has been most useful to me as a judge, I...do not hesitate to say that my five and a half years in the White House – and especially my three years as Staff Secretary for President Bush – were the most interesting and in many ways among the most instructive.”

- a. Why was your work as Staff Secretary most useful and most instructive to you as a judge?
 - b. Regardless of what role you had in the document request, in your opinion, should documents from your time as Staff Secretary be released so that the Senate and the public can see your full record?
 - c. At the hearing you stated that you studied the nominations of recent Supreme Court nominees. In addition, you have extensive experience working on judicial nominations. Are you aware of any confirmation process for any of the Justices currently on the Supreme Court where the Ranking Member of the minority party has been denied access to documents that she or he believed were critical to review to determine the fitness of the nominee to be a Supreme Court Justice?
51. In the same speech as above, you said, “As Staff Secretary...I saw and participated in the process of putting legislation together, whether it was terrorism insurance or Medicare prescription drug coverage or attempts at immigration reform.” The American people care about your views on Medicare, terrorism, and immigration reform. As a self-described “independent” and “pro-law” judge, you likely want your nomination process to be transparent and fair. What issues did you work on substantively while you were Staff Secretary? Please be as detailed as possible.
52. When President Obama nominated your colleague, Merrick Garland, to the Supreme Court, Majority Leader McConnell summarily blocked Judge Garland's nomination. Mr. McConnell left the Supreme Court seat vacant for more than a year, saying, “[t]he American people should have a voice in the selection of their next Supreme Court Justice.” Do you think a confirmation process that allows a Supreme Court nominee to be summarily blocked is working as it should? Do you think this is a fair process?
53. In May 2002, you quoted President Bush, saying “[e]very judicial nominee deserves a prompt hearing and a fair vote, no matter who lives in the White House and no matter which party controls the Senate.” In fact, you went further to say, “there is simply no

justification, in our view [for] circuit court nominees to wait a year for a hearing.” Based on these statements, do you believe Senate Republicans were wrong to deny Merrick Garland a hearing for nearly a year? Does your view of what is a “prompt hearing and a fair vote” change depending on which party controls the Senate?

54. In *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 5 (2016), you wrote that the Consumer Financial Protection Bureau (CFPB) is a “threat to individual liberty.” Your opinion focused primarily on the costs of compliance to a company accused of illegal behavior, but CFPB has returned nearly \$12 billion to 29 million people who were cheated out of their hard-earned money by companies that broke the law. On issues ranging from clean air and water to occupational health and safety to consumer protection, you have opposed Congress’ grants of authority to executive agencies to create safeguards based on their expert analysis of risks and potential solutions. In short, your writings on liberty and freedom seem to translate to rulings for the liberty of polluters and freedom from regulation. Is your conception of individual liberty expansive enough to also account for ordinary Americans’ expectations that they will be free to earn a living or enjoy clean air and water because our laws are being enforced?
55. In *Chevron v. Natural Resources Defense Council*, the Supreme Court wrote that “federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do.” The Court laid out the doctrine of “*Chevron* deference,” holding that, when an agency’s organic statute is silent or ambiguous with respect to a specific issue, a reviewing court should consider only whether the agency’s answer is based on a permissible construction of that statute. However, you have written that *Chevron* deference is “an atextual invention by the courts” that is “nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.” In your opinion, courts should “simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes.” Brett Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev 1907, 1910-1912 (2017).
- Your opposition to *Chevron* deference appears to reflect a more general hostility to agency regulations, particularly when those regulations are often critical to protecting workers, consumers, and the environment, for example.
- a. Why do you believe a reviewing court should substitute its own judgment for that of Congress, or of the experts and scientists at the EPA, or of the Nuclear Regulatory Commission, or of the National Highway Transportation and Safety Authority, or of the Federal Communications Commission, or for any of the independent agencies that Congress has created?
- b. How does your theory of allowing courts to “determine the best reading” of a law avoid inconsistent interpretations that are based solely on the subjective views of judges on a particular case?
56. You have acknowledged the serious problem posed by climate change, saying “the task of dealing with global warming is urgent and important at the national and international

level.” Do you agree, as a general principle, that someone who is injured or imminently will be injured by climate change has standing to challenge government regulations relating to climate change? Please provide one or more concrete examples of “injury-in-fact” resulting from climate change that would establish standing.

57. Forced arbitration clauses are ubiquitous in modern agreements, including credit card contracts, cell phone contracts, online click-through “agreements,” employee handbooks, and nursing home admissions forms to name a few. These clauses restrict Americans’ access to justice by stripping them of their constitutional right to go to court. The Federal Arbitration Act (“FAA”), as originally drafted and passed by Congress in 1925, was intended to apply—and for nearly 60 years had been presumed to apply—only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Congress did not intend to force individual American consumers, employees, and patients into secret, private arbitration as a means of depriving them of their constitutional right to trial by jury. Despite the original intent of the FAA, the Supreme Court in recent years has reinterpreted the FAA more broadly, leading more and more individuals to be shut out of courts and forced into arbitration. Given the Act’s history and the fact that these clauses now apply to every aspect of American life, are there any limits to when individual consumers, nursing home residents, and workers should be subject to forced arbitration? What are those limits?
58. You served as Co-Chair of the Federalist Society’s School Choice Subcommittee, Religious Liberties Practice Group from 1999 to 2001. Please describe your involvement in that subcommittee’s conferences, symposia, publications, speaking engagements, litigation and the like during that time.

Senate Judiciary Committee

“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States”

Questions for the Record

September 10, 2018

Senator Amy Klobuchar

Independent Judiciary

You referred to our independent judiciary as “the crown jewel of our constitutional republic.”

- What three opinions would you name that best demonstrate your independence as a judge?

Precedent

During your testimony, you referenced “precedent,” “precedent on precedent,” “entrenched precedent,” and cases like *Brown v. Board of Education*, which you acknowledged as “settled law.”

- What Supreme Court precedents from the last three decades – if any – would you consider to be settled law?

Executive Power

I asked you about the view that you expressed in *Seven-Sky v. Holder* that the President can decline to enforce a law regulating private individuals, even if a court has found it to be constitutional.

- Can the President ever decline to enforce a law – even if a court has found it to be constitutional – outside of the context of prosecutorial discretion?
- Article II, Section 3 of the Constitution, says that the President “shall take care that the laws be faithfully executed.” If a President does not faithfully execute a law – outside of the context of prosecutorial discretion – can a person seek to enforce that provision of the Constitution in court?

Constitutional Avoidance

Justice Brandeis said in his 1936 opinion in *Ashwander v. Tennessee Valley Authority*: “The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”

- You have said that the Court should “consider jettisoning” the canon of constitutional avoidance. Have you consistently used the canon of constitutional avoidance as a judge on the D.C. Circuit, and would you describe yourself as a jurist who decides cases on the narrowest possible grounds?

Administrative Law

We also discussed your views on executive agencies, including your writings on the deference that should be given to agency interpretations of statutes and your record on overruling agency actions. Although you responded that you have also upheld agency actions in administrative law cases, you have ruled against agencies in an overwhelming majority of cases involving areas such as environmental law.

- Do you believe your record suggests that you are skeptical of agency actions to implement health and safety protections, and if not, why not?

In the hearing, you replied to Senator Lee that the non-delegation doctrine holds that “at some point, Congress can go too far in how much power it delegates to an executive or independent agency.” But the Court has not applied this doctrine since 1935.

- Do you believe that the non-delegation doctrine is still good law?

Campaign Finance

In a March 2002 email from your previous work in the White House that was provided to the Committee, you discussed your views on campaign finance laws.

- Is it still your view that limits on contributions to candidates have “some constitutional problems”?

Antitrust

During the hearing, you said that you “don’t get to pick and choose” which Supreme Court precedents to follow. But your dissent in the 2008 *Whole Foods* case cited none of the relevant Supreme Court precedent and only cited three federal cases, discussing just one at significant length. In contrast, the majority applied the Supreme Court’s decisions in *Brown Shoe*, *Philadelphia National Bank*, and other relevant binding precedent in reaching their conclusions.

- Why did you choose not to apply these Supreme Court precedents in your dissent?
- How was your decision not to apply *Brown Shoe* and *Philadelphia National Bank* in the *Whole Foods* case consistent with your claim that you follow all Supreme Court precedent?

During the hearing, you said that in the 1970s, the Supreme Court “moved away from the analysis” in *Brown Shoe* and *Philadelphia National Bank*.

- Does that mean that you do not consider these cases binding Supreme Court precedent?
- *Brown Shoe* and *Philadelphia National Bank* have been consistently cited and applied by the courts since the late 1970s, and they remain important legal tools for enforcers challenging anticompetitive mergers to this day. Are other circuits and federal judges mistaken in continuing to apply these precedents?

Affirmative Action

I asked you about an email in which you said you thought that a federal program to encourage the participation of minority- and women-owned businesses in transportation contracting was unconstitutional. You responded that your arguments were rooted in the precedent established by *Crosen v. City of Richmond*. In *Crosen*, the Court held that the government could not institute “rigid” racial quotas in the awarding of contracts without “direct evidence of race discrimination.” However, the program that was discussed in your email did not involve quotas.

- Is it your view that *Crosen* should be extended to prohibit any preferences in federal contracting for minority-owned businesses?
- Do you think that using race as a factor in federal contracting is consistent with the Fourteenth Amendment?

Senate Judiciary Committee
 “The Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the
 United States”
 Follow- Up Questions for the Record
 September 13, 2018
 Senator Amy Klobuchar

Precedent

In my initial written questions, I noted that you referenced “precedent,” “precedent on precedent,” “entrenched precedent,” and cases like *Brown v. Board of Education*—which you acknowledged to be “settled law”—during your testimony last week. I also asked you for certain examples of Supreme Court precedents from the last few decades that you would consider to be settled law, although you declined to answer that question.

- *Brown* was decided in 1954. Will you state explicitly that *Brown* is settled law?
- Would you consider any Supreme Court decisions decided since 1954 to be settled law? If so, which ones? If not, why not?

I also asked you whether *Humphrey’s Executor* – which was decided more than 80 years ago – was correctly decided. You responded that it was a precedent, and that it had been reaffirmed.

- Will you acknowledge that *Humphrey’s Executor* is settled law? If not, on what basis would you characterize the precedent established by *Humphrey’s Executor* – which was decided in 1935 – differently than how you discuss the precedent established years later by *Brown*?
- In response to my written questions, you stated that it would be improper for you to comment on cases or issues that might come before you. You also stated in the hearing that *Humphrey’s Executor* has been reaffirmed by courts. In light of that statement, do you consider the 80-year-old precedent established by *Humphrey’s Executor* to be one that the Supreme Court might reconsider?

In your response to my written questions, you stated: “Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.”

- At a 2016 event, you stated that you would “put the final nail in” the precedent created by *Morrison v. Olson*. Do you consider that statement to be consistent with the principles you stated in response to my written question? If so, how?

Executive Power

In my initial written questions I asked you about the view that you expressed in *Seven-Sky v. Holder* and whether a President can decline to enforce a law – even if a court has found it to be constitutional – outside of the context of prosecutorial discretion. You answered that it would be inappropriate to respond to hypotheticals.

- Is there any Supreme Court precedent that affirms any president’s decision to decline to enforce a law – even if a court has found it to be constitutional – outside of the context of prosecutorial discretion?

In response to my initial written questions, you also responded that you believe that “[t]he limits of prosecutorial discretion are uncertain.”

- Are there any limits to prosecutorial discretion?
- What Supreme Court precedents define the limits of prosecutorial discretion?
- In response to my initial written questions, you cited *Heckler v. Chaney*. Do you consider *Heckler v. Chaney* binding Supreme Court precedent when considering the principles governing the permissible scope of enforcement discretion?

In response to my question about *Seven-Sky*, you responded that your statement in that case was referring to the concept of prosecutorial discretion.

- Was your statement in *Seven Sky* referring only to the concept of prosecutorial discretion?
- Would your statement in *Seven Sky* ever be applicable to a matter that was not a matter of prosecutorial discretion?

Last week, John Dean – who served as White House Counsel under President Nixon – testified before the Committee that if you are confirmed, we will have “the most presidential powers friendly Court in the modern era.”

- Do you agree with that characterization? If not, why not?

Constitutional Avoidance

In my initial written questions, I asked you about your comments that the Court should “consider jettisoning” the canon of constitutional avoidance. You responded that your comment was made in the context of an article discussing “the problem of ambiguity as a trigger” for certain canons. As you have noted, the canon of constitutional avoidance currently depends on an initial determination of whether the statute is clear or ambiguous.

- The canon of constitutional avoidance is generally understood to apply only where a statute is ambiguous. Would you “consider jettisoning” constitutional avoidance in its current form?
- If ambiguity is not an appropriate trigger for applying constitutional avoidance, how would you define when it is “appropriate” to use constitutional avoidance?
- Is the use of statutory ambiguity as a trigger for applying the constitutional avoidance canon an established precedent? Is it settled law?

I previously referred to Justice Brandeis’s concurring opinion in *Ashwander v. Tennessee Valley Authority*, a case from 1936 that is frequently cited by the Court as precedent for the application of constitutional avoidance.

- Do you view Justice Brandeis’s opinion in *Ashwander* as established precedent?
- Is Justice Brandeis’s opinion in *Ashwander* settled law?
- Do you consider the precedent established by *Ashwander* to be one that the Supreme Court might reconsider?

I also asked whether you consistently applied the canon of constitutional avoidance in my initial written questions. You responded that you “consistently applied constitutional avoidance where appropriate.”

- What are three opinions that best demonstrate that you have “consistently applied constitutional avoidance where appropriate”?

- How is your dissent in *United States Telecom Association* consistent with your statement that that you have “consistently applied constitutional avoidance where appropriate”?
- Your academic writings have criticized Justice Roberts’s application of constitutional avoidance in *NFIB v. Sebelius*. Did Justice Roberts err in his application of constitutional avoidance in that case?
- Many recent Supreme Court majority opinions have cited *Ashwander* and applied the canon of constitutional avoidance. Do you believe the current Court applies constitutional avoidance too often?

In my initial written questions, I asked you if you would describe yourself as a jurist who decides cases on the narrowest possible grounds. You did not respond to that question.

- Would you describe yourself as a jurist who decides cases on the narrowest possible grounds?
- If so, what are three opinions that demonstrate that you are a jurist who decides cases on the narrowest possible grounds?

Administrative Law

In my initial written questions, I asked if your record suggests that you are skeptical of agency actions to implement health and safety protections. You responded generally and stated that you have “ruled both for and against agency actions in these areas.”

- What are all the instances where you have written or joined a majority or concurring opinion, or written or joined a dissent, upholding an agency action implemented to protect public health or safety during the previous Administration?
- What are all the instances where you have written or joined a majority or concurring opinion, or written or joined a dissent, overturning or curbing an agency action implemented to protect public health or safety during the previous Administration?

I also asked about your exchange with Senator Lee on the non-delegation doctrine during the hearing. You said that, “at some point, Congress can go too far in how much power it delegates to an executive or independent agency.” In response to my initial written questions, you said you could not comment on the non-delegation doctrine because of a pending Supreme Court case addressing this matter.

- Why did you answer questions on the non-delegation doctrine during the hearing rather than responding – as you did to me – that you cannot comment on it because of a pending Supreme Court case?
- When it comes to the non-delegation doctrine, is *Panama Refining Co. v. Ryan* binding precedent?
- When it comes to the non-delegation doctrine, is *A.L.A. Schechter Poultry Co. v. United States* binding precedent?

Campaign Finance

In my initial written questions, I asked you about a 2002 email from your previous work in the White House in which you stated your view that limits on contributions to candidates have “some constitutional problems.” You responded that the Court has since struck down limitations on campaign contributions as unconstitutional in several cases subsequent to your 2002 email, including *Randall v. Sorrell* (2006) and *McCutcheon v. FEC* (2014).

- In one of the cases that you cited, *Randall v. Sorrell*, the Court affirmed that some limits on contributions to candidates are constitutional as established by *Buckley v. Valeo*. Do you agree that limits on contributions to candidates are constitutional as established by *Buckley*?
- Is the Court's holding on permissible contribution limits in *Buckley* settled law?
- In *Randall*, Justice Breyer applied a five-factor test to evaluate the constitutionality of a state's contribution limits. Is this five-factor test the appropriate test when evaluating the constitutionality of limits on contributions to candidates?
- In *McCutcheon v. FEC*, the Court held that "spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder's official duties, does not give rise to quid pro quo corruption." Do you agree?
- What, if any, state interest—other than quid pro quo corruption or the appearance of corruption—would justify campaign finance regulations?

In response to my initial written questions, you also stated that the Supreme Court has explained the constitutional analysis that applies to contribution limitations in *Buckley* and subsequent precedents.

- Is the application of strict scrutiny to contribution limits consistent with the Court's prior campaign finance precedents?
- Is the application of strict scrutiny to contribution limits consistent with *Buckley*?
- Can you describe any circumstances in which courts should subject candidate contribution limits to strict scrutiny?
- What is the appropriate standard that should be applied to candidate contribution limits?
- Do you view *Citizens United* as a departure from prior precedent?

Antitrust

In my initial written questions, I asked why you chose not to apply Supreme Court precedent in *Brown Shoe* and *Philadelphia National Bank* when you wrote your dissent in *Whole Foods*. The majority applied these precedents in reaching the opposite conclusion than the one that you reached. You did not answer the question on why you did not cite these precedents, but responded that your *Whole Foods* dissent "relied on basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine."

- Why did you choose not to apply *Brown Shoe* and *Philadelphia National Bank* in your dissent?
- In your previous response, you said that your dissent "relied on basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine," and you cited *Leegin v. PSKS* and *State Oil v. Khan*. Do you believe these cases overturned either *Brown Shoe* or *Philadelphia National Bank*?
- Do you believe either *Leegin* or *State Oil* overturned *Brown Shoe* when it comes to defining antitrust markets?
- In your previous response, you stated that the *Whole Foods* case turned on "how to define the relevant market." Do you consider *Brown Shoe* binding precedent when defining the relevant market?
- How was your relevant market analysis – which ignored virtually all of the aspects of the *Brown Shoe* analysis – consistent with your obligation to respect precedent?

I also asked whether you considered *Brown Shoe* and *Philadelphia National Bank* binding Supreme Court precedent. You cited your opinion in *United States v. Anthem*, arguing that there had been a “shift in antitrust analysis toward a focus ‘on the effects on the consumers of the product or service’ of the merging parties and away from the strict anti-merger approach that the Court had employed in the 1960s.”

- Consumer welfare in antitrust certainly includes price—but also the quality of products and the choices that people have. The majority criticized your opinion and what they call your “single-minded focus on price.” Does the consumer welfare standard in antitrust include evaluating other considerations in addition to price?
- In addition to price, what other factors do you believe should be considered as part of the consumer welfare standard?
- Did your analysis in *Anthem* reflect full consideration of the factors embodied by the consumer welfare standard? Did it focus on any factor other than price?

**Senator Patrick Leahy (D-Vt.), Senate Judiciary Committee,
Questions for the Record
Hearing on the Nomination of The Honorable Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States
September 10, 2018**

1. At your 2006 nomination hearing, you said that you “absolutely” believed President Bush’s statements that the United States “does not torture” and does not “condone torture.” At the time, I brought your attention to abuses that took place at Abu Ghraib. Senator Durbin reminded you that our government sanctioned techniques such as threatening detainees with dogs, forced nudity, and painful stress positions. Since then, the Senate Intelligence Committee’s 6,000 page report about Bush-era detention policies provided details about the CIA’s widespread use of waterboarding and other “enhanced interrogation techniques,” which of course is a euphemism for torture. **Knowing what you know now, do you still believe what you testified in 2006 — that the United States did not engage in the practice of torture during the George W. Bush administration?**
2. Attached in Appendix I is a document that was obtained through a FOIA request. It shows that you, as Staff Secretary, were specifically looped in to review talking points covering the just-released and infamous Bybee torture memo. **What other emails relating to post 9-11 torture and detainee policies exist from your tenure as Staff Secretary?**
3. Torture is as un-American as it is illegal. Thanks to the leadership of my late dear friend Senator John McCain, torture is explicitly banned by law. Under Justice Jackson’s *Youngstown* framework, a President’s power “is at its lowest ebb” when he acts contrary to the will of Congress. Nonetheless, candidate Trump repeatedly threatened to resurrect the practice of torture upon becoming President. **In your view, is there any circumstance in which the President could violate a statute passed by Congress and authorize the use of torture?**
4. When you testified before this Committee in 2006, you testified: “I was not involved and am not involved in the questions about the rules governing detention of combatants.” But in 2007, the *Washington Post* published a report indicating that you had been consulted on and offered an opinion regarding whether the Supreme Court would approve of American citizens being detained as enemy combatants without access to counsel.¹ **Is the *Washington Post* correct that, while you were in the Bush White House, you were consulted on such a policy matter regarding the detention of enemy combatants?**
5. Presidents frequently invoke an expansive view of “national security” to justify sweeping, often seemingly unrelated executive actions, such as when President Trump has used national security to justify enacting tariffs or to ban transgender Americans from serving in the military. In both of those examples, actual studies carried out by the

¹ http://voices.washingtonpost.com/chenev/chapters/pushing_the_envelope_on_presi.

relevant executive agencies did not demonstrate any national security threat that could be rectified by the President's action, which proceeded nonetheless. You have written in support of an expansive view of executive power many times in the past.

- a. **Should the courts defer to the President on the definition of "national security" in the absence of a clear legal definition? What about in the case of a clear legal definition?**
 - b. **When the President and the agencies legally charged with executing a particular law of the United States containing a national security exception are not in agreement on whether a national security need exists, or when they are in disagreement, can a clear national security justification be said to exist?**
 - c. **Is it necessary that a national security waiver be written into a law for the President to waive certain provisions on national security grounds?**
6. During your 2006 hearing, I asked whether you had any knowledge of President Bush's post 9-11 torture and detainee policies. You testified that you were "not aware" of the "legal justifications or the policies relating to the treatment of detainees" until "2004, when there started to be news reports" on the subjects. Yet a 2007 news report indicated that in 2002, you were a key player in White House discussions about whether President Bush's detainee policies would pass muster before the Supreme Court. There are still thousands of your documents we have not reviewed – and thousands that may have been screened out of the partisan production we received – that could shed additional light upon what you knew at the time. At some point they will become public. **At any point in your tenure in the White House, were you aware of any aspects of President Bush's post 9-11 torture and detention policies before they became public through news reports?**
 7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers." **Do you agree that the Constitution provides Congress with its own war powers, and that Congress may exercise these powers to restrict the President – even in a time of war?**
 8. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." **In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

9. You indicated in your hearing testimony that the Supreme Court's recent decision in *Carpenter v. United States* was a "game changer" regarding the intersection of technology and the Fourth Amendment. **In the wake of *Carpenter*, what is your view on the continued vitality (or lack thereof) of the Fourth Amendment's "third-party doctrine," as explained by the Court in *Smith v. Maryland*?**
10. At your hearing on September 6, 2018, I asked you the following question. You did not answer my specific question. Please do so now:

In your concurrence in *Klayman v. Obama*, you went out of your way to say that not only is mass surveillance of American's telephone metadata okay because it is not a search. You also said — with no support, and citing only the 9-11 Commission Report but no specific part of it — that even if it is a search, it is justified because the government demonstrated a "special need" to prevent terrorism. This was months after Senator Lee and I worked to pass the USA FREEDOM Act, which prohibited such collection.

The year before you issued your opinion, the Privacy and Civil Liberties Oversight Board (PCLOB) stated publicly that it could not identify "a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation." Others also found that the NSA's phone records program was not essential to thwarting terrorist attacks.²

- a. **Why did you go *out of your way* to issue a concurrence stating that this program met a critical national security need, when it already was found to have made no difference in fighting terrorism? *Why not simply join the majority opinion*?**
- b. **Is it your view that merely making a reference to terrorism, even with respect to a program that was already found to have made no concrete difference in fighting terrorism, is sufficient to justify an exception to the Fourth Amendment's warrant requirement?**

11. **At any point during your time in the White House Counsel's office, were you involved in obtaining or providing legal analysis as to the Fourth Amendment**

² "Based on the information provided to the Board, we have not identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack. And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. In that case, moreover, the suspect was not involved in planning a terrorist attack and there is reason to believe that the FBI may have discovered him without the contribution of the NSA's program. Even in those instances where telephone records collected under Section 215 offered additional information about the contacts of a known terrorism suspect, in nearly all cases the benefits provided have been minimal — generally limited to corroborating information that was obtained independently by the FBI." See https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf.

implications of any warrantless electronic surveillance program, whether actual or hypothetical?

12. According to the 2009 Report on the President's Surveillance Program, prepared by the Inspectors General of the DOD, DOJ, CIA, NSA and ODNI, on September 17, 2001, John Yoo, who was then at the Office of Legal Counsel, wrote a memo to your supervisor, Timothy Flanigan, "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential terrorists." The memorandum was entitled, "Constitutional Standards on Random Electronic Surveillance for Counter-Terrorism Purposes." **As of 2001, were you aware that Mr. Yoo had written such a memorandum to Mr. Flanigan?**
13. According to the same 2009 Joint Inspector General Report, Attorney General Alberto Gonzales believed that that September 17, 2001 memo, along with another written by Mr. Yoo in October 2001, provided the legal authority for the electronic surveillance program that would be codenamed Stellar Wind. **As of 2001, did you have any interactions with Mr. Yoo, Mr. Flanigan, or anyone else, about either the contents of or legal reasoning underlying either of these memoranda?**
14. **Did you have any conversations of any type whether via email, over the phone, in person or otherwise with Mr. Yoo between September 17, 2001 and October 4th 2001 regarding warrantless surveillance of phone and/or email conversations within the United States?**
15. Attached in Appendix II is a September 17, 2001 email you wrote to John Yoo, BCC'ing Mr. Flanigan, asking the following question: "Any results yet on the 4A [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"
 - a. **Would you agree that the question in your September 17, 2001 email is substantially similar to the one Mr. Yoo answered in his memorandum to Mr. Flanigan dated September 17, 2001?**
 - b. **Other than to help evaluate the legality of a bulk collection electronic surveillance program, for what purpose would you have asked Mr. Yoo to provide a legal analysis of the Fourth Amendment implications of such a program?**
 - c. **Given that the answer to your question to Mr. Yoo helped form the legal justification for the NSA's electronic surveillance program, is it still your position, as you testified in 2006, that you had neither "seen any documents relating to" the President's NSA warrantless wiretapping program nor "heard anything" about it prior to the public disclosure of the program in 2005?**

- d. **What response did you receive from Mr. Yoo, to your September 17, 2001 email?**
- e. **It is clear from the email you sent that you had discussed the topic of warrantless surveillance with Mr. Yoo prior to your email request. Please detail the conversations or interactions you had with Mr. Yoo regarding the subject of warrantless surveillance between September 11 and September 17, 2001.**

16. At your hearing on September 6, 2018, I asked you about your dissenting opinion in *U.S. v. Jones*, which I described as “more like an analysis we’d get from the Chinese government than we’d get from James Madison.”

In response, you stated the following:

KAVANAUGH: I also went on in that opinion to say the attachment of the GPS device on the car was an invasion of the property right and that independently would be a Fourth Amendment problem. When the case went to the Supreme Court, the majority opinion for the Supreme Court followed that approach that I’d articulated in saying that it was a violation of the Fourth Amendment so the approach I’d articulated there formed the basis of saying it was actually unconstitutional.

Your response to me conveyed that you believed that “the attachment of the GPS device on the car was an invasion of the property right” and “was a violation of the Fourth Amendment.” However, your actual opinion merely asserted that this argument “poses an important question.” Your opinion specifically stated that you “do not yet know whether I agree with that conclusion,” and that it “requires fuller deliberation.” **Is it your testimony that you found in *U.S. v. Jones* that the attachment of the GPS device on the car constituted a violation of the Fourth Amendment?**

17. During your 2004 confirmation hearing, you were asked by Senator Kennedy about now-Judge William Pryor in the following exchange:

SENATOR KENNEDY: Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor.

KAVANAUGH: That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally . . . I was not involved in handling his nomination.

You added that aside from participating in a moot, you did not work on the nomination of Judge Pryor to the 11th Circuit Court of Appeals.

Yet the limited documents that we have been permitted to see from your time in the White House Counsel's Office suggest you indeed worked on his nomination personally, even if you were not the point person assigned to his nomination.

- a. Did you participate in the Pryor working group? If so, how many counsels were assigned to this working group?
 - b. What calls did you participate in related to the Pryor nomination?
 - c. What was your role with respect to Judge Pryor's White House interview(s)?
 - d. Did you ever personally interview Judge Pryor, including by participating in any group or joint interviews of Judge Pryor?
 - e. Prior to recommending Judge Pryor for the nomination, were you aware that he had called *Roe v. Wade* "the worst abomination in the history of constitutional law?" Were you also aware that argued that a constitutional right to same sex intimacy would "logically extend" to activities like "necrophilia, bestiality, and pedophilia?"
 - f. During your moot session with Judge Pryor, did you advise him on how to handle questions on his views on *Roe* and same-sex intimacy?
 - g. Did you attend an "emergency umbrella meeting" to discuss Bill Pryor's hearing on 6/6/2003 at Baker & Hostetler?
18. Did you contact investigators to turn over documents you suspected may have been stolen by Manny Miranda that he had provided to you?
 19. After the theft of confidential Democratic files from senators serving on the Senate Judiciary Committee became public in December 2003, what steps did you take to ensure you did not receive or benefit from stolen property?
 20. Did you contact and volunteer to be interviewed by any federal investigators in relation to the hacking of Democratic computer files?
 21. On how many occasions did Manny Miranda request to meet with you in person? On how many occasions did he suggest meeting you off-site (defined here as neither his nor your office)?
 22. On how many occasions did Mr. Miranda provide you with paper documents related to Democratic senators, either directly (i.e., hand to hand) or indirectly (e.g., through Don Willet)?
 23. Did you ever communicate with Manny Miranda while you served as White House Staff Secretary?

24. In at least one email, you passed along inside information about Democrats from Mr. Miranda that you stated originated with "Democratic sources." **Who were those sources?**
25. **I asked you in written questions in 2004 whether you had ever heard of a Democratic mole. You never answered the question. Please do so now.**
26. You stated in your decision in *Heller II* that a gun restriction must not conflict with the history and tradition of the Second Amendment.
- a. **Would you agree that our founding fathers almost certainly never envisioned 3-D printing technology that could be used to print plastic firearms at home with no expertise?**
 - b. **Would you agree that, consistent with the history and tradition of the Second Amendment, such technology, which is only beginning to emerge now, could be regulated or even banned?**
27. It has been mentioned many times that you have made it a point to hire women and minority law clerks. I think that's important and commendable. **Why do you believe it is appropriate for you to have an interest in your law clerk's race or sex when placing them on the government payroll, but a university cannot do the same for its admissions?**
28. In my view, and in my capacity as a Dodd-Frank conferee, the structure and independence of the Consumer Financial Protection Bureau (CFPB) is key in insulating decisions and actions from undue political influence. In your dissent in *PPH Corp. v. Consumer Financial Protection Bureau*, you held that the governing structure of the CFPB is unconstitutional and that could be remedied by removing the for-cause requirement allowing the President to fire the director. Congress created the CFPB to be a consumer watchdog and to fight on behalf of individual Americans who cannot by themselves afford to fight lengthy and costly legal battles. Too often, even if consumers were harmed or wronged by companies who broke the law and acted in bad faith, they do not stand a chance against the company's scores of legal experts eager to prolong and appeal cases. The CFPB levels the playing field on behalf of these Americans and must have the authority and flexibility to advocate on their behalf.
- a. **Do you believe the for-cause provision in the governing structure of the CFPB is unconstitutional?**
 - b. **Do you believe the fear of losing one's job could inform whether a director chooses to pursue a particular course of action with respect to a company's violation of laws, especially if the president disagrees?**
 - c. **How can Congress ensure the CFPB director can take on unpopular but legitimate cases?**

d. Do you believe independent agencies with multi-member governing bodies with term-limits are constitutional?

e. Do you believe any other aspects of CFPB's structure are unconstitutional? If so, which aspects?

29. In your dissent in *U.S. Telecom v. FCC*, you asserted that Internet Service Providers (ISPs) have editorial discretion under the First Amendment to choose what content to carry or not to carry. Were this view to become the law of the land, it would give ISPs unprecedented veto power over free speech online. This would be a real problem because 70 million Americans have only one choice of broadband provider. There is no competition; there are no alternatives. Tens of millions of American consumers would have no recourse but to see only what their ISPs allowed them to see online.

We have a president who is famously thin-skinned when it comes to news reports that are critical of him. And he has repeatedly threatened to punish media organizations he deems "fake news." **If ISPs have editorial discretion to choose what Americans can see online, what would stop an ISP from cutting off access to legitimate news sites in an effort to gain favor with the President?**

30. Part of the justification you cite in your dissent in *U.S. Telecom v. FCC* is the dual role that some ISPs have as both cable and Internet providers. Specifically, your dissent states that:

"Indeed, some of the same entities that provide cable television service colloquially known as cable companies – provide Internet access over the very same wires. If those entities receive First Amendment protection when they transmit television stations and networks, they likewise receive First Amendment protection when they transmit Internet content. It would be entirely illogical to conclude otherwise."

I would like to explore your conclusion further. In addition to ISPs that use cable wires to provide Internet access, there are ISPs that provide high speed Internet access over telephone lines, a service known as DSL.

- a. Would it be logical to conclude that providers of Internet access over telephone wires should receive the same level of editorial discretion as providers of traditional telephone service? If not, what are the material differences?**
- b. If providers of Internet access over telephone wires are entitled to editorial discretion, would it be logical to conclude that providers of traditional telephone service provided over the same wires should receive the same level of editorial discretion?**

- c. Would it be logical to conclude that Internet access provided over telephone wires should be subject to the same regulatory scheme as traditional telephone service provided over the same wires?**
31. There are ISPs that also use the transmission of radio frequencies to provide Internet access to consumers. Many of these ISPs also use radio frequencies to provide voice service. In addition, radio frequencies are used to provide a wide array of other services.
- a. Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as providers using these frequencies to provide voice service? If not, what are the material differences?**
- b. If ISPs providing Internet access over radio frequency are entitled to editorial discretion, would it be logical to conclude that providers using these frequencies to provide voice service should receive the same level of editorial discretion?**
- c. Would it be logical to conclude that Internet access provided over radio frequency should be subject to the same regulatory scheme as voice service provided over radio frequency?**
- d. Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as the operator of a garage door opener, which also transmits using radio frequencies?**
32. Many who consider themselves constitutional originalists have been critical of Supreme Court decisions that recognized the right to privacy. The originalist argument is that privacy is not an enumerated right and therefore cases like *Roe* and *Griswold* were wrongly decided.
- a. You have suggested that other Supreme Court precedent (*U.S. v. Nixon*) may have been wrongly decided.³ Do also you believe *Roe v Wade* and *Planned Parenthood v Casey* were wrongly decided?**
- b. Do you believe the Constitution protects personal autonomy and privacy as a fundamental right?**
33. In *Priests for Life v. Department of Health and Human Services*, you wrote in reference to the exercise of religion that, “when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government has substantially burdened.”
- a. Do you believe that, under the Constitution, corporations should be treated as persons?**

³ *Attorney Client Privilege, Does it Pertain to the Government?*, WASHINGTON LAWYER, January/February 1999.

- b. **Do you believe that non-governmental organizations, such as Priests for Life, should be treated as individuals when it comes to denying their workers access to affordable contraception?**
 - c. **Do you believe that a boss's private views trump the medical needs and health insurance choices of the boss's employees?**
34. You have praised Justice Scalia's jurisprudence in writings and speeches. In a 2011 interview, Justice Scalia stated that the Equal Protection Clause does not extend to women or LGBT individuals.⁴
- a. **Do you agree with that view?**
 - b. **Does the Equal Protection Clause protect individuals on the basis of their gender or sexual orientation?**
 - c. **Does the Constitution permit discrimination in certain instances?**
35. Justice Kennedy wrote in *Planned Parenthood v. Casey* that "At the heart of liberty is the right to define one's own concept of existence."
- a. **Do you agree with Justice Kennedy in this case?**
 - b. **Do you believe "the right to define one's own concept of existence" means states cannot pass laws discriminating against LGBT Americans?**
36. In your dissent in *Seven-Sky v. Holder*, you wrote that, "the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional." Your reasoning was that, "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional."
- a. **How is this position consistent with the president's constitutional obligation to "take care that the laws be faithfully executed"?**
 - b. **During your time in the Bush White House, did you ever draft, revise, edit, approve, or otherwise contribute to any signing statements reserving the president's right not to enforce laws or part(s) of laws? If so, which ones?**
 - c. **Can a president refuse to comply with a court order?**
 - d. **If a president refuses to comply with a court order, how should the courts respond?**

⁴*Scalia: Constitution Does not Protect Women Against Discrimination*, WASHINGTON POST, January 4, 2011, at <http://voices.washingtonpost.com/4-4-2011/01/scalia-constitution-does-not-p.html>.

- e. **How can a court serve as a legitimate check on the powers of the executive branch if the president can disregard its rulings whenever the president deems it to be necessary?**
37. In 2017, you became a member of the Board of Directors of the Washington Jesuit Academy, a parochial school in the District of Columbia that accepted vouchers from the D.C. voucher program. You indicated in the questionnaire you submitted to the Committee that you, “participate in meeting where the Board deals with various issues, including educational decisions.”
- a. **Due to your involvement as a board member of this school, will you recuse yourself from cases regarding the legality of school vouchers since the decision will have a direct impact on how the Washington Jesuit Academy functions as a school?**
 - b. **If confirmed, will you step down from the Board of Directors of the Washington Jesuit Academy to avoid the perception of there being a possible conflict of interest?**
 - c. **Do you believe that taxpayer dollars should be given to private parochial schools, whereby tax payer dollars could be used to promote religious messages?**
 - d. **Do you believe that institutions that receive federal education dollars should be required to follow the same civil rights protections as public schools?**
38. You said that “a judge must interpret statutes as written. And a judge must interpret the Constitution as written.” Given the varying and complicated constraints faced by agencies, cost-benefit analysis may vary by administration, mission area, desired outcome, and economic indicators, among other variables. Guidance for agencies on cost-benefit analysis provided by the Office of Management and Budget and internal guidance will also inform the structure and depth each analysis.
- a. **Do you believe it is appropriate for judges to interpret the varying methods of cost-benefit analysis and determine if they are sufficient or appropriate for any given regulation?**
 - b. **If so, what statute on cost-benefits analysis should the court interpret?**
 - c. **Do you think the benefits of certain regulatory action, especially in the environmental space, are more difficult to measure than the costs? Does that make measuring them when engaging in a cost-benefit analysis any less important?**

39. You have criticized *Chevron* deference as being aggressive executive overreach and argued that courts should determine the best reading of the statute.
- a. **How will you make sure expertise is accounted for when considering complicated, scientific cases regarding the environment?**
 - b. **What role should experts in agencies play when interpreting statutes?**
40. You have often argued that plaintiffs representing industry should have standing for economic damages incurred from environmental regulations. In some cases, for example *Grocery Manufacturers Assoc v. EPA*, you have claimed that a relatively low bar of economic harm qualifies as standing.
- a. **Will individuals and nongovernmental organizations receive the same treatment when you consider whether they have standing for damages?**
 - b. Often environmental regulations create significant economic benefits and value to human health, the clean energy economy, and environmental sustainability while some industries face challenges as a result of the regulations. **How do you address and balance these economic factors when determining standing?**
 - c. **As someone who has said “the task of dealing with global warming is urgent and important at the national and international level,” do you agree that the damage caused to individuals, corporations, and communities by climate change should be considered for standing on similar grounds to the economic hardship created by regulations that mitigate climate change?**
41. You have argued that the EPA does not have the authority to regulate greenhouse gases under the Clean Air Act despite statute giving EPA authority to regulate “any air pollutant.”
- a. **Do you still believe that EPA cannot regulate greenhouse gases?**
 - b. **If so, why are greenhouse gases excluded from this definition of “any air pollutant?”**
42. Chief Justice Roberts wrote in *King v. Burwell* that
- “oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

43. In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were only advisory and could not mandate that a district court judge sentence a given defendant within a given range. Notwithstanding *Booker*, many Courts of Appeal, including the D.C. Circuit in cases like *United States v. Haipe*, have held that the guidelines “frame the discretion” of district court judges. This conception of the post-*Booker* advisory guidelines leads to sentence reversals in cases in which, for example, the defendant’s sentence is within even his own calculated range. **What is your view on the proper role of the advisory guidelines in evaluating a district court’s sentencing decisions?**
44. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.” **While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate for leaders to attack a judge’s integrity based on his ethnicity, or to question the legitimacy of a federal court?**
45. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.) **Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions of a President?**
46. **Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?**
47. **Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”⁵**
48. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**
49. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.” **When is it appropriate for the**

⁵ https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf.

Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

- 50. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?**
- 51. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.” Do you believe the Constitution protects that personal autonomy as a fundamental right?**
- 52. As White House Staff Secretary at the time *Lawrence v. Texas* was decided, what was as your role within the Bush administration as part of its effort to push a constitutional amendment defining marriage as a union between a man and a woman?**
- 53. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis. In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**
- 54. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety. How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I’m interested in specific examples, not just a statement that you’ll follow applicable law.**
- 55. It is important for me to try to determine for any judicial nominee – and especially one to our Nation’s highest court – whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” Can you discuss the importance of the courts’ responsibility under the *Carolene Products***

footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

56. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like the Iran-Contra Affair, warrantless spying on American citizens, and politically-motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly. **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**
57. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**
58. As you know, in *Morrison v. Olson* the Supreme Court upheld the constitutionality of a law that allowed the Attorney General to recommend appointment of an independent counsel to investigate and prosecute certain high-ranking Government officials, including the President, for federal crimes. You have said that the case has been "effectively overruled," but you would "put the final nail in."⁶
- a. **What does it mean for a case to have been "effectively overruled"? Precedent has either been overruled or not.**
 - b. **What other Supreme Court precedent, in your opinion, has been "effectively overruled"?**
59. At your hearing last week, you and Senator Hirono had the following exchange:
- SEN. HIRONO: Have you otherwise ever received sexually suggestive or explicit e-mails from Judge [Alex] Kozinski, even if you don't remember whether you were on this "Gag List" or not?
- KAVANAUGH: So Senator, let me start with no woman should be subjected to sexual harassment in the workplace, and ... [*sic*]⁷
- You avoided answering the question. Please go through your files and emails, and definitively state whether you ever received sexually suggestive or explicit emails from Judge Kozinski, whether as part of his "Easy Rider Gag List" or otherwise.**

⁶ Federal Courts & Public Policy," American Enterprise Institute, Washington, D.C., March 31, 2016, <https://www.c-span.org/video/?c4740724.kavanaugh-final-nail>.

⁷ <http://www.cq.com/doc/congressionaltranscripts-538349678&search=6DCpZ3GR>.

60. **Following up from the prior question, if you ever received sexually suggestive or explicit emails from Judge Kozinski, did you ever speak or otherwise communicate with him about the appropriateness of this conduct?**
61. Attached in Appendix III is an email that you received from a White House colleague on June 8, 2001 at 10:13 a.m., making a comment – on a government computer network – that is clearly inappropriate. **Did you ever speak or otherwise communicate with this colleague about the appropriateness of this conduct?**
62. **What is the Eureka Club? When did you take part in activities or gatherings under that name or a substantially similar name? And what were the activities associated with these gatherings?**
63. **Do you *personally* believe that Nazis, Nazi sympathizers, or white nationalists are “fine people”?**
64. **Have you ever ruled on a case involving a policy that, as an employee of the Bush administration, either you helped create or for which you provided legal or policy analysis? If so, please describe.**
65. **Regarding judicial philosophy, do you believe it is important for a judge to approach his or her analysis in a given case with intellectual honesty? Why or why not? Stated differently, would it be appropriate for a judge to have a predetermined conclusion at the outset of a case?**

#

1373

Appendix I

From: "Miers, Harriet"
To: "Kavanaugh, Brett M."
Subject: Fw: let me know when you get this...thx
Received(Date): Sat, 12 Jun 2004 18:10:14 -0500

Brett, fwi.

-----Original Message-----

From: Jim Wilkinson [mailto: [REDACTED] P6(b)(6)]
To: Miers, Harriet <Harriet.Miers@who.eop.gov>
Sent: Sat Jun 12 19:08:40 2004
Subject: let me know when you get this...thx

These were written by WH Counsel and NSC legal (approved by both). they have also been approved by Wilkinson, Bartlett, Rowe...Sieve Hadley also wanted Harriet, Brett, and Andy to see them. I am on my cell at [REDACTED] P6(b)(6) these are for use by Condi and Powell for tomorrow's Sunday shows.

Ã* The President believes we must do everything possible to protect the American people from terrorism. Gathering intelligence about the plans of terrorists is critical to defending America.

Ã* In all aspects of our nation's war on terror, including the conflict in Iraq, the President has insisted our government must comply with U.S. laws and treaty obligations.

Ã* He has repeatedly made clear that torture of detainees is not permitted under U.S. policy, and he has never considered the possibility of authorizing torture.

Ã* The abuses of Abu Ghraib are a violation of the President's policies Ã** not a result of them - and these violations are being investigated and will be punished. The President has been and remains firmly committed to our military's observance in Iraq of the Geneva conventions and our other international agreements.

Ã* To help ensure our government follows the law, the executive branch receives legal opinions. The Department of Justice in a legal analysis discussed the possibility that under some circumstances could be legally defensible. The lawyers were considering a situation in which the information gained from an interrogation

might prevent future attacks by foreign enemies. However, the President has never considered authorizing torture under any circumstances.

Ã* Interrogation techniques must be kept confidential so we do not give away information that would signal to our adversaries what they could anticipate if captured, allowing them to prepare for it and potentially counter it. As required by law, we brief the appropriate Congressional leadership on authorized interrogation techniques.

Ã* While our actions in the War on Terror are governed by rules, the terrorists do not respect any rules. They are an enemy that hides among civilian populations and seeks to inflict large-scale civilian casualties by surprise attack. We have an obligation to aggressively and lawfully interrogate captured detainees to obtain information that may help us prevent future attacks.

<<detainee message pts.doc>>

1374

Appendix II

From: CN=Brett M. Kavanaugh/OU=WHO/C=EOP [WHO]
To: Yoo, John C <John.C.Yoo@usdoj.gov>
BCC: timothy.flanigan [timothy.flanigan [WHO]]
Sent: 9/17/2001 3:29:35 AM
Subject: 4A issue

***** Begin Original ARMS Header *****
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/C=EOP [WHO])
CREATION DATE/TIME: 17-SEP-2001 07:28:35.00
SUBJECT: 4A issue
TO: "Yoo, John C" <John.C.Yoo@usdoj.gov> ["Yoo, John C" <John.C.Yoo@usdoj.gov> [UNKNOWN]]
FROM: UNKNOWN
BCC: timothy.flanigan [timothy.flanigan [WHO]]
READ: UNKNOWN
***** End Original ARMS Header *****

Any results yet on the 4A implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?

REV_00023540

1376

> ----- Reply Separator
> Subject: Su Ching is booked
> Author: [PRA 6]
> Date: 6/8/01 10:13 AM
>
>
> Boys,
>
> Although you may be hoping that I've lined up a
> hostess for a
> rub-n-tug massage session, "Su Ching" actually
> is the sailboat (a
> Tayana 55) we've got for Friday, Sept. 7 to
> Sunday, Sept. 9 out of
> Annapolis. You can check out the boat at
>
>
> [http://www.annapolisbaycharters.com/BayBareBoats/baybare.htm/suching_b](http://www.annapolisbaycharters.com/BayBareBoats/baybare.htm/suching_baybare.htm)
>
> aybare.htm
>
> We've got the boat starting at 9 on Friday,
> although if we wanted, a
> couple of us could head to Annapolis on Thurs.
> afternoon, get an
> orientation on the boat, and buy some
> groceries. Whether that makes
> sense will depend on how early people want to
> get going on Friday.
> Because we can't leave Annapolis until the last
> person gets there, we
> should discuss at some point when or Friday
> people want to rendezvous
> in DC or Annapolis. (I'd think we could work
> it so that the non-DC
> people could get picked up at the airport by
> BK, major me, esp. if
> the New Yorkers take the same flight.)
>
> We could still shift the weekend one day, to
> Sept. 8 thru 10, if
> that's what people prefer, but so far I've
> heard a mild preference for
> 7 thru 9.
>
> Your cruise director,
> [PRA 6]
>
> ----- Reply Separator
> Subject: RE: Lake Place '01, Option 2
> Author: [PRA 6] at
> [PRA 6]
> Date: 6/4/01 10:38 AM
>
> Preference for Maine (more scenic, I would think),
> but will happily defer to
>
> the majority. Very mild preference for 7-9 over
> 8-10.
>
> -----Original Message-----
> From: [PRA 6]
> Sent: Friday, June 01, 2001 9:53 AM
> To: [PRA 6]
> [PRA 6]

REV_00018952

```

> > "mailto:brett_m_kavanaugh@who.eop.gov@inetgw";
> [REDACTED]
> CC: [REDACTED]
> Subject: RE: Lake Place '01, Option 2
>
> Thanks for the responses. Two questions:
>
> 1. Do you prefer Sept. 7-9 (fri. thru sun.)
> or Sept. 8-10 (sat. thru
>
> Mon.)? Note that if we do 7-9, that makes
> for a three-day work week.
>
>
> as Monday Sept. 8 is Labor Day.
>
> 2. [REDACTED] are you ok w/ the
> Annapolis roll?
>
> I'd like to lock in the boat soon, as I've
> only found one that's the
> big enough but doesn't require hiring a
> captain.
>
>
> _____ Reply Separator
>
> Subject: RE: Lake Place '01, Option 2
> Author: [REDACTED]
> Date: 6/1/01 8:37 AM
>
>
> I agree that the Annapolis venue might be more
> convenient. Either is fine
>
> with
> me.
> [REDACTED]
> [REDACTED]
>
> -----Original Message-----
> From: [REDACTED]
> Sent: Thursday, May 31, 2001 6:02 PM
> To: [REDACTED]
>
> [REDACTED]
> [REDACTED]
> [REDACTED]
> Subject: Lake Place '01, Option 2
>
>
> Boys.
>
> Here's an alternative that I think could be
> interesting: we could
> charter a somewhat bigger boat, a Tayana 55,
> out of Annapolis.
>
> The pluses: it's easier to get to Annapolis
> than to Rockland, ME;
> the
> boat's a good bit bigger, so we could more
> comfortably spend all
> three
> days cruising on it; and the weather in Sept.
> is likely to be warmer
> in MD than in ME.
>
> The minus: it costs money to rent, unlike

```

REV_00018953

1378

> the one in ME. It would
>> work out to be about \$2800 total for three
> days, including taxes,
>> fuel, and a dinghy (w/o food and booze). I'm
> guessing we'll get 6 or
>
>>
>> 7, so say something under \$500 apiece.
>>
>> We could book it for Sept. 7-9 (Fri. thru
> Sun.) or for Sept. 8-10
>> (Sat. thru Mon.). I mention that weekend
> because it's the only
>> weekend nobody's said no to, plus the boat is
> available then. If
>> anyone wanted to come to DC the night before,
> you could either stay
>> w/
>> me or we could head to Annapolis and stay
> onboard.
>>
>> Let me know what you think. My own vote: as
> much as I like taking
>> the budget approach to any venture, I think
> the Annapolis roll could
>> be better, given that we'd have a much nicer
> boat and it would be
>> less
>> complicated logistically, as we wouldn't have
> to line up any rooms
>> ashore and it's easier to get to for all of
> us.
>>
>>
>>
>>
>>
=== message truncated ===

Do You Yahoo!?
Make international calls for as low as \$.04/minute with Yahoo! Messenger
<http://phonecard.yahoo.com/>

REV_00018954

**Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of the
United States Supreme Court Questions for the Record**

Questions for Judge Kavanaugh

Submitted September 10, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. In an exchange with Senator Graham during your hearing before the Committee, you explained, “[t]he *Nixon* holding said that, in the context of the specific regulations there, that a criminal trial subpoena to the president for information -- in that case, the tapes -- could be enforced, notwithstanding the executive privilege that was recognized in that case, as rooted in Article II of the Constitution.”
 - a. What are the “specific regulations” to which you referred when discussing *United States v. Nixon*?
 - b. Is it your view that the “specific regulations” referenced in (a) were dispositive to the overall holding of the case?
2. On at least five occasions when referencing the *Nixon* precedent during the hearings, you made a point of noting that the subpoena at issue in that case was a criminal trial subpoena.
 - a. What role did the fact that the subpoena in *Nixon* originated from a district court, rather than a grand jury, play in the Court’s analysis?
 - b. Was the fact that the subpoena was a trial subpoena dispositive to the Court’s holding that the constitutionally protected executive privilege was not absolute and that the President had to respond thereto?
 - c. Does *Nixon* control with respect to questions relating to subpoenas of the president issued by a grand jury?
 - d. Does *Nixon* control with respect to cases involving congressional subpoenas to the president?
 - e. Does *Nixon* control with respect to cases involving administrative subpoenas to the president?
 - f. Does *Nixon* control with respect to cases involving subpoenas to the president issued in state trial proceedings?
 - g. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state officials?

- h. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state grand juries?
 - i. As you know, the *Nixon* case involved a subpoena for tape recordings. Does the precedent apply to cases involving subpoenas for presidential testimony as well as documentary evidence in the president's possession, custody, and control?
3. During your hearing and in our private meeting, you stated unequivocally that you had never taken a position on the constitutional question whether a sitting president can be indicted. But as a member of a panel at a 1998 Georgetown Law Review event you were asked "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?" You promptly raised your hand. When I asked you to reconcile this seeming conflict, you said: "[t]here's been Department of Justice law," referring to the Office of Legal Counsel's (OLC) opinion, authored by now-judge Randy Moss, that a sitting president cannot be indicted. You also said the OLC opinion is encompassed "within the general concept of law."
- a. Are you aware of any court decisions that refer to OLC opinions or guidance as "law"?
 - b. What weight do courts afford OLC opinions and guidance?
 - c. Do OLC opinions serve as binding precedent for courts? Are they binding on the D.C. Circuit Court of Appeals? On the Supreme Court?
 - d. Is the executive branch bound to follow OLC opinions?
 - e. What are the legal repercussions for the executive branch contravening an OLC opinion?
 - f. Does a person adversely affected by an executive action in violation of an OLC opinion have a legal cause of action?
 - g. What authority does the Attorney General have to decree "law"?
 - h. Do OLC opinions go through the notice-and-comment rulemaking process prescribed by the Administrative Procedures Act?
 - i. Besides the Randy Moss OLC opinion that you repeatedly mentioned during your testimony, is there any statutory or regulatory authority governing whether a president can be indicted?
 - j. As a judge on the DC Circuit, have you ever cited an OLC opinion as binding law? Have you ever cited the Randy Moss OLC opinion as such?
 - k. You have been a prolific legal writer and speaker, including on the separation of powers and executive power. Can you point to any citations in your spoken or written works that describe OLC opinions as "law"?

1. At our private meeting, you agreed with my assessment that, as a general rule, OLC opinions, as the views of the executive branch, take positions advancing the broadest defensible view of executive power. Could you explain your understanding of why this is the case?
4. In your discussion of *Sea World of Florida, LLC v. Perez* with Senator Feinstein, you noted that state tort law provides protection for workers in workplaces in which the Department of Labor is unable to issue safety protections. Specifically, you said, “And I made clear that of course state tort law -- as the NFL has experienced with the concussion issue -- state tort law always exists as a way to ensure or help ensure safety in things like the SeaWorld show.”
 - a. How do state tort law and our civil justice system, in general, help promote workplace safety?
 - b. Do state tort law and our civil justice system play a role in promoting public health and safety in other areas, like consumer protection and environmental protections? If so, how?
 - c. Does the fact that state and federal court proceedings are public play a role in promoting public health and safety? If so, how? Does the prevalence of binding pre-dispute arbitration clauses in employment and consumer contracts limit the ability to seek redress in state and federal courts? If so, how?
 - d. Does the fact that many arbitration proceedings occur behind closed doors undermine courts’ roles in promoting public health and safety?
 - e. The Seventh Amendment ensures the right to a jury “in suits at common law.”
 - i. What role does the jury play in our constitutional system?
 - ii. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of arbitration clauses?
5. Do you agree with Justice Gorsuch that personal attacks on federal judges from officials in the other branches of government are “demoralizing”?
6. Under current law, what rights does Congress have to documents, materials, and testimony *vis-à-vis* claims of executive privilege?
7. In response to my questioning regarding your interactions with the media during the Starr investigation, you said, “I spoke to the reporters at the direction and authorization of Judge Starr.”
 - a. During the Starr investigation, did you ever speak with members of the press or other authors about the investigation without explicit direction from Judge Starr or your superiors?

- i. If so, do you release the reporters in these instances from any confidentiality obligations related to these conversations?
 - b. In your testimony, you said you would let me know whether you are willing to release the reporters from their confidentiality obligations if Judge Starr allows the reporters to disclose the conversations. Whether or not Judge Starr may have a role in releasing reporters from obligations of source-protection confidentiality related to his investigation of the Clintons, are you personally willing to release reporters of any such obligations, separate and apart from whatever obligations Judge Starr may claim?
 - c. Were you ever an off-the-record source to the press or other authors? If so, were all these conversations at the explicit direction of Judge Starr?
 - d. Did you ever provide non-public information regarding the investigation to reporters off the record?
 - e. Did you ever provide information on non-public matters relating to the grand jury, including but not limited to the identity of past or planned witnesses and/or the nature or content of their testimony, to reporters off the record?
 - f. During or since your nomination hearing, have you been in touch with Judge Starr regarding reporters or source-protection confidentiality obligations from that investigation? If so, please explain fully the content of and reason for those communications.
8. In your testimony, you stated you had ruled for environmental interests in “many cases.” Please list all of the cases in which you ruled for environmental interests on substantive rather than procedural grounds.
- a. Did you rule for environmental interest(s) on substantive ground(s) in *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
 - b. Did you rule for environmental interest(s) on substantive ground(s) in *Center for Biological Diversity v. EPA*, 722 F.3d 401, 2013 WL 3481511 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
 - c. Did you rule for environmental interest(s) on substantive ground(s) in *Coal. for Responsible Regulation Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
 - d. Did you rule for environmental interest(s) on substantive ground(s) in *Communities for a Better Environment v. EPA*, 748 F.3d 333 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

- e. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- f. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- g. Did you rule for environmental interest(s) on substantive ground(s) in *Energy Future Coalition v. EPA*, 793 F.3d 141 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- h. Did you rule for environmental interest(s) on substantive ground(s) in *Grocery Mfrs. Ass'n v. EPA*, 704 F.3d 1005 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- i. Did you rule for environmental interest(s) on substantive ground(s) in *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- j. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- k. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- l. Did you rule for environmental interest(s) on substantive ground(s) in *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- m. Did you rule for environmental interest(s) on substantive ground(s) in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- n. Did you rule for environmental interest(s) on substantive ground(s) in *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.
- o. Did you rule for environmental interest(s) on substantive ground(s) in *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

- p. Did you rule for environmental interest(s) on substantive ground(s) in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled?
9. Does a foreign national living in the United States have a First Amendment right to make expenditures on issue advertisements?
- a. Do foreign nationals living in the United States have a First Amendment right to make contributions to organizations that make expenditures on issue ads?
10. You referenced during your testimony that you had overlapped with former FBI Director Robert Mueller during your time in the George W. Bush investigation. What is your opinion of Robert Mueller's character and work ethic? Do you believe that the investigation he is currently overseeing as Special Counsel is a "witch hunt?"
11. Are there any debts, creditors, or related items that you did not disclose on your FBI disclosures?
12. On your 2015 Financial Disclosure Report dated May 13, 2016,¹ you reported between \$15,001 - \$80,000 in debt accrued over two credit cards (Chase, Bank of America), and one loan (Thrift Savings Plan). On your 2016 Financial Disclosure Report dated May 5, 2017, you reported having between \$60,004 and \$200,000 in debt accrued over three credit cards (Chase, Bank of America, USSA) and a loan (Thrift Savings Plan). White House Spokesman Raj Shah told the Washington Post that you "built up the debt by buying Washington Nationals season tickets for playoff games for [yourself] and a 'handful' of friends." Shah said some of the debts were also for home improvements.²
- a. What was the total dollar amount of your liabilities in 2015 and 2016, respectively?
- b. What explains the meaningful increase in your liabilities between 2015 and 2016?
- c. Was Mr. Shah's characterization of the sources of your debt wholly accurate? If not, please correct any inaccuracies or omissions.
- d. Did you tell the White House that you built up the debt by buying Washington Nationals season tickets for playoff games for yourself and a "handful" of friends?
- e. For how many seasons have you purchased Washington Nationals season tickets?

¹ <https://fixthecourt.com/2018/07/bmk-fd-all>

² https://www.washingtonpost.com/investigations/supreme-court-nominee-brett-kavanaugh-piled-up-credit-card-debt-by-purchasing-nationals-tickets-white-house-says/2018/07/11/8e3ad7d6-8460-11e8-9e80-403a221946a7_story.html?utm_term=.cc28ff7d0f05

- f. How many tickets did you purchase each year? What was the overall cost and cost per ticket?
 - g. Please identify the individuals for whom you purchased baseball tickets.
 - h. For each individual listed in the previous question, what financial arrangement, if any, was agreed to with respect to your purchase and their reimbursement of the cost of the baseball tickets?
 - i. Did you purchase any baseball tickets for friends in lieu of paying them back for personal debts? If yes, please specify the source and amount of each debt.
 - j. For each of 2015 and 2016, what percentage of your credit card debt would you attribute to home improvements? Please also explain what home improvements were undertaken and when.
 - k. For each of 2015 and 2016, what percentage of the credit card and TSP debt would you attribute to the purchase of baseball tickets?
 - l. Besides baseball season tickets and home improvements, did you have any other sources of personal or household debt from 2015 through 2018? If so, please specify.
 - m. Did you have any creditors, private or otherwise, not listed in your Financial Disclosure Reports?
13. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. As noted above, the prior year, on your 2016 Financial Disclosure Report dated May 5, 2017, you reported between \$60,004 and \$200,000 in debt accrued over three credit cards and a TSP loan. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years. With respect to your debt for baseball tickets, White House spokesman Raj Shah told *The Washington Post* that your friends reimbursed you for their share of the baseball tickets and that you have since stopped purchasing the season tickets.
- a. For each debt listed in your 2015 and 2016 Financial Disclosure Reports, (i.e., each credit card and the TSP loan listed in your 2015 and 2016 Financial Disclosure Reports), please identify the date on which the debt was paid and the source of the funds for repayment.
 - b. For the individuals for whom you purchased baseball tickets, please specify the name of each individual, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.
 - n. Beyond the money reimbursed by your friends for baseball tickets, how did you pay off your remaining debt? From what source did this money come?

14. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote "Exempt."
- Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?
 - For each gift (if any) you believe is exempt from reporting, please provide a description of the gift, the approximate value, date received, the donor, and the reason you believe the gift was exempt from reporting requirements.
15. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."
- Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?
 - For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, the date and amount of any reimbursements that you received for these costs, and the reason you believe the reimbursement was exempt from reporting requirements.
16. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy.
17. Your Bank of America accounts appear to have greatly increased in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.
18. In 2006, you purchased your primary residence in Chevy Chase, MD for \$1,225,000, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during, and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.
- Did you receive financial assistance in order to purchase this home? And if so, was the assistance provided in the form of a gift or a personal loan?
 - If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and the individual(s) who provided this assistance.

- c. Was this financial assistance disclosed on your income tax returns, financial disclosure forms, or any other reporting document?
19. You have disclosed in your responses to the Senate Judiciary Questionnaire that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.
- a. How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?
 - b. Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees? If so, please describe the circumstances.
 - c. If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.
 - d. To the extent such assistance or rate reduction could be deemed a "gift," was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?
20. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?
21. Have you ever received a Form W-2G reporting gambling earnings? If so, please list dates and amounts.
22. Have you ever reported a gambling loss to the IRS? If so, please list the dates and amounts.
23. Bill Burck produced to the committee a document from your tenure in the White House Counsel's Office that references a "game of dice." After a reunion with friends in September 2001, you emailed: "Apologies to all for missing Friday (good excuse), and growing aggressive after blowing still another game of dice (don't recall). Reminders to everyone to be very, very vigilant w/r/t confidentiality on all issues and all fronts, including with spouses."
- a. Since 2000, have you participated in any form of gambling or game of chance or skill with monetary stakes, including but not limited to poker, dice, golf, sports betting, blackjack, and craps? If yes, please list the dates, participants, location/venue, and amounts won/lost.
 - b. Do you play in a regular or periodic poker game? If yes, please list the dates, participants, location/venue, and amounts won/lost.
 - c. Have you ever gambled or accrued gambling debt in the State of New Jersey?

- d. Have you ever had debt discharged by a creditor for losses incurred in the State of New Jersey?
 - e. Have you ever sought treatment for a gambling addiction?
 - f. In the email quoted above, please explain what “issues” and “fronts” you wanted your friends to be “very, very vigilant” about “w/r/t/ confidentiality, including with spouses.”
24. Is lying under oath an impeachable offense for an Article III judge?
25. Your *PHH v. CFPB* opinion said, “In order to maintain control over the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct those subordinate executive officers.”
- a. Is it true that the Constitution says nothing explicit about presidential removal power?
 - b. If Article II contemplated complete presidential control over all administration, why does Article II explicitly allow Congress to appoint inferior officers of the United States?
 - c. Is it notable that Congress has long provided for the judicial appointment of prosecutors, including prosecutors to fill certain vacancies in the position of U.S. Attorney?
26. The justices of the U.S. Supreme Court are the only federal judges not bound by the Code of Conduct for U.S. Judges, which sets rules for when judges must recuse themselves from hearing cases.
- a. Do you think the Supreme Court should adopt the Code of Conduct?
 - b. What standard would you use as a justice to resolve your own recusal issues?
 - c. Supreme Court justices rarely divulge their reasons for deciding whether or not to recuse from a given case. Do you agree with that practice, or do you believe that the justices should make clear their rationales in this context?
27. In 1992, in his dissent in *Planned Parenthood v. Casey* (1992), Chief Justice Rehnquist wrote: “We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”
- a. What do you understand Rehnquist to have meant by the “traditional approach to *stare decisis* in constitutional cases”?
 - b. Do you agree with Justice Rehnquist that it would have been within the traditional approach to *stare decisis* to overrule the opinion in *Roe*?
28. The Supreme Court upheld the essential holding of *Roe* two years ago in its most recent decision on abortion, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In *Whole Woman’s Health*, the Court demonstrated that the undue burden test is a robust check on legislatures that requires courts to examine whether abortion restrictions have

benefits that outweigh the burdens they impose and to strike them down if they do not.³ The decision explicitly holds that the test is a form of heightened scrutiny. Proper application of the test requires courts evaluate whether an abortion restriction furthers a valid state interest based on the court's independent examination of credible evidence set forward in the case. When a law's burdens outweigh its benefits, it is unconstitutional.

- a. In your view, what is the standard for evaluating whether a restriction violates a woman's constitutional right to terminate a pregnancy?
29. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), you wrote a dissent arguing that all agency actions related to security clearances should be immune from judicial review – even in cases when claims involve evidence of clear racial bias.
 - a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are they?
 30. In October 2017, the Department of Justice instructed its attorneys that Title VII's prohibition against sex-based discrimination in hiring or employment practices does not protect transgender workers. Several federal courts, however, have ruled that transgender employees are protected under Title VII.
 - a. Do you believe that transgender individuals should be considered a protected class?
 - b. If not, how does being transgender differ from recognized protected classes like gender or race?
 - c. What criteria should be used to determine new suspect classifications in equal protection?
 31. The National Labor Relations Act (NLRA) sets forth as the public policy of the United States the support of collective bargaining rights of employees in their unions with their employers.
 - a. Do you believe the long-standing precedents protecting exclusive representation should survive?
 - b. Do you believe that the mission of the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy, is constitutional?
 32. Where in the Constitution's text does it state that corporations should be treated the same as people in terms of equal protection, due process, or first amendment legal protections? Does a strict constructionist view of the Constitution permit such treatment?
 33. Many states, including Florida, have enacted laws concerning the possession or ownership of firearms by people with mental illness. Does the 2nd Amendment provide any basis for restriction of ownership or possession of firearms by people with a history of mental illness? If so, what is that basis?

³ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016).

34. Judge Easterbrook wrote: “relying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren’t commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned. A law’s existence can’t be the source of its own constitutional validity.”
- a. What are your views of Judge Easterbrook’s critique of the “common use test”?
 - b. Is there ever an instance where you would consider public safety justifications when evaluating a constitutional challenge to a gun safety law?
35. Which regulations did you work on during your time as Staff Secretary from 2003-2006?
36. Please answer the following questions regarding your work in the Bush White House, if you answer yes, please describe your role.
- a. Did you work on, provide advice on, or otherwise have involvement in legislation to limit abortion procedures?
 - b. Did you work on, provide advice on, or otherwise have involvement in hate crimes legislation or the administration’s position on pending legislation to expand federal hate crimes laws?
 - c. Did you work on, provide advice on, or otherwise have involvement in litigation designed to undermine or limit the holding in *Roe v. Wade*?
 - d. Did you work on, provide advice on, or otherwise have involvement in the Bush administration’s position on a proposed constitutional amendment defining marriage as between one man and one woman?
 - e. Did you have any involvement in the Bush administration’s use of taxpayer dollars to fund columnists to promote a proposed constitutional amendment defining marriage as between one man and one woman?
 - f. Did you work on, provide advice on, or otherwise have involvement in the issue of so-called “enhanced interrogation measures”?
 - g. Did you participate in any discussions or edits to documents related to so-called “enhanced interrogation measures” or torture or the applicability of the Geneva Convention?
 - h. Did you work on, provide advice on, or otherwise have any involvement in the issue of the detention of enemy combatants, at Guantanamo Bay or elsewhere?
 - i. Did you have any awareness of the abuses at Abu Ghraib, or similar occurrences elsewhere, before they became public knowledge?
 - j. Did you work on, provide advice on, or otherwise have involvement in leaking the identity of then-CIA agent Valerie Plame, or the subsequent coverup? Did you have any awareness of these events before they became public knowledge?
 - k. Did you work on, provide advice on, or otherwise have involvement in the drafting and passage of the Patriot Act?

- l. Did you work on, provide advice on, or otherwise have involvement in the post-9/11 domestic surveillance programs, including the NSA warrantless wiretapping and bulk phone records that came to light in December 2005? Were you aware of these programs before they became public knowledge?
- m. Did you work on, provide advice on, or otherwise have involvement in proposals to block grant Medicaid?
- n. Did you work on, provide advice on, or otherwise have involvement in discussion about the privatization of social security?
- o. Did you work on, provide advice on, or otherwise have involvement in any international climate change or control policies, including the Kyoto Protocol?
- p. Did you work on, provide advice on, or otherwise have involvement in the enactment of Executive Order 13233, which limited public access to the records of former Presidents?
- q. Did you work on, provide advice on, or otherwise have involvement in the federal government's response to Hurricane Katrina?
- r. Were you aware of corrupt activities surrounding lobbyist Jack Abramoff before they became public knowledge? Did you ever take a meeting with him?
- s. Did you work on, provide advice on, or otherwise have involvement in the decision to allow the assault weapons ban to expire? What other matters did you work on related to firearms? Were you involved in any way in speeches or other documents or meetings related to the *Heller* case?
- t. Did you work on, provide advice on, or otherwise have involvement in efforts to limit race-based or gender-based affirmative action through legislative, executive, or judicial action?
- u. Did you work on or provide any advice the Bush administration's amicus briefs in the 2003 University of Michigan equal opportunity in higher education cases *Grutter* and *Gratz* in which the administration took the position that race-conscious considerations were unconstitutional?
- v. Did you work on or provide any advice on the Bush administration's amicus brief in the 2006 *Parents Involved in Community Schools* case in which the administration intervened on behalf of white parents to oppose the limited use of race to help diversify public schools in Seattle and Louisville?
- w. Did you work on any other cases, policies, or matters that aimed to restrict the use of race-conscious criteria in any federal, state, or local contracting, employment, or educational programs?
- x. Did you work on any cases, policies, or matters in which you advanced the argument that native Hawaiians or other indigenous people were not entitled to the same legal and constitutional protections as Native Americans?

- y. Did you work on any cases, policies, or matters in which you advanced arguments consistent with your statement in a 1999 press interview that within the next 10-20 years courts would declare “we are all one race in the eyes of government”?
- z. Did you work on, provide advice on, or otherwise have involvement in the U.S. Attorney firings that were the subject of a September 2008 Department of Justice OIG report?
 - aa. Did you work on, provide advice on, or otherwise have involvement in the systems of politicized hiring at the Department of Justice that were the subject of three DOJ OIG reports in June and July of 2008?
 - bb. Did you work on, provide advice on, receive any documents or communications about, or otherwise have involvement in issues pertaining to Purdue Pharmaceuticals, Giuliani Partners, or the Oxycontin investigation?

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**Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of the
United States Supreme Court Questions for the Record**

**Questions for Professor Peter Shane, Professor Law Moritz College of Law, Ohio State
University**

Submitted September 10, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. If a sitting president is immune from criminal investigation, what potential issues would this raise with respect to the preservation of evidence, either documentary or testimonial?

**Senator Chuck Grassley
Questions for the Record**

**Judge Brett Kavanaugh
Nominee, Associate Justice of the Supreme Court of the United States**

1. I'd like to give you a chance to respond to some of the issues raised last week regarding contraceptives and abortion rights.
 - a. When responding to Senator Cruz's question about your opinion in *Priests for Life v. United States Department of Health & Human Services*, you said: "It was a technical matter of filling out a form, in that case with—that—they said filling out the form would make them complicit in the provision of the abortion-inducing drugs that they were—as a religious matter, objected to." Why did you use the term "abortion-inducing drugs"?

RESPONSE: That was the position of the plaintiffs in that case, and I was accurately describing *the plaintiffs'* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only when recount the plaintiffs' own assertions.

- b. Senator Blumenthal and others on the Committee asked you about a March 24, 2003 email in which you addressed legal scholars' views of *Roe v. Wade*. Please explain the context of that email. In particular, did you express any personal view in that email on whether *Roe v. Wade* was "settled law"?

RESPONSE: That email commented on the views of legal scholars. It did not describe my own views.

2. Last Tuesday, as the Committee recessed for a break, a man approached you and extended his hand as you left the hearing room. Media reports later identified the man as Fred Guttenberg, the father of a shooting victim from Marjory Stoneman Douglas High School in Parkland, Florida. Please explain your reaction to Mr. Guttenberg.

RESPONSE: As I was leaving the hearing room for a recess last Tuesday, a man behind me yelled my name, approached me from behind, and touched my arm. It had been a chaotic morning with a large number of protestors in the hearing room. As the break began, the room remained noisy and crowded. When I turned and did not recognize the man, I assumed he was a protestor. In a split second, my security detail intervened and ushered me out of the hearing room.

In that split second, I unfortunately did not realize that the man was the father of a shooting victim from Parkland, Florida. Mr. Guttenberg has suffered an incalculable loss. If I had known who he was, I would have shaken his hand, talked to him, and expressed my sympathy. And I would have listened to him.

3. During the hearings last week, Senator Leahy asked you about your role in the nomination of Judge William Pryor to the U.S. Court of Appeals for the Eleventh Circuit. Since your hearing,

the media has reported on emails you wrote regarding that nomination while in the White House Counsel's Office, as well as the nomination of Judge Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit.

During your time in the White House Counsel's Office, were you the person primarily responsible for handling either of these nominations? If not, did you work with others in the White House Counsel's Office to support these nominations? If you did support these nominations, what sort of work did you perform?

RESPONSE: As I stated in response to written questions after my 2004 hearing, it is fair to say that all of the attorneys in the White House Counsel's Office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations. As I have accurately explained before, I was not the primary person in the Counsel's Office assigned to Judge Pryor's or Judge Pickering's nomination.

4. Senator Leahy asked you about former Judiciary Committee staff member Manuel Miranda. Senator Leahy asked whether you knew that Miranda took files without authorization from Democrats on the Senate Judiciary Committee. When you received these emails, did you know that some of the materials you received from Mr. Miranda had been taken from the files of Senate Democrats without their authorization?

RESPONSE: No.

5. During the hearings last week, Senator Leahy asked you about a September 17, 2001 email you sent to John Yoo, an attorney in the Office of Legal Counsel at the Department of Justice. In the email, you asked about legal research regarding potential surveillance techniques.
 - a. Please explain the context of that email.

RESPONSE: As I explained at the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office. The email on September 17, 2001, mere days after the attacks, was sent in that context.

- b. Please explain that email in light of your testimony to the Committee in 2006 regarding the National Security Agency's (NSA) Terrorist Surveillance Program.

RESPONSE: As I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the Terrorist Surveillance Program, or TSP until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I understand it, the September 17, 2001, email was not referring to the TSP, which did not exist at that time.

The Honorable Jeff Flake
Questions for the Record
U.S. Senate Judiciary Committee
“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States”
September 10, 2018

1. Should a president be able to use his authority to pressure executive or independent agencies to carry out his directives for purely political purposes?

RESPONSE:

No one is above the law.

Many of the greatest moments in Supreme Court history have come when the independent judiciary has stood up for the principle that no one—not even the president—is above the law. Frequently, these moments have occurred during times of political crisis. For example, the *Youngstown Steel* case arose during the Korean War. President Truman seized steel mills to aid the war effort. His action was well-intentioned, but the Supreme Court stepped in and said the President lacked authority to seize private property. As Justice Jackson’s landmark concurring opinion in that case made clear, the Commander-in-Chief remains subject to both the Constitution and the laws passed by Congress, even in the national security context.

Another example of this principle is *United States v. Nixon*, a unanimous decision authored by Chief Justice Burger and joined by two other Nixon appointees holding that President Nixon had to produce the tapes. Likewise, in *Clinton v. Jones*, two of President Clinton’s appointees to the Court ruled against him, holding that a sitting president does not have the power to delay civil litigation against him in his personal capacity for unofficial acts.

The importance of enforcing constitutional and statutory constraints on the Executive also arose in *Hamdan v. United States*, in which I wrote the opinion for the D.C. Circuit. That military commission prosecution was initially brought by President George W. Bush’s Administration against Salim Hamdan, an associate of Osama bin Laden’s. Hamdan challenged his conviction on the ground that it violated *ex post facto* principles. Although the case was a marquee prosecution for the Bush Administration in the war on terror—and was very important to the President who appointed me to the D.C. Circuit—I concluded that Hamdan’s argument was correct, and I wrote an opinion vacating his conviction.

For courts to have the authority to stand up to the other branches, it is critical that they maintain independence. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

The independence of the judiciary is critical to the confidence the American people have in our system of government. As you have eloquently said, “[judicial] independence goes both ways,” which is why “[e]lected politicians shouldn’t seek to interfere with the judicial power and the courts shouldn’t interpose themselves into political affairs.” As a federal judge, I appreciated how you explained during the hearing last week that you “certainly do not think it is in our interest to bring the element of politics any closer to the judiciary.” That is why I cannot comment on issues likely to come before me or on current political controversies, in keeping with the nominee precedent from all eight sitting Supreme Court Justices. Indeed, this is why, as a judge, I no longer vote in elections.

In my experience serving in the Executive Branch, I worked with countless men and women who were deeply dedicated to good government and to serving the public with the highest integrity. These men and women worked early mornings and late nights to serve the American people and give them the best government possible. Throughout that experience, my colleagues and I lived by the principle that everything the Government does must be based on sound legal principles and a legitimate factual basis. Pure politics is never enough. That’s a principle I have lived by throughout my entire career, and it is one I will continue to live by whether I continue as a circuit judge or am confirmed to the Supreme Court. I have never and will never bow to public pressure from any president, any Senator, or any other political actor—and I am confident that my colleagues in the judiciary will never do so either.

Nomination of Brett Kavanaugh to be Associate Justice of the Supreme Court
Questions for the Record
Submitted September 10, 2018

QUESTIONS FROM SENATOR FEINSTEIN

1. You have referred to *Roe v. Wade* as “settled law.”
 - a. **Can the Supreme Court overrule a longstanding decision even if it is considered settled law?**
 - b. **Was *Abood v. Detroit Board of Education* (1977) settled law before 2016?**
 - c. **Was *Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911) settled law before 2006?**
 - d. **Was *Michigan v. Jackson* (1986) settled law before 2008?**
 - e. **Was *Austin v. Michigan Chamber of Commerce* (1990) settled law before 2009?**

RESPONSE: As discussed at the hearing, “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would respect the law of precedent given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

2. When we met in my office, I raised concerns about your potentially being the fifth vote to overturn *Roe*. You said that it is important to be aware of the real-world implications of Court decisions. However, you have never lived in a world where women did not have safe, legal reproductive care.
 - a. **Please explain your understanding of what it means for a woman to be able to control her reproductive life.**
 - b. **What is your understanding of how women are being affected in states in which access to reproductive care has been curtailed?**

RESPONSE: As I discussed during the hearing, I understand the importance that people attach to *Roe v. Wade*, the depth of feelings about the decision, and the real-world importance of the issue. Both *Roe* and *Casey* are precedents of the Supreme Court entitled to respect under the law of precedent. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including in *Casey*, which specifically analyzed the stare decisis factors at great length and is itself a precedent on precedent.

3. If *Roe v. Wade* were overruled, and the decision whether to permit abortions was left to the states:
- a. **Should there be an exception on abortion bans to protect the health or life of the mother?**
 - b. **Would an abortion ban without such an exception be constitutionally permissible?**
 - c. **Should there be an exception on bans on abortion in cases of rape and incest?**
 - d. **Would an abortion ban without such an exception be constitutionally permissible?**

RESPONSE: As a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

4. In a 2017 speech at the American Enterprise Institute, you described Justice Rehnquist as your “first judicial hero.” You said that Justice Rehnquist “clearly wanted to overrule *Roe* and *Casey* and did not have the votes.” You also praised Justice Rehnquist for “stemming the tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” (9/18/2017 Speech at AEI – From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist).
- a. **What are the judicially created “unenumerated rights” you were referring to?**

RESPONSE: The *Glucksberg* case involved the claimed right to assisted suicide. As I discussed at the hearing, it is well-settled that the Constitution protects unenumerated rights. This speech was intended to spell out the consequential impact of Chief Justice Rehnquist’s work, by describing “five different areas of his jurisprudence, where he had helped the Supreme Court achieve . . . a common sense middle ground that has stood the test of time” I did not discuss particular unenumerated rights in my speech. Rather, in describing Chief Justice Rehnquist’s important contributions to the law with *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agree with Justice Kagan that the decision provides the primary test that “the Supreme Court has relied on for forward-looking future recognition of unenumerated rights”—and *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

5. In that same speech, you also said: “In case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. Agree with Rehnquist analysis. Rehnquist makes a good point here. Rehnquist destroys the majority’s reasoning here. At that time, in 1987, Rehnquist had been on the Court for 15 years, almost all of it as an associate justice. And his opinions made a lot of sense to me. In class after class, I stood with Rehnquist. That often meant in the Yale Law School environment of the time that I stood alone. Some things don’t change.”

a. Which Justice Rehnquist dissents did you agree with in law school?

RESPONSE: Please see my response to Question 4. My speech specifically noted that “I do not agree with all of [Chief Justice Rehnquist’s] opinions.” As I explained at the hearing, principles of judicial independence make it inappropriate for me, like Justice Kagan, to give a thumbs up or thumbs down on particular opinions. That said, the precedential holdings of the Supreme Court are those contained in majority opinions, not dissents.

b. Was Justice Rehnquist’s dissent in *Roe v. Wade* one of the dissents with which you agreed in law school?

RESPONSE: See my answer to Question 5.a.

c. If so, has your view changed since then?

RESPONSE: See my answer to Question 5.a.

d. Was your statement that you “stood alone” and “some things don’t change” an acknowledgement that your views are outside the mainstream?

RESPONSE: No.

6. You have called Justice Scalia one of your “heroes” in a number of speeches over the years. In one of these speeches from 2016, you praised Justice Scalia’s view that “courts have no legitimate role . . . in creating new rights not spelled out in the Constitution.” You asked the audience to think about Justice Scalia’s dissent in *Casey* on abortion. (6/2/2016, “Remembering Justice Scalia,” George Mason University). In *Casey*, Justice Scalia said “the issue is whether [the right to abortion] is protected by the Constitution of the United States. I am sure it is not.” (*Casey*, at 980).

a. Is the right to decide whether to continue a pregnancy a Court created right?

RESPONSE: In *Roe v. Wade*, the Supreme Court grounded a right to abortion in its understanding of “the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action.” 410 U.S. 113, 153 (1973). The holding of *Roe* has been reaffirmed many times since 1973, including in *Casey*, and is entitled to respect under the law of precedent. *Casey* is precedent on precedent. The reference in my speech set forth above merely attempted to summarize Justice Scalia’s jurisprudence in certain areas.

b. What “new rights not spelled out in the Constitution” do you believe the Court has created?

RESPONSE: This reference in my speech set forth above merely attempted to summarize Justice Scalia’s jurisprudence in certain areas.

7. Even if *Roe v. Wade* is not completely overruled, the “undue burden” test from *Planned Parenthood v. Casey* might be applied in a manner that severely restricts access to reproductive care.

a. What’s the practical difference to women if *Roe* is not overruled but gutted?

RESPONSE: *Roe v. Wade* is a precedent of the Supreme Court entitled to respect under the law of precedent. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including, most recently, in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. ____, 136 S.Ct. 2292 (2016). *Casey*, moreover, specifically analyzed the stare decisis factors at great length in reaffirming *Roe* and is itself a precedent on precedent. As a nominee, it would not be proper to speculate about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court.

b. What has been the practical impact of the undue burden test on women’s access to reproductive care in states with strict limits on abortion?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their issue in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

8. In an interview with CNN, Senator Graham said about you and *Roe*, “there is a process to overturn a precedent and I think he understands that process.” (Graham on CNN State of the Union, 9/2/18).

a. Was *Roe* discussed at your mock hearings in preparation for your nomination hearing?

RESPONSE: In preparation for the hearing, various people, including Senators, Administration personnel, and former law clerks provided advice on a range of legal matters. While I received a wide range of advice, the answers I gave at the hearing were my own.

b. What were you advised to say?

RESPONSE: Please see my response to Question 8.a.

9. One of your former law clerks wrote that when it comes to “enforcing restrictions on abortion, no court-of-appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh.” (Sarah E. Pitlyk, *Judge Brett Kavanaugh’s Impeccable Record of Constitutional Conservatism*, National Review (July 3, 2018))

a. Is that an accurate assessment of your record? If not, how would you qualify the statement?

RESPONSE: I speak for myself. I am an independent judge and have been for 12 years. My opinions show that independence.

10. In your opening statement on Tuesday, September 4, you said you would “interpret the Constitution as written, informed by history and tradition.” As you know, the history and tradition of this country has disfavored women, minorities, Native Americans, immigrants, LGBT people, individuals with disabilities, and many more.

a. When you said “history and tradition,” to whose history and tradition were you referring?

RESPONSE: The Supreme Court has repeatedly stated that the Constitution “must be interpreted according to its text, by considering history, tradition, and precedent . . .” *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

b. How does your view of “history and tradition” take into account the fact that classes of people have historically been disfavored?

RESPONSE: Please see my response to Question 10.a.

c. Does the “history and tradition” of the United States include the decision on who to marry?

RESPONSE: Please see my response to Question 10.a.

d. Does the “history and tradition” of the United States include a woman’s right to use contraceptives?

RESPONSE: Please see my response to Question 10.a.

e. Does the “history and tradition” of the United States include a woman’s right to choose whether to terminate a pregnancy?

RESPONSE: Please see my response to Question 10.a.

11. In *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the Supreme Court held that states cannot prohibit the use of contraceptives because doing so would violate a constitutional right to privacy. Senator Harris asked whether you believed that *Griswold* and *Eisenstadt* were correctly decided. You responded that you have “no quarrel” with Justice White’s concurrence in *Griswold*.

a. Is *Griswold* settled law?

b. Is *Eisenstadt* settled law?

c. What did you mean when you said you have “no quarrel” with Justice White’s concurrence in *Griswold*? Did you mean you agree with his concurrence, or something else?

RESPONSE: As I explained at the hearing, “Justice White’s concurrence in *Griswold* was a persuasive application of *Pierce* [*v. Society of Sisters*, 268 U.S. 510 (1925)] and *Meyer* [*v. Nebraska*, 262 U.S. 390 (1923)].” At the hearing, I said that I agreed with Chief Justice Roberts and Justice Alito about those cases.

12. Does a pharmacist have a constitutional right to refuse to fill a prescription for contraception on the basis of the pharmacist’s religious beliefs?

RESPONSE: This subject involves an area of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

13. You testified: “Being a good judge means paying attention to the words that are written, the words of the Constitution, the words of the statutes that are passed by Congress. Not doing what I want to do, not deferring when the executive rewrites the laws passed by Congress, but respect for the laws passed by Congress, respect for the rule of law, the words put into the Constitution itself.”

a. Where in the text of the First Amendment text are businesses mentioned?

RESPONSE: As I said at the hearing, in my decision in *United States Telecom Association v. FCC*, I followed the Supreme Court’s *Turner Broadcasting* decision. Specifically, I explained in that opinion that “[t]he Supreme Court’s landmark decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner Broadcasting II*), established that those foundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment.” 855 F.3d 381, 427 (D.C. Cir. 2017). *Turner Broadcasting* is a business. The Supreme Court has applied the First Amendment to businesses in many other cases. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

b. What in U.S. history demonstrates that the founding fathers intended the First Amendment to recognize religious beliefs of companies and businesses?

RESPONSE: Under existing Supreme Court precedent, some constitutional rights apply to businesses. I am bound to follow those precedents subject to the rules of precedent. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

14. The Affordable Care Act (ACA) plays a vital role for millions of Americans in this country. Thanks to the ACA, people across the nation can no longer be denied coverage by insurance companies because of preexisting conditions. Families throughout the country enjoy the security and certainty that comes with having quality health coverage. Jackson Corbin made precisely these points in his testimony on September 7, when he said: “If you destroy protections for pre-existing conditions, you will leave me and all the kids and adults like me without care or without the ability to afford our care — all because of who we are.” (Corbin Testimony at p. 3)

a. Do you believe Congress has the authority to enact legislation that prevents discrimination based on health status?

RESPONSE: As I explained in *Seven-Sky v. Holder*, 661 F.3d 1, 52 (2011), “[t]he elected Branches designed [the Affordable Care Act] to help provide all Americans with access to affordable health insurance and quality health care, vital policy objectives.” I further noted that “[c]ourts must afford great respect to that legislative effort and should be wary of upending it.” *Id.* at 53. Nevertheless, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment further on a matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

- b. **At any point before or after your nomination to the Supreme Court, has anyone from the Trump Administration discussed with you your views on the Affordable Care Act or Congress's ability to regulate the health insurance market more generally? If so, who and what was discussed?**

RESPONSE: I was asked questions similar to those posed by the Senators on the Senate Judiciary Committee during preparation for the hearing and during preparation for meetings with individual Senators. I have given no hints, forecasts, or previews, and I have made no commitments.

- c. **During your nomination hearing, you spoke frequently of the fact that you were aware of or considered "real-world consequences" of judicial decisions. Have you ever experienced being denied coverage for a preexisting condition? Have you ever been denied health insurance? Have you or your family ever been uninsured?**

RESPONSE: No, as to me and my immediate family (my wife and daughters). I do not know as to other members of my extended family.

- d. **If not, what steps have you taken to understand what it would be like if the Affordable Care Act were struck down?**

RESPONSE: Please see my response to Question 14.a.

15. In a September 2017 speech at the American Enterprise Institute (AEI), you praised decisions authored by Chief Justice Rehnquist striking down federal statutes on the grounds that they were beyond Congress's Commerce Clause power. One of those decisions, *United States v. Lopez*, found the Gun-Free School Zones Act unconstitutional. The other, *United States v. Morrison*, held that parts of the Violence Against Women Act (VAWA) providing a federal civil remedy for victims of gender-motivated violence were unconstitutional. At AEI you said that these two decisions "were critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power."

- a. **Why was it "critically important" for the Supreme Court to strike down gun restrictions?**

RESPONSE: As explained in my answers to Questions 4 and 5, this speech was intended to spell out the consequential impact of Chief Justice Rehnquist's work by describing "five different areas of his jurisprudence."

- b. **Why was it "critically important" for the Supreme Court to strike down the ability for victims of sexual violence to sue for civil damages in federal courts?**

RESPONSE: Please see my response to Question 15.a.

- c. In light of your emphasis on considering real-world consequences, what do you believe are the real-world consequences of your narrow view of the Commerce Clause?**

RESPONSE: Please see my response to Question 15.a.

- d. Specifically, what has been the impact of striking down that section of the Violence Against Women act?**

RESPONSE: Please see my response to Question 15.a.

- e. What has been the impact of striking down the Gun Free Schools Act?**

RESPONSE: Please see my response to Question 15.a.

16. You also connected *Lopez* and *Morrison* to the Supreme Court's 2012 decision concerning the Affordable Care Act, *NFIB v. Sebelius*, saying: "Although it is not often the first thing discussed about [*NFIB v. Sebelius*], we do remember that a five-justice majority said that the Commerce Clause did not give Congress authority to require citizens to purchase a good or service." (*From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, Speech at AEI (Sept. 18, 2017))

- a. Why did you think it is important to highlight that decision?**

RESPONSE: The *NFIB* case is of course an important precedent.

- b. Do you believe the Court was correct in *NFIB v. Sebelius* in concluding that Congress does not have authority under the Commerce Clause to regulate health care?**

RESPONSE: As I explained at the hearing, principles of judicial independence make it inappropriate for me, like Justice Kagan, to give a thumbs up or thumbs down on particular opinions.

17. In your dissent in *Seven-Sky v. Holder*, a 2011 case concerning the constitutionality of the Affordable Care Act's individual mandate, you wrote the following: "Under the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." (*Seven-Sky v. Holder*, 661 F.3d 1, 50 n. 43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting))

- a. On what basis did you conclude that the President is the ultimate arbiter of whether a law "that regulates private individuals" is constitutional?**

RESPONSE: As I said at the hearing, footnote 43 of my opinion in *Seven-Sky v. Holder* refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, which says the executive branch has the "exclusive authority and

absolute discretion whether to prosecute a case.” And in *Heckler v. Chaney*, the Supreme Court said this principle applies to civil enforcement as well. The limits of prosecutorial discretion are uncertain.

b. Where in the Constitution is the President given this authority?

RESPONSE: In *United States v. Nixon* and *Heckler v. Chaney*, the Supreme Court recognized the power of prosecutorial discretion.

c. Has this conclusion ever been adopted by a majority in any Supreme Court decision? If so, which decision?

RESPONSE: Yes. In the criminal context, the Supreme Court has stated that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” *United States v. Nixon*, 418 U.S. 683, 693 (1974). As I said at the hearing, the Supreme Court recognized that the doctrine of prosecutorial discretion applies in the civil context in *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985).

d. Is there any constitutional limit on the ability of a President to undermine or otherwise refuse to enforce duly enacted legislation?

RESPONSE: As I have explained, those limits are debated.

18. You have expressed opinions in the past about immunity of sitting presidents from investigation, indictment, and prosecution. Although you were asked about these issues during your hearing, your answers were unclear. Accordingly, please answer the following questions with a simple yes or no:

- a. Do you believe that the Constitution prohibits the criminal investigation of a sitting president?
- b. Do you believe that a sitting president can be required to respond to a grand jury subpoena consistent with the Constitution?
- c. Do you believe that the Constitution prohibits the indictment of a sitting president?
- d. Do you believe that the Constitution prohibits the prosecution of a sitting president?

RESPONSE: I discussed these issues at length at the hearing.

19. You have written that “the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even before a charge or trial.” (*In re Aiken County*, 725 F.3d 255 (D.C. Cir.2013))

a. Do you believe the President’s pardon authority is subject to any limits?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

20. In *Clinton v. Jones*, 520 U.S. 681 (1997), the Supreme Court said it is “settled” that a President’s conduct – before or while in office – can be investigated. The Court cited *U.S. v. Nixon* and said that a court may require a President to cooperate in the investigation of possible misconduct.

a. Was *Clinton v. Jones* correctly decided?

b. Have any Supreme Court rulings called it into question?

RESPONSE: *Clinton v. Jones* is a precedent of the Supreme Court entitled to all the respect due under the law of precedent.

21. You have stated: “it makes no sense at all to have an independent counsel looking at the conduct of the President.” (Georgetown Panel – Independent Counsel Statute Failure, Feb. 19, 1998)

a. Do you stand by that statement?

RESPONSE: As I discussed at the hearing, Congress decided not to reauthorize the independent counsel statute in part because of the significant flaws in the statute. As I also explained at the hearing, the appointment of an independent counsel under that now-expired statute is distinct from the appointment of a special counsel under separate statutory authority and Executive Branch regulations. I have repeatedly stated my approval of the general system of special counsels.

22. You have argued that “an independent counsel should never be appointed to prosecute the President because a sitting President should not be subject to criminal indictment.” (The President and the Independent Counsel, Georgetown Law Journal, July 1998)

a. Do you stand by that statement?

RESPONSE: Please see my response to Question 18.

23. You have said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that at all.” (Independent Counsel Structure & Function, Georgetown Law Journal Symposium, Feb. 19, 1998.)

a. Do you stand by that statement?

RESPONSE: As I said at the hearing, no one is above the law, including a President. The primary dispute is over whether a President may be criminally prosecuted while he is in office or whether such a prosecution should instead be deferred until after a President leaves office. For 45 years, the Department of Justice has stated that a sitting President may not be indicted while in office. Regardless, the House and the Senate also possess the impeachment and removal powers.

24. During my questioning, I pointed out that when you worked in the Office of Independent Counsel Ken Starr investigating President Clinton, you argued for aggressive questioning of the President. But you have also taken the opposite position. For example, in a panel discussion in 1998, you said: “If the President were the sole subject of a criminal investigation, I would say no one should be investigating that. That should be turned over immediately to the Congress.” (Video, *Independent Counsel Structure & Function*, Georgetown Law Journal Symposium (Feb. 19, 1998))

In your response, you indicated that the events of September 11, 2001, were what caused you to change your mind about investigating the President. You said: “What changed was September 11th. That is what changed. So after September 11th, I thought very deeply about the presidency, and I thought very deeply about the independent counsel experience, and I thought very deeply about how those things interacted.”

But you said that “no one should be investigating” the President on February 19, 1998—three-and-a-half years before September 11, 2001.

a. What changed your mind before September 11th when you argued against the President being the sole subject of a criminal investigation in 1998?

RESPONSE: I have described my views at that time in my writings and at the hearing.

25. As discussed above, in February 1998, after you had left the Independent Counsel’s Office, you publicly expressed serious concerns about having an independent counsel conduct an investigation into a sitting President. You stated that Congress should be the body investigating the President. Yet you returned to work for the Independent Counsel in April or May 1998.

a. Why did you return to work for the Office of the Independent Counsel?

RESPONSE: I returned to the Independent Counsel’s Office at the request of Judge Starr to assist the Office, including to argue a case in the Supreme Court in June 1998.

26. You have said that the president should have “absolute discretion” to decide when to appoint a special prosecutor, and that any such prosecutor should be nominated by the President and confirmed by the Senate. (Georgetown University Law Center, Feb. 19, 1998)

- a. **If the president is a possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**
- b. **If the president’s close associates are the possible target or subject of an investigation, does he still have “absolute discretion” to select the person who will investigate?**

RESPONSE: My comments in 1998 were policy proposals, not statements of law. Given my position now as a sitting judge and nominee, it would be inappropriate for me to comment on these questions.

27. During your White House tenure, many of President Bush’s signing statements specifically asserted that he would interpret laws “consistent with the constitutional authority of the President to supervise the unitary executive branch” and would disregard laws he deemed inconsistent. I asked you during your hearing about one such statement that President Bush issued regarding the Detainee Treatment Act of 2005, reserving the President’s right to disregard that law’s ban on torture if it interfered with his constitutional authorities as President. (Signing Statement, H.R. 2863, Dec. 30, 2005)

- a. **You said at your hearing that this signing statement would have crossed your desk when you were Staff Secretary, and you recalled that “there was debate” about it. What position did you take in that debate?**

RESPONSE: As discussed at the hearing, I do not specifically remember any comments I made or the details of who within the government took what position, but I do recall that there was internal debate and controversy about the signing statement. The White House Counsel ordinarily would have been in charge of the final recommendation for signing statements. As Staff Secretary, my role was not to replace the legal or policy advisors, but rather to make sure that the President had the benefit of the views of advisors, as any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

- b. **At that time, what did you know about interrogation techniques being used on detainees or combatants or about memos written by the Office of Legal Counsel regarding interrogation techniques?**

RESPONSE: As I explained during the hearing, I was not read into the program involving the controversial enhanced interrogation techniques, and I was not involved in crafting the legal memos justifying that program. Your report for the Intelligence Committee and the DOJ Office of Professional Responsibility report confirm that point. I became aware of the program and the memos when they were publicly disclosed in news reports in 2004.

c. Was the Bush Administration planning to disregard any of the provisions of the Detainee Treatment Act?

RESPONSE: As I stated during the hearing, I recall that there was internal debate and controversy about a signing statement for the Act.

d. Did the Bush Administration ever disregard requirements of the Detainee Treatment Act of 2005?

RESPONSE: See my answer to Question 27.b.

28. You have written in opinions, and said in public appearances, that the President may decline to enforce a law that he thinks is unconstitutional “even if a court has held or would hold the statute constitutional.” (*Seven-Sky v. Holder*, 661 F.3d 1 (2011))

a. Did President Bush ever exercise this authority?

RESPONSE: This portion of the footnote referred to prosecutorial discretion. I believe President Obama relied in part on the power of prosecutorial discretion in the DACA program.

b. If so, what was your role in advising on this authority when it was exercised?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

c. Do you still believe the President has this authority?

RESPONSE: Prosecutorial discretion has been recognized by the Supreme Court as part of the President’s executive authority. The extent of that discretion is the subject of litigation.

d. Are there any limits to the President’s authority to decline to enforce a law he thinks is unconstitutional?

RESPONSE: As I noted in *In re Aiken County*, “it has occasionally been posited that the President’s power not to initiate a civil enforcement action may not be entirely absolute (unlike with respect to criminal prosecution) and thus might yield if Congress expressly mandates civil enforcement actions in certain circumstances,” 725 F.3d 255, 264 n.9 (2013). Whether there are limits on the President’s authority is the subject of pending litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

e. If the President and the Supreme Court disagree, which branch's interpretation is controlling?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. As I also stated at the hearing, when the Supreme Court issues a ruling prohibiting the President from doing something or ordering the President to do something, the Supreme Court's word is the final word, subject of course to a constitutional amendment or a subsequent overruling by the Court. See *Cooper v. Aaron*, 358 U.S. 1, 23 (1958).

29. The Committee has an email from your time in the White House where Deputy National Security Adviser Steve Hadley asks for your review of talking points defending the Administration's position on torture. The talking points read: "the President has never considered authorizing torture under any circumstances." (Email from Harriet Miers to Brett Kavanaugh, Fw: let me know when you get this...thx (June 12, 2004)). This email asking for your input was sent four days after the *Washington Post* reported on legal memos justifying the use of brutal enhanced interrogation techniques

a. Did you respond to this email? Did you provide any feedback on these talking points? If so, what was your response or feedback?

RESPONSE: As noted, I became aware of the program and the memos when they were publicly disclosed in news reports. I do not recall what reaction, if any, I had in response to the talking points that you mention from more than 14 years ago. As Staff Secretary, my usual role would have been to send draft talking points around for comment and input from other staff members.

b. At that time, what did you know about these memos or the interrogation techniques being considered by the United States?

RESPONSE: Please see my response to Question 29.a.

c. If you did not know about the OLC memos or the interrogation techniques, why were you being asked to review talking points?

RESPONSE: I was Staff Secretary. Please see my response to Question 29.a.

d. The talking points stated that the Bush Administration "has never considered authorizing torture." Did you believe it was accurate at the time?

RESPONSE: Please see my responses to Question 29.a and 29.b.

e. Knowing what you know today, do you believe that this was accurate?

RESPONSE: Please see my responses to Questions 29.a and 29.b.

30. On November 1, 2001, President Bush issued Executive Order 13233, which significantly restricted and slowed the release of records under the Presidential Records Act by giving sitting and former presidents the ability to delay the release of records indefinitely. (It has since been rescinded.) Some of the limited number of documents we have received from your time in the White House Counsel's Office suggest that you were involved with this executive order.

a. Please describe the nature and extent of your work or advice on this executive order or related issues.

RESPONSE: I worked on it. While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

b. What is the justification for withholding from public view presidential records that are not protected by a legitimate claim of executive privilege?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

c. The Presidential Records Act was enacted in 1978 to enhance the public's access to presidential records. Do you believe President Bush's executive order served that purpose?

RESPONSE: The order speaks for itself.

31. Congress has established several independent agencies, such as Security Exchange Commission and Federal Communications Commission, which are important for enforcing our laws and safeguarding Americans' rights. Congress requires the President to have good cause to remove the heads of these agencies to insulate them from political interference. You objected to this limit on the President's power and struck down the "for cause" requirement in a case involving the Consumer Financial Protection Bureau. (*PHH Corp. v. CFPB*, 839 F.3d 1 (2016))

The *en banc* D.C. Circuit disagreed and overturned your decision, holding that the CFPB's for-cause provision was constitutional under *Humphrey's Executor v. United States*, a 1935 Supreme Court decision that established the constitutionality of independent agencies.

a. In light of this, how can you contend that your opinion was consistent with *Humphrey's Executor*?

RESPONSE: As I explained at the hearing, I concluded in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 8 (2016), that the Consumer Financial Protection Bureau was unconstitutionally structured. As a single-Director independent agency exercising substantial executive authority, the Bureau was "the first of its kind and a historical anomaly." *Id.* at 17. In light of the historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, I concluded that *Humphrey's Executor* could not be stretched to cover the Bureau's novel agency structure. *Id.* at 8.

b. The CFPB was designed to protect consumers. How did your opinion in this case protect consumers?

RESPONSE: My opinion enforced the requirements of the Constitution as I understood them in light of Supreme Court precedent. My opinion in the *PHH* case would not have halted the CFPB's ongoing operations to protect consumers or otherwise fulfill its statutory mission. My opinion would have made the CFPB director removable for cause, rather than at will, and left the Bureau able to continue its duties.

c. What is the real-world impact of this decision?

RESPONSE: The impact of my dissenting opinion, if adopted, would have been to make the CFPB director removable at will, rather than for cause. The remainder of the statute would have remained in place.

d. What do you believe would be the real-world impact of allowing a President to fire heads of independent agencies at will?

RESPONSE: Please see my answer to Question 31.c.

32. You wrote in your dissent that the CFPB’s single-Director structure “threatens individual liberty more than the traditional multi-member structure does.”

a. What individual liberty is threatened?

RESPONSE: As I explained in my opinion, in the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head. *See PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 183 (2018) (Kavanaugh, J., dissenting). A multi-member structure helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty. *Id.*

b. Does the individual liberty you are referencing refer to financial services providers?

RESPONSE: It refers to anyone affected by the actions of the CFPB.

c. Where in the statute is this interest for financial service providers outlined?

RESPONSE: Please see my answer to Question 32.b. As relevant here, my decision was based on the Constitution as interpreted by Supreme Court precedent.

d. Where in the Constitution is there language applying individual liberty rights to companies?

RESPONSE: The Supreme Court has explained, including in cases involving entities rather than individuals, that “[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) (internal quotation marks and citation omitted).

33. The *en banc* majority decision in *PHH* stated that *Morrison v. Olson* “remains valid and binding precedent.”

a. Do you agree with that statement?

RESPONSE: My dissent in *PHH* speaks for itself.

34. Throughout his administration, President George W. Bush frequently issued signing statements reserving the right not to enforce laws or portions of laws he believed encroached on the President's constitutional authority. According to Professor Peter Shane, in President Bush's first six years in office, he "raised nearly 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his 42 predecessors combined." (Peter M. Shane, *Madison's Nightmare: Executive Power and the Threat to American Democracy* (2009))

a. During your time in the White House Counsel's office, were you involved in any of these statements?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

b. Which ones and what was your involvement?

RESPONSE: While working in the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy, and for several years, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. I do not recall my work or involvement in all of these matters.

35. Jay Bybee was nominated for an open seat on the Ninth Circuit and confirmed to that position by the Senate in March 2003, during your time in the White House Counsel's office.

- a. Did you recommend him for the seat? If so, why?**
- b. What role did you play in his confirmation process?**
- c. At the time, were you aware of Mr. Bybee's view on executive authority or the "unitary executive"?**
- d. Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos that he had authored or signed regarding the power to transfer terrorists, interrogation of combatants or detainees, or the sharing of grand jury information under the PATRIOT Act)?**

- e. **Did you learn about the existence of any of these memos before his confirmation by the Senate? If not, when did you first become aware of these memos?**
- f. **Do you believe that the Senate should have known about these memos and had access to all information relevant to Mr. Bybee's involvement in these issues before it confirmed him? If not, why not?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was responsible for district court nominations from certain states and circuit court vacancies were handled as they arose. Judge Bybee's nomination was not one of the nominations that I primarily was assigned to during my service in the White House Counsel's Office. While I do not have specific recollection of all of the circumstances surrounding Judge Bybee's nomination, including comments that I made, I do recall that I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant. As I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations." I knew that Judge Bybee was a highly respected academic who was strongly supported by Senator Harry Reid.

- g. **Do you believe the Senate, in considering your nomination, is entitled to all information relevant to your possible involvement in these issues? If not, why not?**
- h. **Has the Committee been provided all documents relevant to your knowledge or involvement in post-9/11 terror policies and programs?**
- i. **Same question for:**
 - i. **warrantless surveillance?**
 - ii. **interrogation of combatants and detainees?**
 - iii. **transfer of terrorists or combatants (including rendition)?**
 - iv. **detention of combatants?**
 - v. **military tribunals or commissions?**

RESPONSE: As I said during the hearing, this is an issue for the Senate, the Executive Branch, and President Bush. Many of the same issues have arisen in confirmation proceedings for current and recent members of the Supreme Court including Chief Justice Roberts, Justice Kagan, Justice Alito, and Justice Scalia.

36. Emails provided to the Committee indicate that John Yoo also was considered as a potential nominee for the 9th Circuit.
- a. **Did you recommend Mr. Yoo as a nominee for the Ninth Circuit? If so, why?**
 - b. **At the time, were you aware of Mr. Yoo's view on executive authority or the "unitary executive"?**
 - c. **Were you aware of any of the memos he had written advocating an expansive view of presidential war powers (including memos regarding warrantless surveillance, the power to detain combatants, or the interrogation of combatants or detainees)? If not, when did you first become aware of these memos?**
 - d. **Did you ever recommend Mr. Yoo for any other positions within the Administration? If so, when, what positions, and why did you recommend him? For each such position, please also indicate whether you knew, at the time, of his views of executive authority or involvement in Office of Legal Counsel memos related to surveillance, interrogation, or detention.**
 - e. **When Mr. Yoo withdrew his name from consideration as a possible nominee to the Ninth Circuit, you asked "why??? . . . he was my magic bullet." What did you mean? How was Mr. Yoo a "magic bullet"? Why did he withdraw?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was responsible for district court nominations from certain states and circuit court vacancies were handled as they arose. While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that John Yoo was considered as a potential nominee for the Court of Appeals for the Ninth Circuit. He was a highly respected academic at Boalt Hall. I cannot speak to why Mr. Yoo withdrew his name from consideration as a possible nominee. Beyond that, I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant. As I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations."

37. You worked extensively on judicial nominations while you were in the White House Counsel's office.
- a. **As part of the judicial nomination process, did you consider or discuss whether a potential nominee would help the president as a member of the judiciary? If so, please identify the specific candidates or nominees and why they were viewed as helpful to the president.**

RESPONSE: While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that I regularly discussed many judicial nominations, and suggested concerns or offered ideas and opinions where I believed them to be relevant.

38. In 1994, I was the author of the federal Assault Weapons Ban (AWB) which contained a sunset provision. As the sunset approached, I worked to renew the legislation — in 2003, 2004, and again in 2005. You were at the White House during that time, serving in the role of Staff Secretary.

a. While serving in the Bush White House, did you meet with—or discuss the renewal of the assault weapons ban with—the NRA or any other advocacy group? Please describe those meetings and/or discussions, including who you met or spoke with.

b. What did the NRA or other advocacy groups request?

RESPONSE: As I explained at the hearing, I worked on a wide variety of issues during my time in the Bush White House. As Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters that I was not read into, would likely have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, as well as other Presidential actions. I do not recall all of the matters that crossed my desk during this time. Further, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors. During that time, I met with many people on a variety of issues, but I do not now have a specific recollection of such a meeting about this bill.

c. At the White House, did you ever discuss or work on the assault weapons ban and/or other Second Amendment issues? If so, what was the nature of your work and/or discussions? I am not asking if you were the primary person, I am asking if you worked on the issue at all.

RESPONSE: Please see my response to Questions 38.a and b.

d. If you did not work on the assault weapons ban or other Second Amendment issues, were you ever consulted on these issues?

RESPONSE: Please see my response to Questions 38.a and b.

- e. **Did you ever discuss whether President Bush should support renewal of the assault weapons ban? If so, what was your view?**

RESPONSE: Please see my response to Questions 38.a and b.

- f. **What was your view on the constitutionality of the assault weapons ban at the time you served in the White House?**

RESPONSE: Please see my response to Questions 38.a and b.

- g. **If your view has changed, how has it change?**

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on a policy or litigation matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. This approach is essential for the independence of the Judiciary, as is revealed by prior nominee precedent.

39. Also during your time as Staff Secretary, the National Rifle Association strongly backed a landmark lawsuit against the District of Columbia related to the District's handgun ban. The lawsuit in that case, *District of Columbia v. Heller*, commenced in 2003.

- a. **Did you ever discuss this lawsuit with the NRA or any other advocacy group? If so, which group and what was your position?**

RESPONSE: Please see my response to Questions 38.a and b.

- b. **What was your view on the decision to file the lawsuit at the time it was filed?**

RESPONSE: Please see my response to Questions 38.a and b.

40. During your hearing, I asked you about assault weapons being in "common use." You stated: "Semiautomatic rifles are widely possessed in the United States. There are millions and millions and millions of semiautomatic rifles that are possessed so that seemed to fit common use and not being a dangerous and unusual weapon."

- a. **What was the source for your statement that there are "millions and millions and millions of semiautomatic rifles that are possessed"?**

RESPONSE: In my dissent in *Heller v. District of Columbia*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), I provided sources and noted that about 40 percent of rifles sold in 2010 were semi-automatic. I also noted and provided a citation to the record that approximately two million semi-automatic AR-15 rifles have been manufactured since 1986. These statements were consistent with statements made by the majority opinion in that case. *See id.* at 1261 ("We think it clear enough in the record that semi-automatic rifles and

magazines holding more than ten rounds are indeed in ‘common use,’ as the plaintiffs contend. Approximately 1.6 million AR-15s alone have been manufactured since 1986, and in 2007 this one popular model accounted for 5.5 percent of all firearms, and 14.4 percent of all rifles, produced in the U.S. for the domestic market.”).

b. Do you believe that people commonly utilize assault weapons? If so, what is the evidence for that assertion?

RESPONSE: Please see my response to Question 40.a.

41. In your dissent in the D.C. Circuit’s *Heller* case, you analogized assault weapons to semiautomatic rifles, which you then said were like semiautomatic handguns. Assault weapons like the AR-15, however, are just civilian versions of M-16s.

a. From a constitutional perspective, what makes an AR-15 more like a semiautomatic handgun than like an M-16?

RESPONSE: My dissent in *Heller* discusses this question in some detail. Beyond the discussion set forth in that dissent, I believe it would be inappropriate for me to offer further commentary. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

42. In 2003, while you were in the White House Counsel’s office, the Supreme Court decided to hear two cases involving the University of Michigan’s efforts to increase racial diversity on campus—*Grutter v. Bollinger* and *Gratz v. Bollinger*. The Bush Administration filed briefs in these cases arguing that the University of Michigan’s programs were unconstitutional.

a. What was your view on whether the Bush Administration should oppose the University of Michigan’s efforts to increase racial diversity on campus?

b. Did you support an argument that only race-neutral programs can be used to try to achieve racial diversity on campus?

RESPONSE: As a lawyer in the White House, any views I expressed would have been in keeping with trying to advance President Bush’s legal and policy agenda. As a judge and a nominee, your question implicates issues that remain in dispute and that may come before me as a judge. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the

political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I will note that my views 15 years ago as a White House attorney do not dictate my views now as a judge.

43. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), Chief Justice Roberts wrote: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”

a. Do you agree with Chief Justice Roberts’s statement?

b. Do you believe that a majority of the Court supported this statement?

RESPONSE: *Parents Involved in Community Schools v. Seattle School District No. 1*, is a precedent of the Supreme Court entitled to the respect due under the law of precedent. Your question implicates the meaning of—and significance of—a specific portion of the Chief Justice’s opinion. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case.

44. In 2012, you wrote the majority opinion in *South Carolina v. United States*, which allowed South Carolina’s voter ID law to go into effect. The other two judges on the panel wrote a concurring opinion that highlighted the critical importance of the Voting Rights Act. The concurring opinion said that the Voting Rights Act had played a “vital function” in keeping the voter ID law from being “more restrictive” and that the Voting Rights Act has “continuing utility” in “detering problematic, and hence encouraging non-discriminator, changes in state and local voting laws.”

a. Why didn’t you join the concurring opinion?

b. What did you disagree with in the concurring opinion and why?

RESPONSE: I wrote the unanimous opinion in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012), which was joined in full by Judges Kollar-Kotelly and Bates. *Id.* at 52 (Kollar-Kotelly, J., concurring); *id.* at 53 (Bates, J., concurring). Both Judges referred to my opinion as “excellent.” *Id.* at 52 (Kollar-Kotelly, J., concurring); *id.* at 53 (Bates, J., concurring). In that opinion, I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *Id.* at 32-33. Our opinion *blocked* enforcement of South Carolina’s voter ID law for the 2012 elections.

45. Section 2 of the Voting Rights Act prohibits drawing election districts in a manner that is meant to dilute the voting power of minorities. In 1982, Congress strengthened Section 2 to allow plaintiffs to prove a violation of the Voting Rights Act where a local electoral practice had the effect of denying to racial or language minorities an equal opportunity to participate in the political process. That same year, the Supreme Court held in *Thornburgh v. Gingles* that plaintiffs could also bring a challenge under Section 2 alleging that legislative maps were drawn in a way that infringed on racial minorities' rights to vote.

a. Do you consider *Gingles* to be settled law?

b. Is it correct law?

RESPONSE: *Thornburg v. Gingles*, 478 U.S. 30 (1986), is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

46. In the 2003 case *Lawrence v. Texas*, the Supreme Court held that states may not intrude into the bedrooms of same-sex couples. Justice Kennedy's majority opinion explained that laws prohibiting intimacy between same-sex couples are unconstitutional because states "cannot demean their existence or control their destiny by making their private sexual conduct a crime."

Justice Scalia—a justice whom you have described as a "hero" and a "role model"—dissented. He argued that the government had the authority to ban intimate sexual activities between consenting gay adults. He wrote: "Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive."

a. Do you agree with Justice Kennedy's opinion or Justice Scalia's?

RESPONSE: As a sitting judge, I am bound to follow Supreme Court decisions, subject to the law of precedent. However, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on existing precedent. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

b. Is *Lawrence* settled law? Is it correct law?

RESPONSE: *Lawrence v. Texas* is a decision of the Supreme Court entitled to respect under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary. In accordance with nominee precedent, I will follow the lead of the current Justices in declining to offer my view as to whether recent precedents of the Supreme Court were correctly decided. For example, when asked to give her opinion on Supreme Court precedents, Justice Kagan said she would not give a thumbs up or thumbs down on Supreme Court precedents. She explained that this was a principle of judicial independence. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

c. *Lawrence* overruled *Bowers v. Hardwick* (1986). Was *Bowers* settled law before it was overruled?

RESPONSE: *Bowers* was overruled for the reasons set forth in *Lawrence*. The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

d. Can a business legally fire an LGBT employee to “protect” other employees from the LGBT employee’s “lifestyle”?

RESPONSE: See my response to Question 46.a.

e. In your White House role, did you provide any legal or policy advice concerning the Court’s *Lawrence* decision? If so, what did you advise?

RESPONSE: I do not remember specifics, but it seems possible that there would have been internal discussions of major Supreme Court decisions such as *Lawrence*.

47. In a 1971 case called *Lemon v. Kurtzman*, the Supreme Court established a three-factor test to decide whether a government’s action violates the Establishment Clause. Several Supreme Court justices have suggested that the Court should abandon the *Lemon* test in favor of a test that accommodates more government aid to religion and more of a religious presence in government.

a. Is *Lemon* settled law? Is it correct law?

b. Do you support the continued application of the *Lemon* test, or do you favor a different test? If so, please explain what you view as the appropriate test and how it addresses entanglement between religion and government?

RESPONSE: As I set forth in my dissent in *Newdow v. Roberts*, “the Supreme Court’s Establishment Clause jurisprudence does not set forth a one-size-fits-all test.” 603 F.3d 1002, 1017 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (citing *Salazar v. Buono*, 559 U.S. 700, 721 (2010) (opinion of Kennedy, J.); *Van Orden v. Perry*, 545 U.S. 677, 686 (plurality opinion); *Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O’Connor, J., concurring in part and concurring in judgment)).

48. The Office of Independent Counsel Ken Starr has been described as “notoriously leaky” because of how often its attorneys spoke to the press about the investigations into President Clinton and First Lady Hillary Clinton. (Josh Gerstein, *‘Brett was involved’: Inside Supreme Court nominee’s work for Bill Clinton probe*, Politico (July 22, 2018)). In your response to the Senate Judiciary Questionnaire, you acknowledged that you spoke to reporters “on background as appropriate or as directed.” (Kavanaugh SJQ at 41).

- a. **While working in the Office of Independent Counsel, did you ever speak with reporters about any of the Office’s investigations into President Clinton or Hillary Clinton (including your investigation into the death of Vince Foster) while those investigations were ongoing?**
- b. **If so, what type of information did you provide to reporters?**
- c. **Did you ever provide any reporters—or anyone else—with information learned through grand jury proceedings or witness interviews?**
- d. **Have you ever provided any information to the press in violation of a statutory or ethical obligation to keep such information confidential?**

RESPONSE: As I said at the hearing, I spoke to reporters at the direction or authorization of Judge Starr consistent with the law.

49. In March 1995, while working in the Office of Independent Counsel Ken Starr, you wrote a memo pushing to broaden the investigation to cover a “full-fledged investigation of [Vince] Foster’s death.” (Kavanaugh Memo to Starr, 3/24/95). By that time, three separate investigations had concluded that Mr. Foster committed suicide, and as you admitted in your memo, the Independent Counsel might lack prosecutorial jurisdiction over any crime uncovered in relation to that death. You nonetheless pursued the allegation that Mr. Foster was murdered, and the theory that he had an affair with Hillary Clinton, for three more years.

- a. **What specific evidence led you to question the conclusion that Mr. Foster had committed suicide and decide, instead, that a “full-fledged” investigation of Mr. Foster’s death was still warranted? Please identify the source(s) for the evidence that justified this conclusion.**

RESPONSE: The decisions regarding the Vince Foster investigation were ultimately made by Judge Starr. Given the persistent public questions about the causes of Mr. Foster’s death, Judge Starr stated that it was important to thoroughly investigate the matter and provide a definitive conclusion. That conclusion was ultimately that Mr. Foster committed suicide. Our report on the Foster death has stood the test of time.

- b. **Did you rely on allegations generated by conservative right-wing media outlets in deciding to pursue a “full-fledged” investigation of Vince Foster’s death? For example, did Chris Ruddy, Ambrose Pritchard-Evans, Hugh Sprunt, Reed Irvine, or Rush Limbaugh provide you with any information about Mr. Foster before you made the decision to re-investigate his death? If so, what specific information did they provide and what weight was it given?**

RESPONSE: Please see my response to Question 49.a.

- c. **In a June 1995 memo, you wrote that “we have asked numerous witnesses about Foster’s alleged affair with Mrs. Clinton.” (Kavanaugh Memo to Starr et al. re: “Summary of Foster Meeting on 6-15-05”, 6/16/95.) Did you lead or participate in this questioning? Were you present during the questioning? Did you object to any of the questions that were asked?**

RESPONSE: Please see my response to Question 49.a.

- d. **Webster Hubbell has stated that Office of Independent Counsel attorneys investigating the death of Vince Foster asked him a number of sexual questions in early 1995, including specifically asking if Hillary Clinton and Vince Foster had engaged in an affair. (Jane Mayer, *Dept. of Inquiring Minds: The Webster Hubbell investigation: Was it about sex?* The New Yorker (Aug. 9, 1999)). Did you participate in the questioning Mr. Hubbell? If so, what was your role? If you were present, did you object to any of the questions that were asked?**

RESPONSE: Please see my response to Question 49.a.

- e. **Did you ever speak with reporters about the investigation into whether Mr. Foster had committed suicide or had been murdered?**

RESPONSE: Please see my response to Question 49.a.

f. Did you ever speak with reporters about the investigation into whether Hillary Clinton and Vince Foster had engaged in an affair?

RESPONSE: Please see my response to Question 49.a.

50. Your Starr-investigation era files from the National Archives include a number of complete files devoted to articles from Christopher Ruddy and others who were strong proponents of the Vince Foster murder conspiracy theory. For example, NARA File no. 70105096, labeled "Foster Death—Articles by Ruddy," is 195 pages long. It includes articles entitled "Foster's Death Site Strongly Disputed," by Ruddy, and a partial transcript from a Rush Limbaugh Radio Broadcast entitled "Foster Note a Forgery." A separate file, NARA File No. 70105100, includes what appears to be a summary analysis of the film "The Death of Vincent Foster: What Really Happened?" and an extended report from Hugh Sprunt entitled "The official record contradicts the Foster suicide conclusion," which appears to have been faxed to your office on September 27, 1995.

a. How often did you or others working on your behalf speak with or otherwise interact with each of the following individuals: Ambrose Pritchard-Evans; Hugh Sprunt; Reed Irvine; and Rush Limbaugh?

RESPONSE: Please see my response to Question 49.a.

b. Were any of these individuals a source for your investigation? If so, what specific information did they provide and what actions did you take in response?

RESPONSE: Please see my response to Question 49.a.

51. A November 13, 1995 memorandum from Starr deputy Hickman Ewing to File, subject line "Chris Ruddy," states that "At noon, Saturday, November 4, 1995, I checked my Little Rock voicemail. Brett Kavanaugh had called at 5:50 p.m. on Friday, November 3 leaving a voicemail to the effect: "I got a voicemail message from Ruddy. He said he had talked to [a witness]. He said that [the witness] was disappointed by the way he was treated in the grand jury. He said he was treated as a suspect. Ruddy knows some of the questions that Brett Kavanaugh asked. Why did Brett ask [the witness] if the guy in the park grabbed his genitalia. Brett said on the voicemail to me, 'I didn't ask him that. *I did ask him about sexual advances by the other man in the park. John Bates and I want you to call Ruddy—at least get him off the [sexually explicit] part. I am worried about that.*'" (Memo from Ewing to File re: "Chris Ruddy," (Nov. 13, 1995) (emphasis added)). Hickman Ewing followed your directions and called Ruddy back the day that he received your voice mail (November 4).

a. Was the Independent Counsel office seeking to influence Mr. Ruddy's articles?

RESPONSE: Please see my response to Question 49.a.

- b. **In a July 15, 1995 memorandum welcoming a new investigator to your team, you recommended that the investigator familiarize himself with the investigation using a number of sources, including “the Ruddy articles.” (Memo from Kavanaugh to Clemente re: “Vince Foster” (July 15, 1995)). Did you and your team consider Chris Ruddy to be a source for your investigation? Please explain any steps taken in response to information provided by Mr. Ruddy.**

RESPONSE: Please see my response to Question 49.a.

- c. **How does your direction to Mr. Ewing to discuss grand jury information with a journalist—i.e., your direction that he discuss with Mr. Ruddy the questions asked of a grand jury witness—comply with grand jury secrecy requirements? Please provide legal support for your position.**

RESPONSE: Please see my response to Question 49.a.

52. In 1998, Ken Starr stated that it was appropriate for attorneys with the Independent Counsel’s office to speak to the media in order to defend its ongoing investigation from attacks made by the Clinton Administration. (Adam Clymer, *Starr Admits Role in Leaks to Press*, New York Times (June 14, 1998)).

- a. **Is this a valid reason to discuss an ongoing investigation with reporters?**

RESPONSE: That was a decision made by Judge Starr.

- b. **At the time, what was the Department of Justice’s policy regarding public discussion of an ongoing investigation?**

RESPONSE: I do not recall. As I stated at the hearing, any conversations that I had with reporters were at the direction or authorization of Judge Starr.

- c. **What is your personal view on whether prosecutors should discuss an ongoing investigation with reporters?**

RESPONSE: Please see my response to Question 52.a.

- d. **Do you believe that your discussions with reporters during your time in the Starr Independent Counsel Office about the Vince Foster investigation were appropriate? Were they fair?**

RESPONSE: Yes.

53. Between March and August of this year, President Trump attacked Robert Mueller's work in at least 127 tweets. The number of such attacks has sharply increased since May.

a. Do you believe that it would be appropriate for Mr. Mueller or members of his team to discuss details of the investigation in light of these attacks?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

54. In 2006, the Department of Justice fired numerous U.S. Attorneys for political reasons, in a process that has been described as "chaotic and spiked with petty cruelty." (Amy Goldstein, *E-Mails Reveal Tumult in Firings and Aftermath*, Washington Post (Mar. 21, 2007)).

According to the Department of Justice report on the dismissals, "the process to remove the U.S. Attorneys originated shortly after President Bush's re-election in November 2004," at which time you were serving as White House Staff Secretary. (U.S. Department of Justice Office of the Inspector General and Office of Professional Responsibility, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, at 16 (Sept. 2008)). The report indicates that beginning in early 2005, Deputy White House Counsel David Leitch, Department of Justice official Kyle Sampson, and White House Counsel Paralegal Colin Newman engaged in email discussions in which Sampson suggested replacing fifteen to twenty percent of all U.S. Attorneys who may not have been "loyal Bushies." (*Id.* at 17).

Sampson first circulated a proposed U.S. Attorney target list in March 2005, after Alberto Gonzales became Attorney General. (*Id.*) You had served under Gonzales in the White House Counsel office. Sampson circulated this list to Associate White House Counsel Dabney Friedrich, at the request of White House Counsel Harriet Miers, on March 23, 2005. (*Id.* at 22). Sampson and Monica Goodling, who was appointed as Counsel to the Attorney General in October 2005 and as DOJ White House Liaison in April 2006, regularly interacted with the individuals at the Executive Office of the Presidency, including with Sara Taylor, a top aide to Karl Rove, regarding U.S. Attorney target lists from March 2005 until the U.S. Attorneys were removed in December 2006. (*Id.* at 22-67).

The DOJ OIG “found significant evidence that political partisan considerations were an important factor in the removal of several of the U.S. Attorneys.” (*Id.* at 325-26). It further concluded that “the White House was more involved than merely approving the removal of Presidential appointees” for at least three U.S. Attorneys, but was unable to fully determine what role the White House played in all removals because White House officials, including Karl Rove and Harriet Miers, declined to participate in the DOJ OIG investigation. (*Id.* at 337-38).

a. Please describe any interactions you had with Kyle Sampson, Monica Goodling, or any other Department of Justice official regarding the dismissal of U.S. Attorneys.

RESPONSE: As you mention, I was serving as Staff Secretary during the period you reference. As I explained during the hearing, during my time as Staff Secretary, any issue that reached the President’s desk from July 2003 until May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time or all interactions I had during those years. In terms of the substance of my work, my role was not to replace the President’s policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

b. Please describe any interaction you had with Karl Rove, Sara Taylor, Dabney Friedrich, David Leitch, Colin Newman, Harriet Miers, or any other White House official regarding the dismissal of U.S. Attorneys.

RESPONSE: Please see my response to Question 54.a.

c. Did you ever receive or comment on any list of proposed U.S. Attorneys targeted for dismissal or replacement?

RESPONSE: Please see my response to Question 54.a.

55. During your time in the White House there were also reports that White House officials were actively involved in politicized hiring by the Department of Justice. (Eric Lichtblau, *Report Faults Aides in Hiring at Justice Dept.*, New York Times (July 29, 2008)). In fact, according to the Department of Justice's Inspector General, officials at the White House developed a method—taught through a seminar and distributed in a document called “The Thorough Process of Investigation”—for searching the Internet to determine a candidate's political leanings. Through this process, DOJ officials used search terms to screen applicants using terms like “abortion,” “homosexual,” “Florida recount,” or “guns.” (U.S. Department of Justice Office of Professional Responsibility and Office of the Inspector General, *An Investigation of Allegations of Politicized Hiring by Monica Goodling and Other Staff in the Office of the Attorney General*, at 20 (July 28, 2008)). The DOJ Inspector General's report on this issue concluded that Department of Justice officials used the results of these searches to improperly discriminate against candidates for career positions at DOJ. (*Id.* at 20, 135).

- a. Did you ever discuss screening job applicants to determine political affiliation or ideology? If so, when, who was involved, and what was discussed?**

RESPONSE: Please see my response to Question 54.a.

- b. Were you involved in developing any methods for screening job applicants based on political affiliation or ideology? If so, when, who was involved, and what methods were developed?**

RESPONSE: Please see my response to Question 54.a.

- c. Were you aware of or did you attend any seminars or training sessions where screening job applicants based on political affiliation or ideology was discussed? If so, what was your involvement?**

RESPONSE: Please see my response to Question 54.a.

- d. Were you aware of or did you assist in preparing the document entitled “The Thorough Process of Investigations,” or any other document discussing screening job applicants based on political affiliation or ideology? If so, what was your involvement?**

RESPONSE: Please see my response to Question 54.a.

- e. When did you first become aware that candidates were being screened based on political affiliation or ideology? What did you do when you learned about this? Did you ever object to this practice? If so, when? Are your objections memorialized in any way?**

RESPONSE: Please see my response to Question 54.a.

- f. **Were you involved in hiring decisions that took into account the political affiliation or ideology of any candidate? If so, please explain the position being filled and why such considerations were taken into account.**

RESPONSE: Please see my response to Question 54.a.

56. After the U.S. Attorney scandal was made public, it became apparent that a number of White House officials communicated with each other and with Department of Justice officials using Republican Party-affiliated e-mail accounts. For example, J. Scott Jennings, the White House deputy director of political affairs, used a “gwb43.com” email address to discuss replacing one U.S. Attorney. (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials’ E-Mails*, Washington Post (March 27, 2007)).

Some have suggested that Karl Rove actually directed the firing of U.S. Attorneys so that the fired attorneys could be replaced with political picks. (Dan Froomkin, *The Rovian Theory*, Washington Post (March 23, 2007)). However, because Rove primarily conducted his official business using an RNC-based email address, official investigations were unable to fully assess his role in the scandal. (*See id.* (noting that “According to one former White House official familiar with Rove’s work habits, the president’s top political adviser does ‘about 95 percent’ of his e-mailing using his RNC-based account.”)).

A 2007 House Oversight and Government Reform Interim Staff Report concluded that “at least 88 White House officials had RNC e-mail accounts. (Committee on Oversight and Government Reform, *The Use of RNC E-Mail Accounts by White House Officials* (June 18, 2007)). Some have suggested that Bush White House officials strategically used these political email accounts to keep particular information secret. Notably, in a 2003 email, Jennifer Farley, a deputy in the White House Office of Intergovernmental Affairs, told Jack Abramoff aide Kevin Ring that “it is better to not put this stuff in writing in [the White House] ... email system because it might actually limit what they can do to help us, especially since there could be lawsuits, etc.” (R. Jeffrey Smith, *GOP Groups Told to Keep Bush Officials’ E-Mails*, Washington Post (March 27, 2007)).

- a. **Did you ever use a non-government email address during your time in the White House, including any email address from the rnhq.org, gwb43.com, georgewbush.com, or any other email affiliated with a political candidate or organization, or registered to a political campaign? (If so, please identify those accounts.)**

RESPONSE: In addition to my White House email address, I had a personal email address that I may have used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use my personal email address for official matters, although I cannot rule out isolated emails.

- b. Can you affirmatively state that you did not use any non-government account to conduct official business during your time in the White House?**

RESPONSE: Please see my response to Question 56.a.

- c. Did Karl Rove or any other White House official ever consult with you regarding the use of any non-government email address?**

RESPONSE: At this time, I do not remember.

- d. When did you first learn that Mr. Rove was using a non-government email address for official business? What did you do when you learned this? When did you learn that emails on Mr. Rove's non-governmental accounts had been deleted? Had anyone advised Mr. Rove that these emails should be preserved and, if so, when was this conveyed to him?**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

- e. Did you play any role in the investigation of the use of non-government emails by White House officials? If so, please describe your role.**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

- f. On April 11, 2007, the White House acknowledged that emails to and from White House officials were lost or deleted between 2001 and 2007 because "White House policy did not give clear enough guidance" on the use of official email, rather than private, and that "the oversight of that [guidance] was not aggressive enough." (Dan Froomkin, *Countless White House E-Mails Deleted*, WASHINGTON POST (Apr. 12, 2007)). Please describe your role in developing and enforcing White House policy on the use of email.**

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

57. In the aftermath of the attacks on September 11, 2001, you were closely involved in crafting the legislation related to the limitation of airlines' liability and the creation of a compensation fund for victims. Ultimately, the compensation fund model that was used paid victims' families an average of approximately \$1.8 million.

- a. At any point in the process, did you express opposition to providing 9/11 victims any form of additional compensation outside of the compensation they would normally be entitled to through already-existing programs like insurance and government benefits?**

RESPONSE: As I explained at my 2004 hearing, in the days after the September 11th attacks, I worked on the September 2001 legislation as a representative of the Bush administration. As I recall, there was bipartisan agreement that the airlines' liability needed to be addressed immediately because the airlines were potentially going to go bankrupt. Ultimately, the separate, important issue of compensation for the victims of the September 11th attacks became linked in the same bill. I recalled in 2004 that there were discussions about compensating each victim's family equally so as not to favor rich over poor. I also recall concern about the time it would take for victims and their families to receive compensation if there were not immediate payments. I also testified in 2004 that we considered various precedents for compensating victims, including the Public Safety Officers' Benefits Fund.

- b. At any point in the process, were you opposed to creating any form of a compensation fund for 9/11 victims?**

RESPONSE: Please see my answer to Question 57.a.

- c. Did you ever propose capping victims' compensation? Did you suggest capping it at \$250,000? \$400,000? \$500,000?**

RESPONSE: Please see my answer to Question 57.a.

- d. If so, were your proposals to cap victims' compensation due to legal concerns, policy concerns, or both? What were your specific concerns?**

RESPONSE: As I testified in 2004, there were discussions about compensating each victim's family equally due to a concern that a litigation model would mean unequal compensation, such that victims from a relatively poor family would receive a smaller amount in compensation. Consistent with what I believed to be the views of President Bush and OMB Director Mitch Daniels, I believe that I thought poor families and rich families should receive the same amount, and should receive payment immediately.

58. During your hearing, I asked you about the Bush White House's position that it was up to the Federal Energy Regulatory Commission ("FERC") to investigate and punish any misconduct by Enron that contributed to the California electricity crisis. You testified that FERC's role was not in your "area of expertise." Congressional investigations showed that Enron executives were focused on stacking FERC with appointees who they thought would be friendly regulators for the company.

When you were in the White House Counsel's office, you were involved in drafting the surveys that the Counsel's office sent to White House staff about their communications with Enron. One of the survey questions asked whether White House staff members had communications with Enron related to FERC or other government agencies. You argued, unsuccessfully, that this question should be narrowed. In particular, you argued in an April 23, 2002, email that any communications disclosed "should be issues-oriented so as not to include appointments."

a. Were you aware at the time you made these arguments that President Bush had appointed a chairman of FERC and another FERC commissioner who had been recommended to him by Enron's Ken Lay?

RESPONSE: While working in the White House Counsel's Office, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, nominations, and policy, among others. I do not recall my work or involvement in all of these matters, nor do I have specific recollection of every discussion in which I took part during my years at the White House.

b. Why was it your view that Congress and the American people should not have information about contacts between the White House and Enron about appointments to the very entities that were responsible for preventing Enron's corporate misconduct?

RESPONSE: I do not agree with the premise of the question.

59. You also distributed draft talking points in May 2002 which argued that it was "highly unusual" for Congress to ask questions about presidential appointments because "appointments are at the core of his constitutional power. The confirmation process is, in effect, the Senate's oversight on that process."

a. Is it your view that congressional oversight of any presidential appointment ends when an appointee is confirmed?

RESPONSE: That is not what that comment says.

b. If congressional investigators, in your view, are not entitled to information about the appointments process, then who – if anyone – can investigate and hold the President accountable for corruption in that process?

RESPONSE: Please see my answer to Question 59.a.

60. During your time on the D.C. Circuit, you have written 61 dissents. Out of all the active judges on the D.C. Circuit, you have the highest number of dissents per year of service on the court.

a. Have you ever dissented in a case in which the majority ruled against an environmental interest?

RESPONSE: As I explained at the hearing, I have ruled for environmental interests on many occasions. I apply the law impartially, without regard to the identity of the parties.

61. Do you believe that human activity is contributing to or causing climate change?

RESPONSE: As a judge, I base decisions on the law and factual evidence in the record. My opinions addressing regulations designed to mitigate the effects of climate change have stated, among other things, that “[t]he task of dealing with global warming is urgent and important at the national and international level.” *Center for Biological Diversity v. EPA*, 722 F.3d 401, 415 (D.C. Cir. 2013) (Kavanaugh, J., concurring).

62. The same night you were announced as President Trump’s nominee for the Supreme Court, the White House circulated a fact-sheet about your judicial record. The document stated: “Judge Kavanaugh protects American businesses from illegal job-killing regulation”; “Judge Kavanaugh helped kill President Obama’s most destructive new environmental rules”; “Judge Kavanaugh has led the effort to rein in unaccountable independent agencies”; and Judge Kavanaugh has “overruled federal agency action 75 times.” (Lorraine Woellert, Politico.com, “Trump asks business groups for help pushing Kavanaugh confirmation” (July 9, 2018).)

a. Is there anything inaccurate about the White House’s assessment of your record? If so, please explain.

RESPONSE: As I stated at the hearing, I have ruled in favor of agencies on numerous occasions when the law and facts have dictated. I have also ruled against agencies when the law and facts have dictated. As I stated, “I decide cases based on the law. I am a pro-law judge.”

63. According to press accounts, you woke President Bush in the middle of the night to sign just-passed legislation that would allow a federal court to intervene in a family dispute over end-of-life care for Terri Schiavo. (New York Times, *After Signing Schiavo Law, Bush Says ‘It Is Wisest to Always Err on the Side of Life’*, Mar. 22, 2005))

a. What other involvement did you have in the Terri Schiavo matter? Did you provide any advice about the legislation?

RESPONSE: My work on this matter was in my capacity as Staff Secretary to President Bush. As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk on the way to the President. That applies to the President’s speeches, public

decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Did you agree at the time that it was appropriate for the federal government to intervene? If so, why? What, if any, principles did you propose to limit the ability of the government to intervene in a personal family matter?**

RESPONSE: Please see my response to Question 63.a.

64. In 2007, you authored the opinion in *Doe ex rel. Tarlow v. District of Columbia*. That case was about whether it was constitutional to force individuals with intellectual disabilities to have medical procedures against their will. All that these individuals wanted was the right to have their wishes at least taken into consideration for major medical decisions.

- a. Does the existence of laws such as the Americans with Disabilities Act and the Individuals with Disabilities Education Act affect whether the rights of individuals with intellectual disabilities are rooted in history and tradition and implicit in the concept of ordered liberty?**

RESPONSE: The plaintiffs in *Tarlow* represented a narrow class of several intellectually disabled people who had “never had the mental capacity to make medical decisions for themselves” and who had “no guardian, family member, or other close relative, friend, or associate” available to provide or withhold consent for surgeries approved by two separate physicians. *Id.* at 377. The unanimous panel for which I wrote explained that allowing people who lack mental capacity to make important medical decisions “would cause erroneous medical decisions . . . with harmful or even deadly consequences to intellectually disabled persons.” *Id.* at 382. In part for that reason, no state applies the rule proposed by the plaintiffs in that case.

65. Only a small fraction of your White House record was produced to the Committee before your hearing. We have not seen close to six million pages of your total record, including documents from your years as Staff Secretary, which you described as the “most instructive” and “useful” to you as a judge. (Remarks to Inn of Court, May 17, 2010)

- a. **Is there anything in the documents that we have not seen that would illuminate your views on or involvement in interrogation, detention, rendition, or warrantless wiretapping?**
- b. **Is there anything in the documents that we have not seen that would illuminate your views on privacy rights?**
- c. **Is there anything in the documents that we have not seen that would show your involvement in issues related to the Enron scandal?**
- d. **Is there anything in the documents that we have not seen that would illuminate your views on the power of the President or the unitary executive theory?**
- e. **Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in politicized hiring and firing of lawyers and applicants in the Department of Justice during the Bush Administration?**
- f. **Is there anything in the documents that we have not seen that would illuminate your knowledge of or possible involvement in the use by approximately 80 Bush White House aides of Republican National Committee email accounts to conduct official business?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated during the hearing, I do not take a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush. As a matter of nominee precedent, I am aware that neither Chief Justice Roberts', Justice Alito's, or Justice Kagan's documents from the Solicitor General's Office, nor Justice Scalia's and Justice Alito's documents from the Office of Legal Counsel, were turned over to the Committee during their confirmations.

66. We have several documents showing that, while you were in the White House Counsel's Office, you handled issues related to the Presidential Records Act, including one email in which a colleague referred to you as "Mr. Presidential Records." (Email from Robert Cobb to Brett Kavanaugh, *speechwriting & laptops* (Feb. 14, 2001))

- a. **Given your past experience with these issues, were you consulted about or in any way involved in the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents

related to my nomination. I cannot speak knowledgeably to the details of the document production.

- b. When did you become aware of the process to be used to provide your records?**

RESPONSE: Please see my response to Question 66.a.

- c. Did you ever communicate with Bill Burck or anyone else at the law firm of Quinn Emanuel Urquhart & Sullivan, LLP, about your nomination to the Supreme Court? If so, when, who was present, and what was discussed?**

RESPONSE: As I testified during the hearing, I saw Mr. Burck on the Saturday after my nomination at a social event. I saw another Quinn Emanuel partner, Chris Landau, at the swearing in of Judge Britt Grant to the United States Court of Appeals for the Eleventh Circuit.

- d. Did you ever communicate with Mr. Burck or anyone else at Quinn Emanuel about the process through which records related to your nomination were produced to the Committee, including issues related to the Presidential Records Act? If so, who, when, and what was discussed.**

RESPONSE: No.

- e. Did you ever communicate with anyone regarding Committee confidential designation for documents related to your record? If so, who, when, and what was discussed.**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

- f. Did you ever communicate with anyone regarding assertion of constitutional or executive privilege over your record? If so, who, when, and what was discussed.**

RESPONSE: Please see my response to Question 66.e.

- g. Did you ever communicate with Mr. Burck about your nomination to the Supreme Court or your confirmation hearings? If so, when, who was present, and what was discussed?**

RESPONSE: As I testified during the hearing, I saw Mr. Burck on the Saturday after my nomination at a social event.

67. Have you ever communicated with anyone about the potential assertion of executive privilege over documents dating from your tenure in either the White House Counsel's Office or as Staff Secretary? If so, when did those discussions occur, with whom, and what was discussed?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

68. Please identify all individuals who assisted in your preparation for testifying before the Judiciary Committee. Include both those from within the Trump Administration and outside of the Trump Administration.

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings was substantive and provided me insight into the issues I could look forward to discussing at the hearing.

69. Please identify all organizations that have assisted in your preparation for testifying before the Judiciary Committee.

RESPONSE: Please see my response to Question 68.

70. At any point before or during your nomination hearing (September 4-7, 2018), did you review or discuss, or were you informed about, any of the documents from your tenure in the White House Counsel's Office that Bill Burek planned to produce or did produce to the Senate Judiciary Committee?

a. If so, which documents did you review or discuss? Please provide a list of Bates numbers of all documents that you reviewed, discussed, or received information about.

RESPONSE: I was informed that I might be asked about documents designated "committee confidential" in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions I was shown some documents that were designated "committee confidential."

b. How many of the documents you reviewed or discussed were designated Committee Confidential? Please provide a list of Bates numbers of all such documents designated Committee Confidential.

RESPONSE: Please see my response to Question 70.a.

- c. Who provided you with copies of these documents or otherwise informed you about the documents' contents?**

RESPONSE: Please see my response to Question 70.a.

- d. At any point during your hearing, were you given advice on how to address Senator's questions?**

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings was substantive and provided me insight into the issues I could look forward to discussing at the hearing. All of my answers were my own.

71. You were added to President Trump's second so-called "short list" of potential Supreme Court nominees on November 17, 2017.

- a. Did you ever discuss with Justice Anthony Kennedy whether you might be an acceptable replacement on the Court if he were to retire? If so, when, who was present, and what was discussed?**

RESPONSE: No.

72. At any point during the process that led to your nomination, did you have any discussions with anyone—including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups—about President Trump's position on loyalty? If so, please elaborate. Was there any communications about whether President Trump may pull your nomination if your answers displeased him?

RESPONSE: As I said at the hearing, I am an independent judge and am loyal to the Constitution. My answers to all questions posed by the Senators were my own.

73. Please describe with particularity the process by which you answered these questions.

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice, and other attorneys from the Department of Justice, the White House Counsel's Office, as well as my former clerks. My answers to each question are my own.

**Senator Patrick Leahy (D-Vt.), Senate Judiciary Committee,
Questions for the Record
Hearing on the Nomination of The Honorable Brett Kavanaugh
to be an Associate Justice of the Supreme Court of the United States
September 10, 2018**

1. At your 2006 nomination hearing, you said that you “absolutely” believed President Bush’s statements that the United States “does not torture” and does not “condone torture.” At the time, I brought your attention to abuses that took place at Abu Ghraib. Senator Durbin reminded you that our government sanctioned techniques such as threatening detainees with dogs, forced nudity, and painful stress positions. Since then, the Senate Intelligence Committee’s 6,000 page report about Bush-era detention policies provided details about the CIA’s widespread use of waterboarding and other “enhanced interrogation techniques,” which of course is a euphemism for torture. **Knowing what you know now, do you still believe what you testified in 2006 — that the United States did not engage in the practice of torture during the George W. Bush administration?**

RESPONSE: To be clear, my 2006 testimony stated my belief in what President Bush had said. As I noted at the hearing last week, I was not read into the program involving the controversial enhanced interrogation techniques, nor did I craft the legal memos for that program.

2. Attached in [Appendix I](#) is a document that was obtained through a FOIA request. It shows that you, as Staff Secretary, were specifically looped in to review talking points covering the just-released and infamous Bybee torture memo. **What other emails relating to post 9-11 torture and detainee policies exist from your tenure as Staff Secretary?**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. Once there was public disclosure of those previously secret memos, the President and White House responded in a number of ways, and I would have performed my usual Staff Secretary role.

3. Torture is as un-American as it is illegal. Thanks to the leadership of my late dear friend Senator John McCain, torture is explicitly banned by law. Under Justice Jackson’s *Youngstown* framework, a President’s power “is at its lowest ebb” when he acts contrary to the will of Congress. Nonetheless, candidate Trump repeatedly threatened to resurrect the practice of torture upon becoming President. **In your view, is there any circumstance in which the President could violate a statute passed by Congress and authorize the use of torture?**

RESPONSE: Under Justice Jackson’s *Youngstown* framework, a President’s power is very limited and at its nadir when the President acts contrary to the will of Congress. And as I noted in my 2006 hearing, the President has the responsibility to follow the laws against torture reflected in statutes passed by Congress.

4. When you testified before this Committee in 2006, you testified: “I was not involved and am not involved in the questions about the rules governing detention of combatants.” But in 2007, the *Washington Post* published a report indicating that you had been consulted on and offered an opinion regarding whether the Supreme Court would approve of American citizens being detained as enemy combatants without access to counsel.¹ **Is the *Washington Post* correct that, while you were in the Bush White House, you were consulted on such a policy matter regarding the detention of enemy combatants?**

RESPONSE: I answered this question at the hearing.

5. Presidents frequently invoke an expansive view of “national security” to justify sweeping, often seemingly unrelated executive actions, such as when President Trump has used national security to justify enacting tariffs or to ban transgender Americans from serving in the military. In both of those examples, actual studies carried out by the relevant executive agencies did not demonstrate any national security threat that could be rectified by the President’s action, which proceeded nonetheless. You have written in support of an expansive view of executive power many times in the past.
- a. Should the courts defer to the President on the definition of “national security” in the absence of a clear legal definition? What about in the case of a clear legal definition?**

RESPONSE: As I discussed at the hearing, national security is not a blank check for the President. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

- b. When the President and the agencies legally charged with executing a particular law of the United States containing a national security exception are not in agreement on whether a national security need exists, or when they are in disagreement, can a clear national security justification be said to exist?**

RESPONSE: As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

¹ http://voices.washingtonpost.com/chenev/chapters/pushing_the_envelope_on_presi/.

- c. **Is it necessary that a national security waiver be written into a law for the President to waive certain provisions on national security grounds?**

RESPONSE: Please see my response to Question 5.b.

6. During your 2006 hearing, I asked whether you had any knowledge of President Bush's post 9-11 torture and detainee policies. You testified that you were "not aware" of the "legal justifications or the policies relating to the treatment of detainees" until "2004, when there started to be news reports" on the subjects. Yet a 2007 news report indicated that in 2002, you were a key player in White House discussions about whether President Bush's detainee policies would pass muster before the Supreme Court. There are still thousands of your documents we have not reviewed – and thousands that may have been screened out of the partisan production we received – that could shed additional light upon what you knew at the time. At some point they will become public. **At any point in your tenure in the White House, were you aware of any aspects of President Bush's post 9-11 torture and detention policies before they became public through news reports?**

RESPONSE: As I said at the hearing, my 2006 testimony on this point was accurate and remains accurate.

7. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers." **Do you agree that the Constitution provides Congress with its own war powers, and that Congress may exercise these powers to restrict the President – even in a time of war?**

RESPONSE: Please see my response to Question 5.a. I explained this issue in some depth at the hearing.

8. Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." **In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?**

RESPONSE: Please see my response to Question 5.a. I have explained my views on this issue in some depth at the hearing and in my writings.

9. You indicated in your hearing testimony that the Supreme Court's recent decision in *Carpenter v. United States* was a "game changer" regarding the intersection of technology and the Fourth Amendment. **In the wake of *Carpenter*, what is your view on the continued vitality (or lack thereof) of the Fourth Amendment's "third-party doctrine," as explained by the Court in *Smith v. Maryland*?**

RESPONSE: Questions involving the third-party doctrine are likely to come before me. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

10. At your hearing on September 6, 2018, I asked you the following question. You did not answer my specific question. Please do so now:

In your concurrence in *Klayman v. Obama*, you went out of your way to say that not only is mass surveillance of American's telephone metadata okay because it is not a search. You also said — with no support, and citing only the 9-11 Commission Report but no specific part of it — that even if it is a search, it is justified because the government demonstrated a “special need” to prevent terrorism. This was months after Senator Lee and I worked to pass the USA FREEDOM Act, which prohibited such collection.

The year before you issued your opinion, the Privacy and Civil Liberties Oversight Board (PCLOB) stated publicly that it could not identify "a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation." Others also found that the NSA's phone records program was not essential to thwarting terrorist attacks.²

- a. **Why did you go out of your way to issue a concurrence stating that this program met a critical national security need, when it already was found to have made no difference in fighting terrorism? Why not simply join the majority opinion?**

RESPONSE: I answered this question at the hearing.

- b. **Is it your view that merely making a reference to terrorism, even with respect to a program that was already found to have made no**

² “Based on the information provided to the Board, we have not identified a single instance involving a threat to the United States in which the telephone records program made a concrete difference in the outcome of a counterterrorism investigation. Moreover, we are aware of no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack. And we believe that in only one instance over the past seven years has the program arguably contributed to the identification of an unknown terrorism suspect. In that case, moreover, the suspect was not involved in planning a terrorist attack and there is reason to believe that the FBI may have discovered him without the contribution of the NSA's program.

Even in those instances where telephone records collected under Section 215 offered additional information about the contacts of a known terrorism suspect, in nearly all cases the benefits provided have been minimal — generally limited to corroborating information that was obtained independently by the FBI.” See [https://www.pclob.gov/library/215-Report on the Telephone Records Program.pdf](https://www.pclob.gov/library/215-Report%20on%20the%20Telephone%20Records%20Program.pdf).

concrete difference in fighting terrorism, is sufficient to justify an exception to the Fourth Amendment's warrant requirement?

RESPONSE: No.

11. At any point during your time in the White House Counsel's office, were you involved in obtaining or providing legal analysis as to the Fourth Amendment implications of any warrantless electronic surveillance program, whether actual or hypothetical?

RESPONSE: As I stated during the hearing, I cannot rule out the possibility of my involvement in the broad range of issues stated in your question. In the wake of the terrorist attacks of September 11, 2001, it was "all hands on deck" on all fronts in the White House Counsel's office.

12. According to the 2009 Report on the President's Surveillance Program, prepared by the Inspectors General of the DOD, DOJ, CIA, NSA and ODNI, on September 17, 2001, John Yoo, who was then at the Office of Legal Counsel, wrote a memo to your supervisor, Timothy Flanigan, "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential terrorists." The memorandum was entitled, "Constitutional Standards on Random Electronic Surveillance for Counter-Terrorism Purposes." As of 2001, were you aware that Mr. Yoo had written such a memorandum to Mr. Flanigan?

RESPONSE: I cannot specifically recall every memorandum that I may have seen while working for the White House Counsel's Office. As I explained in the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office.

13. According to the same 2009 Joint Inspector General Report, Attorney General Alberto Gonzales believed that that September 17, 2001 memo, along with another written by Mr. Yoo in October 2001, provided the legal authority for the electronic surveillance program that would be codenamed Stellar Wind. As of 2001, did you have any interactions with Mr. Yoo, Mr. Flanigan, or anyone else, about either the contents of or legal reasoning underlying either of these memoranda?

RESPONSE: As I explained in the hearing, I testified accurately in 2006 that I did not learn about the Terrorist Surveillance Program, or TSP, until it was described in a New York Times article in December 2005. I had not been read into that program. As I understand it, the September 17, 2001, email does not refer to the TSP.

14. Did you have any conversations of any type whether via email, over the phone, in person or otherwise with Mr. Yoo between September 17, 2001 and October 4th 2001 regarding warrantless surveillance of phone and/or email conversations within the United States?

RESPONSE: I cannot specifically recall every conversation that I may have had while

working for the White House Counsel's Office. As I explained in the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office.

15. Attached in Appendix II is a September 17, 2001 email you wrote to John Yoo, BCC'ing Mr. Flanigan, asking the following question: "Any results yet on the 4A [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"

- a. **Would you agree that the question in your September 17, 2001 email is substantially similar to the one Mr. Yoo answered in his memorandum to Mr. Flanigan dated September 17, 2001?**

RESPONSE: Please see my response to Question 13.

- b. **Other than to help evaluate the legality of a bulk collection electronic surveillance program, for what purpose would you have asked Mr. Yoo to provide a legal analysis of the Fourth Amendment implications of such a program?**

RESPONSE: Please see my response to Question 13.

- c. **Given that the answer to your question to Mr. Yoo helped form the legal justification for the NSA's electronic surveillance program, is it still your position, as you testified in 2006, that you had neither "seen any documents relating to" the President's NSA warrantless wiretapping program nor "heard anything" about it prior to the public disclosure of the program in 2005?**

RESPONSE: Please see my response to Question 13.

- d. **What response did you receive from Mr. Yoo, to your September 17, 2001 email?**

RESPONSE: Please see my response to Question 13.

- e. **It is clear from the email you sent that you had discussed the topic of warrantless surveillance with Mr. Yoo prior to your email request. Please detail the conversations or interactions you had with Mr. Yoo regarding the subject of warrantless surveillance between September 11 and September 17, 2001.**

RESPONSE: Please see my response to Question 13.

16. At your hearing on September 6, 2018, I asked you about your dissenting opinion in *U.S. v. Jones*, which I described as "more like an analysis we'd get

from the Chinese government than we'd get from James Madison.”

In response, you stated the following:

KAVANAUGH: I also went on in that opinion to say the attachment of the GPS device on the car was an invasion of the property right and that independently would be a Fourth Amendment problem. When the case went to the Supreme Court, the majority opinion for the Supreme Court followed that approach that I'd articulated in saying that it was a violation of the Fourth Amendment so the approach I'd articulated there formed the basis of saying it was actually unconstitutional.

Your response to me conveyed that you believed that “the attachment of the GPS device on the car was an invasion of the property right” and “was a violation of the Fourth Amendment.” However, your actual opinion merely asserted that this argument “poses an important question.” Your opinion specifically stated that you “do not yet know whether I agree with that conclusion,” and that it “requires fuller deliberation.” **Is it your testimony that you found in *U.S. v. Jones* that the attachment of the GPS device on the car constituted a violation of the Fourth Amendment?**

RESPONSE: My dissent in *Jones* stated that the D.C. Circuit should grant rehearing to consider “the defendant’s alternative submission” that the installation of a GPS device on his vehicle by police constituted a physical encroachment that would be considered a search under Fourth Amendment precedent. *United States v. Jones*, 625 F.3d 766, 770 (D.C. Cir. 2010) (Kavanaugh, J., dissenting from the denial of rehearing *en banc*). The Supreme Court subsequently granted certiorari to review the case. The defendant’s brief in the Supreme Court repeatedly cited my opinion, and the Court’s majority opinion ultimately adopted reasoning similar to the argument that I advanced in my dissent. *See United States v. Jones*, 565 U.S. 400, 403-13 (2012).

17. During your 2004 confirmation hearing, you were asked by Senator Kennedy about now-Judge William Pryor in the following exchange:

SENATOR KENNEDY: Let me, if I could, ask you about your role in the vetting process, and particularly with regard to William Pryor.

KAVANAUGH: That was not one of the people that was assigned to me. I am familiar generally with Mr. Pryor, but that was not one that I worked on personally . . . I was not involved in handling his nomination.

You added that aside from participating in a moot, you did not work on the nomination of Judge Pryor to the 11th Circuit Court of Appeals.

Yet the limited documents that we have been permitted to see from your time in the White House Counsel's Office suggest you indeed worked on his nomination personally, even if you were not the point person assigned to his nomination.

- a. Did you participate in the Pryor working group? If so, how many counsels were assigned to this working group?**

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nominations was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was primarily responsible for judicial nominations from certain states. Judge Pryor's nomination was not one of the nominations for which I was primarily assigned during my service in the White House Counsel's Office, as I noted in the exchange you provide above. Nonetheless, and as I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges, usually ten lawyers, participated in discussions and meetings concerning all of the President's judicial nominations." I do not have specific recollection of all of the circumstances surrounding Judge Pryor's nomination.

- b. What calls did you participate in related to the Pryor nomination?**

RESPONSE: Please see my response to Question 17.a.

- c. What was your role with respect to Judge Pryor's White House interview(s)?**

RESPONSE: Please see my response to Question 17.a.

- d. Did you ever personally interview Judge Pryor, including by participating in any group or joint interviews of Judge Pryor?**

RESPONSE: Please see my response to Question 17.a.

- e. Prior to recommending Judge Pryor for the nomination, were you aware that he had called *Roe v. Wade* "the worst abomination in the history of constitutional law?" We you also aware that argued that a constitutional right to same sex intimacy would "logically extend" to activities like "necrophilia, bestiality, and pedophilia?"**

RESPONSE: Please see my response to Question 17.a.

- f. During your moot session with Judge Pryor, did you advise him on how to handle questions on his views on *Roe* and same-sex intimacy?**

RESPONSE: Please see my response to Question 17.a.

- g. Did you attend an "emergency umbrella meeting" to discuss Bill Pryor's hearing on 6/6/2003 at Baker & Hostetler?**

RESPONSE: Please see my response to Question 17.a.

18. Did you contact investigators to turn over documents you suspected may have been stolen by Manny Miranda that he had provided to you?

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

19. After the theft of confidential Democratic files from senators serving on the Senate Judiciary Committee became public in December 2003, what steps did you take to ensure you did not receive or benefit from stolen property?

RESPONSE: Please see my response to Question 18.

20. Did you contact and volunteer to be interviewed by any federal investigators in relation to the hacking of Democratic computer files?

RESPONSE: Please see my response to Question 18.

21. On how many occasions did Manny Miranda request to meet with you in person? On how many occasions did he suggest meeting you off-site (defined here as neither his nor your office)?

RESPONSE: Please see my response to Question 18.

22. On how many occasions did Mr. Miranda provide you with paper documents related to Democratic senators, either directly (i.e., hand to hand) or indirectly (e.g., through Don Willet)?

RESPONSE: Please see my response to Question 18.

23. Did you ever communicate with Manny Miranda while you served as White House Staff Secretary?

RESPONSE: Please see my response to Question 18.

24. In at least one email, you passed along inside information about Democrats from Mr. Miranda that you stated originated with "Democratic sources." Who were those sources?

RESPONSE: Please see my response to Question 18.

25. I asked you in written questions in 2004 whether you had ever heard of a Democratic mole. You never answered the question. Please do so now.

RESPONSE: Please see my response to Question 18.

26. You stated in your decision in *Heller II* that a gun restriction must not conflict with the

history and tradition of the Second Amendment.

- a. Would you agree that our founding fathers almost certainly never envisioned 3-D printing technology that could be used to print plastic firearms at home with no expertise?**

RESPONSE: Courts regularly consider cases involving technologies that would have never been envisioned by the Founders. It is the job of judges to consider these technologies against the backdrop of the Constitution. For example, the Fourth Amendment applies to technologies that were not known at the Founding, including cars and modern communication devices. The regulation of 3-D printed firearms is at issue in the federal courts. As such, and as I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such a case or issue. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case or issue.

- b. Would you agree that, consistent with the history and tradition of the Second Amendment, such technology, which is only beginning to emerge now, could be regulated or even banned?**

RESPONSE: Please see my response to Question 26.a.

- 27. It has been mentioned many times that you have made it a point to hire women and minority law clerks. I think that's important and commendable. Why do you believe it is appropriate for you to have an interest in your law clerk's race or sex when placing them on the government payroll, but a university cannot do the same for its admissions?**

RESPONSE: I am proud of my record of hiring the best to serve as my law clerks—including women and minorities—and of my efforts to promote diversity. The extent to which public universities may consider certain factors as admissions criteria is the subject of precedent and ongoing litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

- 28. In my view, and in my capacity as a Dodd-Frank conferee, the structure and independence of the Consumer Financial Protection Bureau (CFPB) is key in insulating decisions and actions from undue political influence. In your dissent in *PPH Corp. v. Consumer Financial Protection Bureau*, you held that the governing structure of the CFPB is unconstitutional and that could be remedied by removing the for-cause requirement allowing the President to fire the director. Congress created the CFPB to be a consumer watchdog and to fight on behalf of individual Americans who cannot by themselves afford to fight lengthy and costly legal battles. Too often, even if consumers were harmed or wronged by companies who broke the law and acted in bad faith, they do**

not stand a chance against the company's scores of legal experts eager to prolong and appeal cases. The CFPB levels the playing field on behalf of these Americans and must have the authority and flexibility to advocate on their behalf.

a. Do you believe the for-cause provision in the governing structure of the CFPB is unconstitutional?

RESPONSE: As I explained at the hearing, I dissented in *PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164-200 (2018) (en banc), because, in my view, the structure of the Consumer Financial Protection Bureau unconstitutionally empowered a single director removable only for cause to exercise significant power over the U.S. economy—an agency structure that Congress had never previously employed. I have repeatedly recognized that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), permits Congress to create independent agencies with leaders removable only for cause. But as my opinion explained in detail, Congress has generally structured those agencies to have multiple leaders, rather than a single leader.

b. Do you believe the fear of losing one's job could inform whether a director chooses to pursue a particular course of action with respect to a company's violation of laws, especially if the president disagrees?

RESPONSE: A determination of that kind is for Congress to make in the first instance. As a judge, I enforce the requirements of the Constitution as construed by Supreme Court precedent.

c. How can Congress ensure the CFPB director can take on unpopular but legitimate cases?

RESPONSE: Please see my response to Question 28.b.

d. Do you believe independent agencies with multi-member governing bodies with term-limits are constitutional?

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues,

e. Do you believe any other aspects of CFPB's structure are unconstitutional? If so, which aspects?

RESPONSE: Please see my response to Question 28.a above.

29. In your dissent in *U.S. Telecom v. FCC*, you asserted that Internet Service Providers (ISPs) have editorial discretion under the First Amendment to choose what content to

carry or not to carry. Were this view to become the law of the land, it would give ISPs unprecedented veto power over free speech online. This would be a real problem because 70 million Americans have only one choice of broadband provider. There is no competition; there are no alternatives. Tens of millions of American consumers would have no recourse but to see only what their ISPs allowed them to see online.

We have a president who is famously thin-skinned when it comes to news reports that are critical of him. And he has repeatedly threatened to punish media organizations he deems “fake news.” **If ISPs have editorial discretion to choose what Americans can see online, what would stop an ISP from cutting off access to legitimate news sites in an effort to gain favor with the President?**

RESPONSE: As I said at the hearing, under the Supreme Court’s decision in *Turner Broadcasting*, if a company exercising editorial discretion in the telecommunications arena has market power, then the government has broad authority to regulate. However, in *United States Telecom Association v. FCC*, 855 F.3d 381 (D.C. Cir. 2017) (en banc), the FCC did not attempt to demonstrate that internet service providers had market power. *Id.* at 434. Therefore, I found no basis to deem the net neutrality rule compliant with *Turner Broadcasting*.

30. Part of the justification you cite in your dissent in *U.S. Telecom v. FCC* is the dual role that some ISPs have as both cable and Internet providers. Specifically, your dissent states that:

“Indeed, some of the same entities that provide cable television service colloquially known as cable companies – provide Internet access over the very same wires. If those entities receive First Amendment protection when they transmit television stations and networks, they likewise receive First Amendment protection when they transmit Internet content. It would be entirely illogical to conclude otherwise.”

I would like to explore your conclusion further. In addition to ISPs that use cable wires to provide Internet access, there are ISPs that provide high speed Internet access over telephone lines, a service known as DSL.

- a. **Would it be logical to conclude that providers of Internet access over telephone wires should receive the same level of editorial discretion as providers of traditional telephone service? If not, what are the material differences?**
- b. **If providers of Internet access over telephone wires are entitled to editorial discretion, would it be logical to conclude that providers of traditional telephone service provided over the same wires should receive the same level of editorial discretion?**

- c. **Would it be logical to conclude that Internet access provided over telephone wires should be subject to the same regulatory scheme as traditional telephone service provided over the same wires?**

RESPONSE: The issues raised in your questions could well come before me in future litigation. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues.

31. There are ISPs that also use the transmission of radio frequencies to provide Internet access to consumers. Many of these ISPs also use radio frequencies to provide voice service. In addition, radio frequencies are used to provide a wide array of other services.
- a. **Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as providers using these frequencies to provide voice service? If not, what are the material differences?**
 - b. **If ISPs providing Internet access over radio frequency are entitled to editorial discretion, would it be logical to conclude that providers using these frequencies to provide voice service should receive the same level of editorial discretion?**
 - c. **Would it be logical to conclude that Internet access provided over radio frequency should be subject to the same regulatory scheme as voice service provided over radio frequency?**
 - d. **Would it be logical to conclude that ISPs providing Internet access over radio frequency should receive the same editorial discretion as the operator of a garage door opener, which also transmits using radio frequencies?**

RESPONSE: The issues raised in your questions could well come before me in future litigation. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on these issues.

32. Many who consider themselves constitutional originalists have been critical of Supreme Court decisions that recognized the right to privacy. The originalist argument is that privacy is not an enumerated right and therefore cases like *Roe* and *Griswold* were wrongly decided.

- a. **You have suggested that other Supreme Court precedent (*U.S. v. Nixon*) may have been wrongly decided.³ Do also you believe *Roe v Wade* and *Planned Parenthood v Casey* were wrongly decided?**

RESPONSE: This is not an accurate description of my view of *Nixon*. I have said repeatedly and publicly over many years that *Nixon* is one of the four greatest moments in Supreme Court history. *Roe* and *Casey* are important precedents of the Supreme Court entitled to respect under the law of precedent. *Casey* is precedent on precedent.

- b. **Do you believe the Constitution protects personal autonomy and privacy as a fundamental right?**

RESPONSE: Please see my response to Question 32.a.

33. In *Priests for Life v. Department of Health and Human Services*, you wrote in reference to the exercise of religion that, “when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government has substantially burdened.”

- a. **Do you believe that, under the Constitution, corporations should be treated as persons?**
- b. **Do you believe that non-governmental organizations, such as Priests for Life, should be treated as individuals when it comes to denying their workers access to affordable contraception?**
- c. **Do you believe that a boss’s private views trump the medical needs and health insurance choices of the boss’s employees?**

RESPONSE: The portion of *Priests for Life* you have quoted concerned the analysis required under the Religious Freedom Restoration Act, a federal statute passed by Congress. Under the Supreme Court’s precedent in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768-74 (2014)—which I, as a lower-court judge, was bound to apply—the Religious Freedom Restoration Act’s protections apply to businesses as well as natural persons. The extent to which the business form affects the rights secured under the Constitution is the subject of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

34. You have praised Justice Scalia’s jurisprudence in writings and speeches. In a

³ *Attorney Client Privilege, Does it Pertain to the Government?*, WASHINGTON LAWYER, January/February 1999.

2011 interview, Justice Scalia stated that the Equal Protection Clause does not extend to women or LGBT individuals.⁴

a. Do you agree with that view?

RESPONSE: As I stated at the hearing, the text and meaning of the Fourteenth Amendment requires equal protection under law for all Americans. Everyone is entitled to equal justice under law.

b. Does the Equal Protection Clause protect individuals on the basis of their gender or sexual orientation?

RESPONSE: Please see my response to Question 34.a.

c. Does the Constitution permit discrimination in certain instances?

RESPONSE: As a general matter, the Equal Protection Clause does not countenance invidious discrimination. The full contours of this prohibition are regularly the subject of cases and controversies brought before the D.C. Circuit and the Supreme Court. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

35. Justice Kennedy wrote in *Planned Parenthood v. Casey* that “At the heart of liberty is the right to define one’s own concept of existence.”

a. Do you agree with Justice Kennedy in this case?

RESPONSE: The passage cited above is the opening sentence in *Planned Parenthood v. Casey*. As I discussed at the hearing, it would be inconsistent with judicial independence to opine on cases or issues that could come before me. This means no forecasts or hints, as Justice Ginsburg said during her confirmation hearing, and no thumbs up or thumbs down on cases, as Justice Kagan said during her confirmation hearing.

b. Do you believe “the right to define one’s own concept of existence” means states cannot pass laws discriminating against LGBT Americans?

RESPONSE: Please see my response to Question 35.a.

⁴ *Scalia: Constitution Does not Protect Women Against Discrimination*, WASHINGTON POST, January 4, 2011, at <http://voices.washingtonpost.com/44/2011/01/scalia-constitution-does-not-p.html>.

36. In your dissent in *Seven-Sky v. Holder*, you wrote that, “the President might not enforce the individual mandate provision if the President concludes that enforcing it would be unconstitutional.” Your reasoning was that, “[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

a. How is this position consistent with the president’s constitutional obligation to “take care that the laws be faithfully executed”?

RESPONSE: As I explained at the hearing, in footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1, 50 n.43 (D.C. Cir. 2011), I was referring to the general concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974), and applied to civil enforcement in *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985). As I further explained at the hearing, the limits of prosecutorial discretion are uncertain.

b. During your time in the Bush White House, did you ever draft, revise, edit, approve, or otherwise contribute to any signing statements reserving the president’s right not to enforce laws or part(s) of laws? If so, which ones?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of my work, my role was not to replace the policy or legal advisers, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

c. Can a president refuse to comply with a court order?

RESPONSE: As I said in the hearing, no one is above the law of the United States, including a President of the United States. As I also stated at the hearing, when the Supreme Court issues a ruling prohibiting the President from doing something or ordering the President to do something, the Supreme Court’s word is the final word, subject of course to a constitutional amendment or a subsequent overruling by the Court. *See Cooper v. Aaron*, 358 U.S. 1 (1958). In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment any further on this question.

d. If a president refuses to comply with a court order, how should the courts respond?

RESPONSE: Please see my response to Question 36.c.

e. How can a court serve as a legitimate check on the powers of the executive branch if the president can disregard its rulings whenever the

president deems it to be necessary?

RESPONSE: Please see my response to Question 36.c.

37. In 2017, you became a member of the Board of Directors of the Washington Jesuit Academy, a parochial school in the District of Columbia that accepted vouchers from the D.C. voucher program. You indicated in the questionnaire you submitted to the Committee that you, “participate in meeting where the Board deals with various issues, including educational decisions.”

a. Due to your involvement as a board member of this school, will you recuse yourself from cases regarding the legality of school vouchers since the decision will have a direct impact on how the Washington Jesuit Academy functions as a school?

RESPONSE: I will consider that question as appropriate.

b. If confirmed, will you step down from the Board of Directors of the Washington Jesuit Academy to avoid the perception of there being a possible conflict of interest?

RESPONSE: I plan to step down from the Board, if I am confirmed.

c. Do you believe that taxpayer dollars should be given to private parochial schools, whereby tax payer dollars could be used to promote religious messages?

RESPONSE: This question calls upon me to offer my views as to a matter of public policy. As a sitting judge and nominee, it would be inappropriate for me to provide an answer.

d. Do you believe that institutions that receive federal education dollars should be required to follow the same civil rights protections as public schools?

RESPONSE: Please see my response to 37.c.

38. You said that “a judge must interpret statutes as written. And a judge must interpret the Constitution as written.” Given the varying and complicated constraints faced by agencies, cost-benefit analysis may vary by administration, mission area, desired outcome, and economic indicators, among other variables. Guidance for agencies on cost-benefit analysis provided by the Office of Management and Budget and internal guidance will also inform the structure and depth each analysis.

a. Do you believe it is appropriate for judges to interpret the varying methods of cost-benefit analysis and determine if they are sufficient or appropriate for any given regulation?

RESPONSE: If the statute requires or precludes cost-benefit analysis, the agency must follow that statute. If the statute gives the agency discretion, the agency must exercise discretion reasonably.

b. If so, what statute on cost-benefits analysis should the court interpret?

RESPONSE: In general, a court should apply the analysis required by the particular statute at issue in the case. As I explained at the hearing, Congress passes laws, and it is the job of judges to determine whether the Executive Branch has acted within the authority given by Congress.

c. Do you think the benefits of certain regulatory action, especially in the environmental space, are more difficult to measure than the costs? Does that make measuring them when engaging in a cost-benefit analysis any less important?

RESPONSE: The Supreme Court has determined that some statutory schemes, including in the environmental arena, require agencies to consider costs and benefits before deciding whether regulation is appropriate and necessary. *See, e.g., Michigan v. EPA*, 135 S. Ct. 2699, 2711 (2015).

39. You have criticized *Chevron* deference as being aggressive executive overreach and argued that courts should determine the best reading of the statute.

a. How will you make sure expertise is accounted for when considering complicated, scientific cases regarding the environment?

b. What role should experts in agencies play when interpreting statutes?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

40. You have often argued that plaintiffs representing industry should have standing for economic damages incurred from environmental regulations. In some cases, for example *Grocery Manufacturers Assoc v. EPA*, you have claimed that a relatively low bar of economic harm qualifies as standing.

a. Will individuals and nongovernmental organizations receive the same treatment when you consider whether they have standing for damages?

RESPONSE: As I explained at the hearing, I am a pro-law judge. Part of being an independent, pro-law judge is ruling for the party that is right, no matter who that party is. In the specific context of your question, I apply standing principles in an evenhanded manner, regardless of the identity of the litigants.

- b. Often environmental regulations create significant economic benefits and value to human health, the clean energy economy, and environmental sustainability while some industries face challenges as a result of the regulations. **How do you address and balance these economic factors when determining standing?**

RESPONSE: I have applied an evenhanded and impartial approach to the wide variety of environmental cases that have come before me.

- c. **As someone who has said “the task of dealing with global warming is urgent and important at the national and international level,” do you agree that the damage caused to individuals, corporations, and communities by climate change should be considered for standing on similar grounds to the economic hardship created by regulations that mitigate climate change?**

RESPONSE: Please see my response to Question 40.b. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

41. You have argued that the EPA does not have the authority to regulate greenhouse gases under the Clean Air Act despite statute giving EPA authority to regulate “any air pollutant.”

- a. **Do you still believe that EPA cannot regulate greenhouse gases?**

RESPONSE: As your question suggests, I addressed one aspect of this issue in *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *14-*23 (D.C. Cir. Dec. 20, 2012). The Supreme Court largely adopted my position in *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). Beyond reference to those prior decisions, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me.

- b. **If so, why are greenhouse gases excluded from this definition of “any air pollutant?”**

RESPONSE: As I explained above and at the hearing, it would be improper for me as a sitting judge and a nominee to comment on legal issues that might come before me.

42. Chief Justice Roberts wrote in *King v. Burwell* that

“oftentimes the ‘meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.’ So when deciding whether the language is plain, we must read the words ‘in their context and with a view to their place in the overall statutory scheme.’ Our duty, after all, is ‘to construe statutes, not isolated provisions?’”

- Do you agree with the Chief Justice? Will you adhere to that rule of**

statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

RESPONSE: As discussed at the hearing, “it is critical that judges stick to the law as written, the text of the statute as passed by Congress and signed by the President.” I also believe, as discussed at the hearing, “footnote 9 of *Chevron* is very important in terms of using all the tools of statutory construction before you make a finding of ambiguity in the statutory term at issue.” In applying those tools, I agree with and respect the principles of statutory interpretation cited in the above passage of the Chief Justice’s opinion. It would not be appropriate for me in this context to opine on whether I agree with how those principles were applied by the Court in *King v. Burwell*.

43. In *United States v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were only advisory and could not mandate that a district court judge sentence a given defendant within a given range. Notwithstanding *Booker*, many Courts of Appeal, including the D.C. Circuit in cases like *United States v. Haibe*, have held that the guidelines “frame the discretion” of district court judges. This conception of the post- *Booker* advisory guidelines leads to sentence reversals in cases in which, for example, the defendant’s sentence is within even his own calculated range. **What is your view on the proper role of the advisory guidelines in evaluating a district court’s sentencing decisions?**

RESPONSE: The role of the advisory sentencing guidelines is a frequently litigated issue that could come before me. As I explained during the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

44. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them “disheartening” and “demoralizing.” **While anyone can criticize the merits of a court’s decision, do you believe that it is ever appropriate for leaders to attack a judge’s integrity based on his ethnicity, or to question the legitimacy of a federal court?**

RESPONSE: As I stated during the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge – which is to decide cases, not to comment on current events as pundits.

45. President Trump praised one of his advisers after that adviser stated during a television interview that “the powers of the president to protect our country are very substantial *and will not be questioned.*” (Emphasis added.) **Is there any**

constitutional provision or Supreme Court precedent precluding judicial review of national security decisions of a President?

RESPONSE: I answered this question at the hearing. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

46. Does the First Amendment allow the use of a religious litmus test for entry into the United States? How did the drafters of the First Amendment view religious litmus tests?

RESPONSE: The extent to which the First Amendment applies to non-citizens seeking entry into the United States is the subject of ongoing litigation and is a matter that could come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

47. Do you agree with Justice Scalia’s characterization of the Voting Rights Act as a “perpetuation of racial entitlement?”⁵

RESPONSE: I cannot speak to Justice Scalia’s views. In my unanimous opinion in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.C. Cir. 2012), I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *Id.* at 32-33.

48. What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?

RESPONSE: The Foreign Emoluments Clause of the Constitution states that “no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.” The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

49. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress’s

⁵ https://www.supremecourt.gov/oral_arguments/argument_transcripts/2012/12-96_7648.pdf.

findings in reaching its decision. As Justice Ginsburg’s dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was “extraordinary” and the Court erred “egregiously by overriding Congress’ decision.” **When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?**

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

50. How would you describe Congress’s authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation’s “Second Founding”?

RESPONSE: As I explained during the hearing, the Thirteenth, Fourteenth, and Fifteenth Amendments are vitally important constitutional Amendments, because they brought the promise of racial equality—which had been denied at the time of the original Constitution—into the text of the Constitution. Because the scope of Congress’s authority to enforce those Amendments is the subject of active litigation, it would be inappropriate for me to comment more specifically on this issue.

51. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: “liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct,” and that “in our tradition, the State is not omnipresent in the home.” Do you believe the Constitution protects that personal autonomy as a fundamental right?

RESPONSE: As I said in my opening statement, Justice Kennedy established a legacy of liberty for ourselves and our posterity. The Supreme Court has, as the portion of *Lawrence* you quote demonstrates, recognized certain areas of personal autonomy as fundamental to liberty. The full contours of this jurisprudence are regularly the subject of cases and controversies brought before the D.C. Circuit and the Supreme Court. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

52. As White House Staff Secretary at the time *Lawrence v. Texas* was decided, what was as your role within the Bush administration as part of its effort to push a constitutional amendment defining marriage as a union between and

man and a woman?

RESPONSE: As I testified in the hearing, while I was Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk as well.

53. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of *stare decisis*. **In your opinion, how strongly should judges bind themselves to the doctrine of *stare decisis*? Does the commitment to *stare decisis* vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?**

RESPONSE: As discussed at the hearing, the judicial power clause of Article III and Federalist 78 make clear that *stare decisis* is “part of the proper mode of constitutional interpretation.” I explained that “at the D.C. Circuit level or the court of appeals level, we follow vertical *stare decisis*, absolutely, and that means that we are not permitted to deviate from a Supreme Court precedent. With respect to [the] Supreme Court, or ... when I am on the D.C. Circuit and we are reconsidering en banc a prior precedent of our own, we can do that at times if the conditions for overruling a precedent are met”—a circumstance that “is rare.” If confirmed, I would respect the rules of *stare decisis* given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

54. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety. **How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.**

RESPONSE: I will follow the applicable rules and will consult with my colleagues as appropriate.

55. It is important for me to try to determine for any judicial nominee – and especially one to our Nation's highest court – whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*, 304 U.S. 144 (1938). In that footnote, the Supreme Court held that “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.” **Can you discuss the importance of the courts’**

responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

RESPONSE: Equal justice under law means that everyone who ends up in an American court is entitled to equal treatment, due process, and the equal protection of the laws.

56. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like the Iran-Contra Affair, warrantless spying on American citizens, and politically-motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest, we make sure that we exercise our own power properly. **Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?**

RESPONSE: Yes.

57. What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

RESPONSE: The Supreme Court has clarified the scope of congressional power under the Commerce Clause of Article I and Section 5 of the Fourteenth Amendment in cases including *United States v. Lopez*, 514 U.S. 549 (1995), *Gonzales v. Raich*, 545 U.S. 1 (2005), *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003). Those cases are important precedents of the Supreme Court entitled to respect under the law of precedent, which I believe is essential to ensuring stability and predictability in the law.

58. As you know, in *Morrison v. Olson* the Supreme Court upheld the constitutionality of a law that allowed the Attorney General to recommend appointment of an independent counsel to investigate and prosecute certain high-ranking Government officials, including the President, for federal crimes. You have said that the case has been “effectively overruled,” but you would “put the final nail in.”⁶

a. What does it mean for a case to have been “effectively overruled”? Precedent has either been overruled or not.

RESPONSE: I have discussed this issue at length in my writings and at the hearing.

b. What other Supreme Court precedent, in your opinion, has been “effectively overruled”?

⁶ Federal Courts & Public Policy,” American Enterprise Institute, Washington, D.C., March 31, 2016, <https://www.c-span.org/video/?c4740724-kavanaugh-final-nail>.

RESPONSE: Article III of the Constitution incorporates a system of precedent. As a judge, I have carefully adhered to precedent.

59. At your hearing last week, you and Senator Hirono had the following exchange:

SEN. HIRONO: Have you otherwise ever received sexually suggestive or explicit e-mails from Judge [Alex] Kozinski, even if you don't remember whether you were on this "Gag List" or not?

KAVANAUGH: So Senator, let me start with no woman should be subjected to sexual harassment in the workplace, and ... [*sic*]⁷

You avoided answering the question. **Please go through your files and emails, and definitively state whether you ever received sexually suggestive or explicit emails from Judge Kozinski, whether as part of his "Easy Rider Gag List" or otherwise.**

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

60. **Following up from the prior question, if you ever received sexually suggestive or explicit emails from Judge Kozinski, did you ever speak or otherwise communicate with him about the appropriateness of this conduct?**

RESPONSE: Please see my response to Question 59.

61. Attached in Appendix III is an email that you received from a White House colleague on June 8, 2001 at 10:13 a.m., making a comment – on a government computer network – that is clearly inappropriate. **Did you ever speak or otherwise communicate with this colleague about the appropriateness of this conduct?**

RESPONSE: Aside from me, none of the senders or recipients of that email were employees of the White House, and no White House business was discussed. I was not the author of the inappropriate comment. The specific email referenced in this question was sent over 17 years ago.

62. **What is the Eureka Club? When did you take part in activities or gatherings under that name or a substantially similar name? And what were the activities associated with these gatherings?**

RESPONSE: A group of friends sometimes gathered for dinner. The scheduling emails for those dinners would sometimes be titled "Eureka."

63. **Do you *personally* believe that Nazis, Nazi sympathizers, or white nationalists are "fine people"?**

⁷ <http://www.cq.com/doc/congressionaltranscripts-5383496?8&search=6DCnZ3GR>.

RESPONSE: There is no place in American public life for vile ideologies of hate.

64. Have you ever ruled on a case involving a policy that, as an employee of the Bush administration, either you helped create or for which you provided legal or policy analysis? If so, please describe.

RESPONSE: I have recused from cases as appropriate. I have explained this issue in *Baker Hostetler v. Department of Commerce*, 471 F.3d 1355 (D.C. Cir. 2006).

65. Regarding judicial philosophy, do you believe it is important for a judge to approach his or her analysis in a given case with intellectual honesty? Why or why not? Stated differently, would it be appropriate for a judge to have a predetermined conclusion at the outset of a case?

RESPONSE: As discussed at the hearing, I believe “process protects you” as a judge. Rather than staking out a predetermined conclusion, the process of briefing, oral argument, and deliberation is critical to allow judges to engage in deliberate decisionmaking and to ensure confidence in the judiciary.

#

Appendix I

From: "Miers, Harriet"
To: "Kavanaugh, Brett M."
Subject: Fw: let me know when you get this. thx
Received(Date): Sat, 12 Jun 2004 18:10:14 -0500

Brett, FYI.

-----Original Message-----

From: Jim Wilkinson [P6/(b)(6)]
To: Miers, Harriet <Harriet_Miers@who.eop.gov>
Sent: Sat Jun 12 19:08:40 2004
Subject: let me know when you get this...thx

These were written by WH Counsel and NSC legal (approved by both)...they have also been approved by Wilkinson, Bartlett, Rowe. Steve Hadley also wanted Harriet, Brett, and Andy to see them. I am on my cell at [P6/(b)(6)] these are for use by Condi and Powell for tomorrow's Sunday shows...

Ã* The President believes we must do everything possible to protect the American people from terrorism. Gathering intelligence about the plans of terrorists is critical to defending America.

Ã* In all aspects of our nation's war on terror, including the conflict in Iraq, the President has insisted our government must comply with U.S. laws and treaty obligations.

Ã* He has repeatedly made clear that torture of detainees is not permitted under U.S. policy, and he has never considered the possibility of authorizing torture.

Ã* The abuses of Abu Ghraib are a violation of the President's policies ã** not a result of them - and these violations are being investigated and will be punished. The President has been and remains firmly committed to our military's observance in Iraq of the Geneva conventions and our other international agreements.

Ã* To help ensure our government follows the law, the executive branch receives legal opinions. The Department of Justice in a legal analysis discussed the possibility that under some circumstances could be legally defensible. The lawyers were considering a situation in which the information gained from an interrogation

might prevent future attacks by foreign enemies. However, the President has never considered authorizing torture under any circumstances.

Ã* Interrogation techniques must be kept confidential so we do not give away information that would signal to our adversaries what they could anticipate if captured, allowing them to prepare for it and potentially counter it. As required by law, we brief the appropriate Congressional leadership on authorized interrogation techniques.

Ã* While our actions in the War on Terror are governed by rules, the terrorists do not respect any rules. They are an enemy that hides among civilian populations and seeks to inflict large-scale civilian casualties by surprise attack. We have an obligation to aggressively and lawfully interrogate captured detainees to obtain information that may help us prevent future attacks.

<<detainee message pls doc>>

1469

Appendix II

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Yoo, John C <John.C.Yoo@usdoj.gov>
BCC: timothy flanagan (timothy flanagan [WHO])
Sent: 9/17/2001 3:28:35 AM
Subject: .4A issue

***** Begin Original ARMS Header *****
RECORD TYPE: PRESIDENTIAL NOTES MAIL
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 17-09-2001 07:28:35.00
SUBJECT: .4A issue
TO: "Yoo, John C" <John.C.Yoo@usdoj.gov> ; "Yoo, John C" <John.C.Yoo@usdoj.gov> [UNRECORDED]
FROM: UNRECORDED
BCC: timothy flanagan (timothy flanagan [WHO])
READ: UNRECORDED
***** End Original ARMS Header *****

Any results yet on the 4A implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?

REV_00023540

Appendix III

Message

From: PRA 6 [UNKNOWN] PRA 6

Sent: 8/1/2001 12:40:54 AM

To: PRA 6

CC: PRA 6 Brett M. Kavanaugh [CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]] PRA 6

Subject: Re: reunion date

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: PRA 6

CREATION DATE/TIME: 1/4/2001 10:40:54 AM

SUBJECT: Re: reunion date

TO: PRA 6 [UNKNOWN]

READ: UNKNOWN

TO: PRA 6

READ: UNKNOWN

TO: PRA 6

READ: UNKNOWN

CC: PRA 6

READ: UNKNOWN

CC: PRA 6 [UNKNOWN]

READ: UNKNOWN

End Original ARMS Header

PRA 6

Sept. 7-9 is fine, but I need to lock a date in this week. What is the old date that we have? Can we definitely select a date soon?

PRA 6

--- PRA 6 wrote:

> Boys,

> My case that conflicted w/ our Sept. 7 to 9 weekend is settling, and accordingly we can go back to those dates. I'll assume that nobody has locked in other plans they can't change unless you tell me differently (ASAP).

> sorry for the flip-flops on dates.

> your cruise director,

> PRA 6

> ps: PRA 6 who we're calling PRA 6 was born on PRA 6 PRA 6 8 pounds 6.5 oz. PRA 6 and PRA 6 are both doing well.

1471

> ----- Reply Separator -----
> Subject: Su Ching is booked
> Author: PRA 6
> Date: 6/8/01 10:13 AM
>
> Boys,
>
> Although you may be hoping that I've lined up a
> hostess for a
> rub-n-tug massage session, "Su Ching" actually
> is the sailboat (a
> Tayana 55) we've got for Friday, Sept. 7 to
> Sunday, Sept. 9 out of
> Annapolis. You can check out the boat at
>
>
> http://www.annapolisbaycharters.com/BayBareBoats/baybare.htm/suching_baybare.htm
>
> We've got the boat starting at 9 on Friday,
> although if we wanted, a
> couple of us could head to Annapolis on Thurs.
> afternoon, get an
> orientation on the boat, and buy some
> groceries. Whether that makes
> sense will depend on how early people want to
> get going on Friday.
> Because we can't leave Annapolis until the last
> person gets there, we
> should discuss at some point when on Friday
> people want to rendezvous
> in DC or Annapolis. (I'd think we could work
> it so that the non-DC
> people could get picked up at the airport by
> BK, PRA 6 for me, esp. if
> the New Yorkers take the same flight.)
>
> We could still shift the weekend one day, to
> Sept. 8 thru 10, if
> that's what people prefer, but so far I've
> heard a mild preference for
> 7 thru 9.
>
> Your cruise director,
> PRA 6

> ----- Reply Separator -----
> Subject: RE: Lake Placid '01 Option 2
> Author: PRA 6 at
> PRA 6
> Date: 6/4/01 10:38 AM
>
> Preference for Maine (more scenic, I would think),
> but will happily defer to
>
> the majority. Very mild preference for 7-9 over
> 8-10.
>
> -----Original Message-----
> From: PRA 6
> Sent: Friday, June 01, 2001 9:23 AM
> To: PRA 6
> PRA 6

REV_00018952

> "mailto:brett_m_kavanaugh@who.eop.gov@inetgw" ;
 > [REDACTED]
 > [REDACTED]
 > Subject: RE: Lake Place '01, Option 2
 >
 > Thanks for the responses. Two questions:
 >
 > 1. Do you prefer Sept. 7-9 (Fri. thru Sun.)
 > or Sept. 8-10 (Sat. thru
 >
 > Mon.)? Note that if we do 7-9, that makes
 > for a three-day work week.
 >
 >
 > as Monday Sept. 3 is Labor Day.
 >
 > 2. [REDACTED] are you ok w/ the
 > Annapolis roll?
 >
 > I'd like to lock in the boat soon, as I've
 > only found one that's the
 > big enough but doesn't require hiring a
 > captain.
 >
 >
 > _____ Reply Separator
 >
 > Subject: RE: Lake Place '01, Option 2
 > Author: [REDACTED]
 > [REDACTED]
 > Date: 6/1/01 8:37 AM
 >
 >
 > I agree that the Annapolis venue might be more
 > convenient. Either is fine
 >
 > with
 > me.
 > [REDACTED]
 >
 > -----Original Message-----
 > From: [REDACTED]
 > [REDACTED]
 > Sent: Thursday, May 31, 2001 6:02 PM
 > To: [REDACTED]
 > [REDACTED]
 > brett_m_kavanaugh@who.eop.gov@inetgw; [REDACTED]
 > [REDACTED]
 > Cc: [REDACTED]
 > Subject: Lake Place '01, Option 2
 >
 >
 > Boys,
 >
 > Here's an alternative that I think could be
 > interesting: we could
 > charter a somewhat bigger boat, a Tayana 55,
 > out of Annapolis.
 >
 > The pluses: it's easier to get to Annapolis
 > than to Rockland, ME;
 > the
 > boat's a good bit bigger, so we could more
 > comfortably spend all
 > three
 > days cruising on it; and the weather in Sept.
 > is likely to be warmer
 > in MD than in ME.
 >
 > The minus: it costs money to rent, unlike

REV_00018953

> the one in ME. It would
>> work out to be about \$2800 total for three
> days, including taxes,
>> fuel, and a dinghy (w/o food and booze). I'm
> guessing we'll get 6 or
>
>>
>> 7, so say something under \$500 apiece.
>>
>> we could book it for Sept. 7-9 (Fri. thru
> Sun.) or for Sept. 8-10
>> (Sat. thru Mon.). I mention that weekend
> because it's the only
>> weekend nobody's said no to, plus the boat is
> available then. If
>> anyone wanted to come to DC the night before,
> you could either stay
>> w/
>> me or we could head to Annapolis and stay
> onboard.
>>
>> Let me know what you think. My own vote: as
> much as I like taking
>> the budget approach to any venture, I think
> the Annapolis roll could
>> be better, given that we'd have a much nicer
> boat and it would be
>> less
>> complicated logistically, as we wouldn't have
> to line up any rooms
>> ashore and it's easier to get to for all of
> us.
>>
>>
>>
>>
>>
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Make international calls for as low as \$.04/minute with Yahoo! Messenger
<http://phonecard.yahoo.com/>

REV_00018954

**Written Questions from Senator Richard J. Durbin to Judge Brett Kavanaugh
September 10, 2018**

For questions with subparts, please respond to each subpart separately.

1. You worked as White House Staff Secretary from July 2003 through May 2006. You have described this time as “formative” and “most instructive to your judging.” You have said in numerous speeches that your duties as Staff Secretary involved substantive policy work. You said you “participated in the process of putting legislation together,” “identif[ied] potential constitutional issues in legislation,” and “worked on drafting and revising executive orders.” In your 2006 hearing, you told then-Chairman Specter that you gave President Bush advice on signing statements, including “identifying potential constitutional issues in legislation.”

Beginning in 2004, I offered numerous amendments in the Senate to bar cruel, inhuman, or degrading treatment of detainees. Senator McCain picked up the banner and—over a veto threat from the Bush Administration—the Senate passed the McCain Torture Amendment in October 2005 by a 90-9 vote. On December 30, 2005, President Bush issued a signing statement claiming the authority to override the McCain Torture Amendment.

- a. In my office I asked you about this signing statement and you said you remember seeing it and thinking that Senator McCain wouldn’t be happy. Why did you think Senator McCain wouldn’t be happy?**

RESPONSE: I believed that Senator McCain would not be happy with any perceived daylight between the President’s signing statement and the McCain Amendment.

- b. Did you provide any comments or express any views, verbally or in writing, regarding the December 30, 2005 signing statement on the McCain Torture Amendment, including comments or views on “potential constitutional issues”?**

RESPONSE: As discussed at the hearing, I do not specifically remember any comments I made or the details of who within the government took what position, but I do recall that there was an internal debate and controversy about the signing statement. As Staff Secretary, my role was not to replace the legal or policy advisors, but rather to make sure that the President had the benefit of the views of advisors, even as any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk.

- c. If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 1.b.

- d. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the December 30, 2005 signing statement?**

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

2.

- a. Did you provide any comments or express any views, either verbally or in writing, about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

RESPONSE: Please see my response to Question 1.b.

- b. If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 1.b.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about legislation offered by me or Senator McCain that banned cruel, inhuman or degrading treatment of detainees?**

RESPONSE: Please see my response to Question 1.d.

3. On October 18, 2004, then-OMB Director Josh Bolten and then-National Security Advisor Condoleezza Rice sent a letter stating the Administration's objection to an earlier version of the McCain Torture Amendment which was included as a provision in the 9/11 Commission Intelligence Reform legislation. The provision was removed because of the Administration's objections.

- a. Did you review or provide comments or views, either verbally or in writing, on this letter?**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. If so, what comments or views did you provide?**

RESPONSE: Please see my response to Question 3.a.

- c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this letter?**

RESPONSE: Please see my response to Question 1.d.

4. On October 5, 2005, just prior to the Senate vote on the McCain Torture Amendment, then-White House spokesperson Scott McClellan issued a veto threat, saying the amendment “would limit the president’s ability as commander-in-chief to effectively carry out the war on terrorism.”

a. Were you involved in any discussions about this veto threat?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. Did you review the language of this veto threat and/or provide comments or views, either verbally or in writing, on the language?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

c. Can you state with certainty that there are no documents in the National Archives that contain your comments or views about this veto threat?

RESPONSE: Please see my response to Question 1.d.

5. Three Office of Legal Counsel memos issued in May 2005 by Steven Bradbury concluded that waterboarding and other abusive techniques do not constitute torture or cruel, inhuman or degrading treatment. You were not asked at your 2006 hearing about the Bradbury torture memos because their existence had not been publicly revealed yet. I asked you in my office if you were involved in any discussions on the Bradbury memos. You said that you did not remember discussions on the Bradbury memos but that you wouldn’t rule anything out.

a. Did you have any involvement with these Bradbury memos during your tenure as Staff Secretary?

RESPONSE: I was not involved in crafting those memos. My understanding is that the Bush Administration later withdrew those May 2005 memos.

- b. Did you participate in any discussions or review any documents regarding these Bradbury memos during your tenure as Staff Secretary?**

RESPONSE: Please see my response to Question 5.a above.

- c. Can you state with certainty that there are no documents in the National Archives regarding the Bradbury torture memos that you wrote, edited, reviewed, or approved while you were Staff Secretary?**

RESPONSE: Please see my response to Question 1.d.

6. The Committee has been denied access to any documents from the National Archives from your tenure as Staff Secretary, leaving a 35-month black hole in your record. Numerous issues you were involved with as Staff Secretary have not come before you as a judge. So we do not have any insight from your judicial record about your views on those issues. **Do you believe the American people should, at minimum, be permitted to see documents from your Staff Secretary tenure regarding issues that have not come before you in any case since you were appointed to the D.C. Circuit?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated during the hearing, I do not have a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush.

7. Last week, in a response to a question from Senator Tillis about your record on LGBTQ issues, you noted that you have not been involved in any cases concerning LGBTQ issues on the D.C. Circuit. However, you have acknowledged that you worked on these issues during your service in the White House Counsel's Office and as Staff Secretary.

For example, we know from news reports that you met with a delegation of Log Cabin Republicans in 2003. You told Senator Tillis last week that you were there as a representative of the Bush White House and discussed judicial nominations and "other issues." But no documentation related to this meeting has been provided to the Committee from your White House records.

In fact, the only public document we've received through the Burck production process that touches on LGBTQ rights appears to be an email with a subject line reading "Gay marriage issues." However, the only email text included in the document was a reply from Alberto Gonzales to you, asking if you were interested in playing a round of golf at Andrews Air Force Base with Jim Haynes. The Committee did not receive any other emails from this chain.

Additionally, when we met in my office, you acknowledged that during your time as Staff Secretary, you “would have been involved in the process” related to President Bush’s endorsement of a constitutional amendment to ban same-sex marriage in 2004. You also said that you did “help implement” the President’s conclusion to support the amendment. The Committee has not received any documents related to your work and opinions on the amendment.

- a. During your time in the White House, did you express any views, either verbally or in writing, on whether or not same-sex marriage is a right guaranteed by the Constitution? If so, please describe the views you expressed.**

RESPONSE: At this point, I do not remember specifics. At that time, the Supreme Court had not yet ruled that same-sex marriage was a right in the Constitution. And most politicians of both political parties opposed (or at least did not support) legalizing same-sex marriage.

- b. Is it possible that there are documents containing your views on whether or not same-sex marriage is a right guaranteed by the Constitution in the National Archives?**

RESPONSE: Please see my response to Question 7.a.

- c. During your time in the White House, did you offer any advice or analysis, either verbally or in writing, related to President Bush’s 2004 endorsement of a constitutional amendment to ban same-sex marriage? If so, please describe the advice or analysis you offered.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President’s speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- d. Is it possible that there are documents containing your advice or analysis related to President Bush’s 2004 endorsement of a constitutional amendment to ban same-sex marriage in the National Archives?**

RESPONSE: Please see my response to Question 1.d.

- e. During your time in the White House, did you express any views, either verbally or in writing, on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans? If so, please describe the views you expressed.**

RESPONSE: Please see my response to Question 7.c.

- f. **Is it possible that there are documents containing your views on whether or not the Constitution or federal statutes permitted religious-based discrimination against LGBTQ Americans in the National Archives?**

RESPONSE: Please see my response to Question 1.d.

- g. **Is it possible that there are documents in the National Archives that contain your advice, analysis, or opinions on any other issues involving the rights of LGBTQ Americans?**

RESPONSE: Please see my response to Question 7.c.

8. You told me in my office that the Partial Birth Abortion Ban Act of 2003 would have come across your desk as Staff Secretary.

- a. **While you were Staff Secretary, did you write, edit, review or approve any documents, emails, or speeches regarding this legislation? If so, please describe them.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other issues. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. **You testified in 2006 that your work as Staff Secretary included "identifying potential constitutional issues in legislation." Did you provide comments or views regarding potential constitutional issues with this legislation?**

RESPONSE: Please see my response to Question 8.a. above.

- c. **During your time in the White House, did you ever provide comments or views on the constitutionality of abortion or legislative restrictions on abortion?**

RESPONSE: Please see my response to Question 8.a. above.

- d. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the constitutionality of abortion or of legislation restricting abortion?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President

Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

9. While you were Staff Secretary:

- a. **Did you write, edit, review or approve any documents, emails or speeches regarding the war in Iraq? If so, please describe all of your involvement in this issue.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. **Did you provide any comments or views on the factual predicate or legal authorization for the war in Iraq? If so, please describe your comments or views.**

RESPONSE: Please see my response to Question 9.a.

- c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the factual predicate or legal authorization for the war in Iraq?**

RESPONSE: Please see my response to Question 1.d.

10. While you were Staff Secretary:

- a. **Did you write, edit, review or approve any documents, emails, or speeches regarding the abuse of detainees at Abu Ghraib prison? If so, please describe all of your involvement in this issue.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. After the Abu Ghraib matter became public, the President and the White House responded in many ways. I would have performed my usual Staff Secretary responsibilities in connection with those responses.

- b. **Did you ever provide comments or views, verbally or in writing, on the abuse of detainees at Abu Ghraib prison? If so, please describe these comments or views.**

RESPONSE: Please see my response to Question 10.a.

- c. **Can you state with certainty that there are no documents in the National Archives that contain your comments or views about the abuse of detainees at Abu Ghraib prison?**

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

11. When we met in my office you told me that it is already public record that President Bush consulted you on his choices for Supreme Court nominees. On July 9, *The New York Times* reported that in 2005 you participated in some of the sessions preparing Supreme Court nominee Harriet Miers for her confirmation process. (Peter Baker, “*A Conservative Court Push, Decades in the Making, With Effects for Decades to Come*,” July 9, 2018.) According to the *Times*, you were “[a]mong those who argued against her nomination from within the White House.” The *Times* said “Mr. Kavanaugh instead favored the selection of Justice Alito, then an appeals judge and a known and trusted figure within the conservative legal community.”

- a. **Please describe all of your involvement in Harriet Miers’ Supreme Court nomination.**
- b. **Did you participate in sessions to help prepare Ms. Miers for her confirmation process? If so, please describe each session in which you participated.**
- c. **Did you write, edit, review or approve any documents, emails, or speeches regarding the nomination of Ms. Miers to the Supreme Court? If so, please describe them.**
- d. **Did you ever provide comments or views, verbally or in writing, raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Alito? If so, please describe your comments or views.**
- e. **What were your concerns about Ms. Miers’ nomination?**
- f. **Is it possible that there are documents containing your comments or views raising concerns about Ms. Miers’ nomination, advocating for then-Judge Samuel Alito’s nomination, or comparing Ms. Miers to then-Judge Samuel Alito in the National Archives?**

- g. Did you favor nominating then-Judge Alito over Ms. Miers?
- h. Were you involved in editing, writing or reviewing Ms. Miers' October 27, 2005 statement announcing her decision to withdraw her nomination or President Bush's statement that same day announcing his acceptance of her withdrawal? If so, please describe your involvement in detail.

RESPONSE: At the time of Harriet Miers's Supreme Court nomination, I was serving as Staff Secretary. Because I was Staff Secretary, speeches and documents for the President related to that nomination would have crossed my desk. Ms. Miers was and is a distinguished attorney and wonderful friend and person. She was an excellent White House official for President Bush.

12. Please describe the full extent of your involvement in each of these litigation matters while you were working in the White House, including whether you participated in any discussions or wrote, edited, reviewed or approved any documents, emails or speeches regarding these matters:

- a. **The Supreme Court's *Roper v. Simmons* decision and associated lower court litigation.**

RESPONSE: During my tenure with the White House, I worked on, provided advice on, or was otherwise involved in many different issues, including those involving legislation, litigation, and policy. Moreover, while I served as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During my tenure in the Counsel's Office, I worked on matters within the scope of my general duties as outlined by Judge Gonzales or other relevant officials.

- b. **The Supreme Court's *U.S. v. Booker* decision and associated lower court litigation.**

RESPONSE: Please see my response to Question 12.a.

- c. **The Supreme Court's *Hamdi v. Rumsfeld* decision and associated lower court litigation.**

RESPONSE: I do not recall the full extent of my involvement in every litigation matter as to which I may have been involved while I was working at the White House. As I discussed in an exchange with Senator Lee at the hearing, I expressed my thoughts at a staff meeting, when the *Hamdi* litigation was public, on what I thought would be Justice Kennedy's likely views regarding indefinite detention of American citizens without affording them access to counsel. Please also see my response to Question 12.a.

d. The Supreme Court's *Rasul v. Bush* decision and associated lower court litigation.

RESPONSE: Please see my response to Question 12.a.

e. Is it possible that there are documents containing your comments or views on these litigation matters in the National Archives?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

13.

a. Please describe the full extent of your involvement in questions about warrantless surveillance of Americans while you were working in the White House.

RESPONSE: As I explained in the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office. While I do not have specific recollections, I cannot rule out having discussed warrantless surveillance generally in the wake of the attacks. I believe everyone was discussing actions to protect America from attack. As I further explained during the hearing, my testimony in 2006 was accurate regarding the fact that I did not know about the Terrorist Surveillance Program, or TSP, until it became public in December 2005.

b. Can you state with certainty that there are no documents in the National Archives that contain your comments, views, or correspondence about warrantless surveillance?

RESPONSE: Please see my response to Question 1.d.

14. On May 10, 2006, you responded to a written question I sent you about your legal experience. Your response discussed policy issues you worked on as Staff Secretary. You said:

The President has given numerous speeches on energy policy, labor policy, communications policy, and environmental policy since I became Staff Secretary. The President has also made a variety of public decisions and policy proposals related to those subjects that also have come through the Staff Secretary's office for review and clearance.

a. What specific energy policy matters did you work on while you were Staff Secretary?

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. What specific labor policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

c. What specific communications policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

d. What specific environmental policy matters did you work on while you were Staff Secretary?

RESPONSE: Please see my response to Question 14.a.

e. Is it possible that there are documents containing your work product, comments or views on these policy issues in the National Archives?

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

15. If there are documents in the National Archives that contain your comments or views about the matters discussed in questions 1 through 14, do you agree that the American people should be allowed to review any such documents prior to a Senate vote on your nomination?

RESPONSE: See my answer to Question 6.

16. On May 10, 2006 you submitted written responses to written questions that Senator Feingold and I sent you for your D.C. Circuit confirmation hearing. You provided the following commitment to me in response to one of my written questions: "If confirmed, I would follow all binding Supreme Court precedent, including *Brown v. Board*, *Miranda v. Arizona*, and *Roe v. Wade*." Will you make this same commitment now, as you seek confirmation to the Supreme Court?

RESPONSE: Those cases are precedents of the Supreme Court entitled to the respect due under the law of precedent. As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

17. Do you agree with President Trump’s statement to Bloomberg News on August 30 that Special Counsel Mueller’s investigation is “an illegal investigation”?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

18. Should a president comply with a grand jury subpoena?

RESPONSE: As I stated during the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that could come before me or to comment on current events or political controversies.

19. Your 2009 Minnesota Law Review article represents a dramatic evolution of your views on presidential investigations since your days working for Independent Counsel Ken Starr.

How often do your views evolve, and are there other contexts where your views have evolved since earlier in your career?

RESPONSE: At every stage of my career in public service, I have tried to reflect on my experiences, learn from them, and—where appropriate—propose reforms that would benefit the nation in the future. My views have evolved in response to new experiences and new facts, especially the attacks of September 11, 2001, and the war that has been waged by the United States since then to protect the American people.

20. What does the Constitution say on the question of whether a sitting president can be indicted?

RESPONSE: As I stated in the hearing, I have not taken a position on that question in the past, and it would be inappropriate for me to take a position on that question now because it could come before me in litigation. As I stated at the hearing, the Department of Justice for the last 45 years has taken the consistent position through Republican and Democratic administrations that a sitting President may not be indicted while in office. Unless and until the Department of Justice changes its position, the issue presumably will not reach the Court.

21. Can members of the President’s immediate family be indicted?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals.

22. Last year you gave a speech at the American Enterprise Institute about Chief Justice Rehnquist, whom you described as a “judicial hero.” You said during the question-and-

answer session that: “[O]ne of the things people recognized about Rehnquist was he played the long game. He saw where he wanted the law to go, and he was willing to make incremental steps to try to convince his colleagues so he could get five justices to that position.”

- a. Is it appropriate for a Supreme Court Justice to play the long game to move the law where the Justice wants it to go?**

RESPONSE: I think most Justices think about the future when they decide cases in the present. As I explained at the hearing, judges decide specific “cases and controversies” as Article III of the Constitution requires. The person with the “best arguments on the law and the precedent” – not on policy – “is the person who will win . . . with me.”

- b. Is a Supreme Court Justice serving as a neutral umpire if the Justice sees where he or she wants the law to go and is willing to make incremental steps to try to convince his or her colleagues to get to that position?**

RESPONSE: See my answer to Question 22.a.

- c. Is it judicial activism for a Supreme Court Justice to see where he or she wants the law to go and make incremental steps to try to convince his colleagues to get to that position?**

RESPONSE: See my answer to Question 22.a.

- d. Have you ever seen where you wanted the law to go and made incremental steps to get your colleagues to that position? If so, please provide examples.**

RESPONSE: See my answer to Question 22.a.

- e. When discussing Chief Justice Rehnquist’s dissent in *Roe v. Wade*, you said in your speech that he was “stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” In your view, which rights fall into this “general tide of freewheeling judicial creation”?**

RESPONSE: As discussed at the hearing, the Constitution protects unenumerated rights. In describing Chief Justice Rehnquist’s important contributions to the law in *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agreed with Justice Kagan that *Glucksberg* provides the test that “the Supreme Court has relied on for forward-looking future recognition of unenumerated rights.” As Justice Kagan said in her hearing, “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure – makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear

signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” It is important to note that *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

23. You gave a speech on February 1, 2018, to the Heritage Foundation in which you criticized the use of canons of statutory interpretation when judges find text to be ambiguous. You noted that because Chief Justice Roberts in *NFIB v. Sebelius* found the Affordable Care Act’s individual mandate to be ambiguous, he applied the constitutional avoidance canon to uphold the ACA as a tax. You said in your speech, “a case of that magnitude should not turn on such a question.”

You repeatedly told the Committee that it is inappropriate for you to opine on matters that could come before you. However, you felt perfectly comfortable signaling to President Trump that you disagreed with Chief Justice Roberts, even though more challenges to the Affordable Care Act are pending.

a. Why do you believe Chief Justice Roberts was wrong to apply the constitutional avoidance canon in upholding the Affordable Care Act’s constitutionality in *NFIB v. Sebelius*?

RESPONSE: In the above-quoted observation, I was discussing the general problem of ambiguity as a trigger for certain canons of statutory interpretation, not the merits of *NFIB v. Sebelius*.

b. Why was it appropriate for you to express this opinion in your speech to the Heritage Foundation in February?

RESPONSE: See my answer to Question 23.a.

c. More challenges to the constitutionality of the Affordable Care Act are likely to come before the Supreme Court soon. How can we trust you to approach these cases with an open mind when you’ve already made clear your opposition to applying the constitutional avoidance canon in cases of this magnitude?

RESPONSE: See my answer to Question 23.a. Moreover, as I explained at the hearing, the person with “the best arguments on the law and the precedent . . . is the person who will win . . . with me.”

24. **According to your originalist understanding of the Constitution, does the Second Amendment provide for a fundamental right to self-defense outside of the home? To be clear, I am asking what your understanding is of the original meaning of the Constitution on this matter.**

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on

issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

25. As we discussed at your hearing, when President Trump announced your nomination at the White House, the first thing you said in your statement was: “Mr. President, thank you. Throughout this process, I have witnessed firsthand your appreciation for the vital role of the judiciary.”

Prior to your making this statement, were you aware that:

- a. **President Trump had claimed that there should be no judges and no due process for asylum seekers at the border?**
- b. **President Trump had criticized a federal judge for jailing Paul Manafort for witness tampering?**
- c. **President Trump had repeatedly criticized federal judges who ruled against him in litigation over his travel ban?**
- d. **President Trump had made racist comments about a federal judge’s Mexican heritage?**
- e. **In 2017 then-Judge Gorsuch called President Trump’s treatment of federal judges “demoralizing”?**

RESPONSE: As I stated during the hearing, my statement was based on my firsthand experience with President Trump and the discussion of the judiciary he had with me during my interview.

26. **How do you square your statement about President Trump’s “appreciation for the vital role of the judiciary” with President Trump’s routine disparagement of the role of the federal judiciary?**

RESPONSE: Please see my response to Question 25. Additionally, as I stated during the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge – which is to decide cases, not to comment on current events as pundits.

27. In the *White Stallion* case you claimed that the word “appropriate” required consideration of industry costs because “that’s just common sense and sound government practice.” **How can someone who claims to be a textualist use their subjective view of “common sense and sound government practice” to define a word?**

RESPONSE: My position in *White Stallion* was vindicated by a unanimous 9-0 vote on that question in the Supreme Court. My position was that consideration of costs was required by the EPA’s statutory obligation to decide whether it was “‘appropriate’ . . . to impose significant new air quality regulations on the Nation’s electric utilities.” My opinion underscored that “consideration of costs is a central and well-established part of the regulatory decisionmaking process” that has been embraced by Justice Breyer, Justice Kagan, Professor Cass Sunstein, and others.

28.

a. While you were working in the White House, did you ever express a view that particular Supreme Court precedents ought to be overturned?

RESPONSE: I do not recall any specific conversations in which I expressed such a view, although it is of course possible that I would have at some point discussed cases such as *Dred Scott*, *Korematsu* and *Buck v. Bell*—which have been widely criticized—among others. In any event, as discussed at the hearing, the judicial power clause of Article III and Federalist 78 make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would commit to respecting all the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

b. If so, when and to whom did you express these views and regarding which precedents did you express them?

RESPONSE: See my answer to Question 28.a.

c. Did you ever debate whether Supreme Court nominees who you were vetting (John Roberts, Harriet Miers, Samuel Alito) might seek to overrule precedents? Is it possible that there are documents in the National Archives that might reflect this?

RESPONSE: I was Staff Secretary when these nominations were considered. Speeches and documents for the President related to those nominations would have crossed my desk. President Bush made clear what he wanted in Supreme Court nominees, and he made the decisions.

29. Are children seeking asylum entitled to a hearing, due process, and legal representation? Or is President Trump correct that sending children fleeing persecution back to their home countries without a hearing before a judge is the appropriate outcome?

RESPONSE: Questions regarding the application of asylum law are the subject of ongoing litigation and may come before me. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a

particular way. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

30. In a 2010 speech, you said that while you were working as Staff Secretary, “I saw regulatory agencies screw up. I saw how they might try to avoid congressional mandates. I saw the relationship between independent agencies and executive agencies and the President and White House and OMB.” **What specifically did you see as Staff Secretary that shaped your views on independent agencies? Are there documents in the National Archives regarding what you saw that shaped your views?**

RESPONSE: As I explained at the hearing, from July 2003 to May 2006, every issue that went to the President’s desk from July 2003 to May 2006, with a few covert exceptions, would have crossed my desk on the way. Please also see my answer to Question 1.d.

31. Business and labor both seem to agree that if you are confirmed to the Supreme Court, you would tilt the Court even further in a pro-business direction.

The Chamber of Commerce has urged your swift confirmation. The White House said, “Judge Kavanaugh protects American businesses from illegal job-killing regulation.” Shortly after your nomination, the employer-side law firm Fisher Phillips put out a legal alert saying, “If confirmed, will Justice Kavanaugh be kind to employers? The answer: you may rely on it.”

AFL-CIO Richard Trumka said about you, “Judge Kavanaugh routinely rules against working families, regularly rejects employees’ right to receive employer-provided health care, too often sides with employers in denying employees relief from discrimination in the workplace and promotes overturning well-established U.S. Supreme Court precedent.”

You have a track record of favoring corporations in cases involving safe working conditions, unions, worker privacy, and consumer protections. There may be outlier cases in your record, which is to be expected given you have taken part in over 2,700 cases. But both business and labor think you’re a safe bet to be sympathetic to the positions of businesses over workers.

a. Are you proud of your pro-business reputation?

RESPONSE: I disagree with that characterization of my record. I rule for the party who has the best argument on the merits. That includes workers in some cases, businesses in others; coal miners in some cases, environmentalists in others; unions in some cases, employers in others. I am not a pro-business or an anti-business judge. I am a pro-law judge.

b. How do you square your pro-business reputation with the claim that you are an originalist and textualist who is a neutral umpire, not a judicial activist?

RESPONSE: Please see my response to Question 31.a.

32. Do you agree that nominees who claim to be textualists and originalists should be able to explain the textual meaning and originalist understanding of constitutional provisions in response to confirmation hearing questions?

RESPONSE: I have aimed to explain my own approach to textualism and originalism to the best of my ability. As I explained at the hearing, I heed the original public meaning of the Constitution or constitutional textualism, by which I mean the approach of “pay[ing] attention to the words of the Constitution.” As Justice Kagan has said, we are all originalists now and we are all textualists now. At all times, I also play close attention to any applicable precedent, as precedent itself is rooted in the Constitution.

33. The Foreign Emoluments Clause in Article I, Section 9, Clause 8 of the Constitution provides that “...no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”

a. What does the text of this clause mean, and what was the Framers’ originalist understanding of it?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

b. Even though there is current litigation about the Emoluments Clause, do you agree that such litigation should not preclude a nominee from explaining the text and original understanding of the Clause, which have not changed since the Founders’ time?

RESPONSE: As this question notes, there is pending litigation in federal courts on this issue. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me, including by offering any preview by engaging in any interpretation of the text at issue. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

34.

a. Did Judge Kozinski ever send you emails to your White House email address?

RESPONSE: Yes.

- b. Did Judge Kozinski ever send you emails with sexually inappropriate jokes or pictures?**

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

- c. Do any of the 102,000 pages of documents over which Mr. Bill Burck has attempted to claim “constitutional privilege” contain correspondence between you and Judge Kozinski?**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

- d. Have you referred any clerks to Judge Kozinski or advised any individuals to apply for clerkships with Judge Kozinski? If so, how many and when?**

RESPONSE: In my capacity as a law professor, it is possible that I talked to students who had applied or were interested in applying to clerk for Judge Kozinski, and assisted them.

- 35. Should judges who engage in the kind of sexually harassing behavior that Judge Kozinski allegedly engaged in resign?**

RESPONSE: Following the allegations against Judge Kozinski, he resigned from the bench. I fully support Chief Justice Roberts' call for “a careful evaluation of whether [the federal judiciary's] standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.”

36. The Supreme Court established the exclusionary rule more than a century ago in the 1914 *Weeks* decision. In 1961, in the landmark case *Mapp v. Ohio*, the Court held that the exclusionary rule applies to the states. The Court said, “the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments.” It is no exaggeration to say that the 4th Amendment rights of all Americans would be endangered without the exclusionary rule because if there is no consequence for an illegal search, there is no deterrent to violating the 4th Amendment.

But in a 2017 speech at the American Enterprise Institute, you praised Justice Rehnquist's opposition to the exclusionary rule and his call to overrule *Mapp v. Ohio*. While you did not explicitly call for eliminating the exclusionary rule, your speech makes clear that you approved of Justice Rehnquist, who, in your words, “righted the ship of constitutional jurisprudence.”

Was it appropriate for you, as a lower court judge, to show support for overruling *Mapp v. Ohio* – a landmark Supreme Court precedent for more than half a century?

RESPONSE: This question does not accurately characterize my speech.

37. On July 22, 2013, in the case *Abdal Razak Ali v. Obama*, a Guantanamo detainee seeking habeas relief filed a motion asking you to recuse yourself, stating: “Judge Kavanaugh has created the appearance of impropriety with respect to the adjudication of issues concerning Guantanamo detainees (and in particular, issues which bear directly on Petitioner’s present circumstances) because of his prior government employment as a legal advisor in the White House which may have direct bearing on the circumstances of this case.” This recusal motion was denied the next day, in a one sentence order stating: “Upon consideration of appellant’s motion for recusal pursuant to 28 U.S.C. § 455(a), it is ordered that the motion be denied.”

a. Question 14 in your Senate Judiciary Questionnaire asked you to “Provide a list of any cases, motions or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte.” You were then asked to identify each such case, and for each case provide “your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent or asserted conflict of interest or to cure any other ground for recusal.” Why did you fail to include the *Abdal Razak Ali v. Obama* recusal motion in your answer to question 14 of your Questionnaire?

RESPONSE: The information set forth in response to Question 14 of my Senate Judiciary Questionnaire was provided by the Clerk’s Office for the United States Court of Appeals for the D.C. Circuit from the court’s records. They did an excellent job in trying as best they could to capture all relevant cases. Their search apparently did not turn up the motion in the *Ali* case.

b. Have you omitted any other motions to recuse you on any other case from your Senate Judiciary Questionnaire?

RESPONSE: Not to my knowledge.

c. Why did you decline to recuse yourself in this case?

RESPONSE: Recusal was not necessary or appropriate.

38. You were also asked in Question 14(b) of your Senate Judiciary Questionnaire to state: “Whether you will follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court. If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.”

You chose to simply ignore that question, so I will ask again now.

- a. Do you believe Supreme Court Justices are governed by disqualification standards in 28 United States Code, Section 455?**

RESPONSE: I will follow the relevant rules, and I will consult as appropriate with my colleagues.

- b. Do you believe Supreme Court Justices are governed by disqualification standards in the Code of Conduct for United States Judges?**

RESPONSE: Please see my response to Question 38.a.

- c. Will you follow the same procedures for recusal if you are confirmed to the Supreme Court as you have followed on the Circuit Court? If not, please explain the procedure you will follow in determining whether to recuse yourself from matters coming before the Supreme Court, if confirmed.**

RESPONSE: Please see my response to Question 38.a.

39. In 2003, I introduced S. 1709, the SAFE Act, bipartisan legislation to reform the Patriot Act, particularly the controversial Section 215. On January 28, 2004, then-Attorney General John Ashcroft sent a letter to then-Senate Judiciary Committee Chairman Orrin Hatch stating, "If S.1709 is presented to the President in its current form, the President's senior advisers will recommend that it be vetoed."

- a. Please describe your involvement in this veto threat.**

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers.

- b. Is it possible that there are documents containing your comments or views on this veto threat in the National Archives or in the possession of other federal agencies?**

RESPONSE: Please see my response to Question 1.d.

40. In 2005, when the Patriot Act was up for reauthorization, I negotiated with then-Senate Judiciary Committee Chairman Arlen Specter a new standard for Section 215 orders to protect innocent Americans while giving the government broad authority to obtain information connected to suspected terrorists or spies. The Republican-controlled Senate

approved this reform on a unanimous vote, but it was removed in conference due to the Bush Administration's objections.

a. Please describe with specificity your involvement in the Patriot Act reauthorization.

RESPONSE: In 2005, I was serving in the White House as Staff Secretary. As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. Is it possible that there are documents containing your comments or views on Patriot Act reauthorization in the National Archives?

RESPONSE: Please see my response to Question 1.d.

- c.** In the 2015 D.C. Circuit case *Klayman v. Obama*, several U.S. citizens filed a lawsuit alleging that the Section 215 program, which was being used for the NSA's bulk collection of innocent Americans' telephone data, was illegal. The program was enjoined by the district court. Some of the plaintiffs were denied standing to sue, and they filed a petition for the D.C. Circuit to re-hear the case en banc. The D.C. Circuit denied the petition in a one-sentence order.

You felt compelled to write a lengthy concurrence arguing that the NSA program was constitutional, even though that question was not before the court. You argued that the bulk collection of telephone data served a "critically important special need – preventing terrorist attacks on the United States." This was despite a Privacy and Civil Liberties Oversight Board report that said: "we have not identified a single instance involving a threat to the United States in which the program made a concrete difference in the outcome of a counterterrorism investigation."

Why did you feel the need to go out of your way to write this concurrence?

RESPONSE: I answered this question at the hearing.

41. On April 13, 2016 you took part in a panel discussion at Marquette Law School. You discussed a proposal you worked on in the Bush White House for judicial nominees to get a vote within 180 days of their nomination. You said, "I'm a little biased on this because I helped work on it."

It is perhaps understandable that a person would be biased in support of a proposal that he or she worked on. However, if a sitting judge admits to even a little bias regarding matters the judge worked on before becoming a judge, it raises concerns about the judge's impartiality

on such matters. This further demonstrates the need to disclose your full White House record.

In order to alleviate concerns about such bias, please provide a list of all proposals you helped work on while you were at the Bush White House.

RESPONSE: My comment reflected the fact that I still agreed with that proposal and had spent considerable time reflecting on it. As I explained at the hearing, I worked on a wide variety of issues during my time in the Bush White House. As Staff Secretary from July 2003 to May 2006, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of my substantive work, my role was not to replace the President's policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During my time working in the White House Counsel's Office, I assisted with some of the wide variety of issues that confront the Office. I worked on the nomination and confirmation of federal judges. I assisted on legal policy issues affecting the tort system, such as airline liability, victims' compensation, terrorism insurance, medical liability, and class action reform. I worked on issues of separation of powers, including issues involving congressional and other requests for records and testimony. I worked on various ethics issues. I also monitored and worked on certain litigation matters, including those involving the White House. This list is not exhaustive.

42. Prior to your hearing, were you shown any documents that had been designated by Chairman Grassley as "committee confidential" (a designation to which Committee Democrats never agreed)? If so, please identify each specific document you were shown and the date on which you were shown it.

RESPONSE: Yes. I was informed that I might be asked about such documents in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions, I was shown some documents that were designated "committee confidential."

43. How many times in 2018 did you communicate with Bill Burck or with a person acting on Burck's behalf for purposes of producing documents for your confirmation process? Please list the dates, participants, and contents of each such communication.

RESPONSE: I do not recall meeting with Mr. Burck or with a person acting on his behalf for the purposes of producing documents for this process. As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

44. Which Senators helped you prepare for your Supreme Court confirmation hearing by participating with you in moots or other practice sessions?

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. As I further noted, each of these meetings were substantive and provided me insight into the issues I could look forward to discussing in the hearing.

45. You cited the so-called “Ginsburg Rule” multiple times during your hearing to explain why you insisted on limiting your substantive answers to our questions. However, at her nomination hearing, Justice Ginsburg answered many questions with candor.

For example, in response to a question about abortion rights, Justice Ginsburg said this:

But you asked me about my thinking on equal protection versus individual autonomy. My answer is that both are implicated. The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.

And in response to a question on the Equal Rights Amendment, Justice Ginsburg responded with the following:

I remain an advocate of the Equal Rights Amendment for this reason. I have a daughter and a granddaughter. I know what the history was. I would like the legislators of this country and of all the States to stand up and say we know what that history was in the 19th century; we want to make a clarion announcement that women and men are equal before the law, just as every modern human rights document in the world does, at least since 1970. I would like to see that statement made just that way in the U.S. Constitution. But that women are equal citizens and have been ever since the 19th Amendment was passed, I think that is the case.

- a. Do you think that those responses were improper under judicial canons?**

RESPONSE: As I explained at the hearing, I believe Justice Ginsburg answered as she did because she had previously written about these subjects.

- b. If the first response was not improper, do you agree with Justice Ginsburg’s statement that the decision of whether or not to bear a child is a decision that a woman must make for herself?**

RESPONSE: Consistent with the approach taken by the Justices currently sitting on the Supreme Court, I am not able to answer questions designed to elicit hints, forecasts, or previews of my approach to a particular case. To do so would violate my duty to be an independent judge

and would send the wrong message to future litigants as well as to the American people in general.

- c. If the second responses was not improper, do you agree with Justice Ginsburg's statement that the Equal Rights Amendment should be added to the U.S. Constitution?**

RESPONSE: It would be a violation of judicial independence for me to opine on political matters in this context.

46. As a judge on the D.C. Circuit, you are bound to follow the Code of Conduct for United States Judges. As you know, the Code is made up of a number of canons. These canons include upholding the integrity and independence of the Judiciary; avoiding impropriety and the appearance of impropriety in all activities; performing the duties of the office fairly, impartially, and diligently; engaging in extrajudicial activities that are consistent with the obligations of judicial office; and refraining from political activity.

The Supreme Court has refused to formally adopt the Code of Conduct for United States Judges or promulgate its own ethics code.

According to Chief Justice Roberts' 2011 annual year-end report, in 1991, the Supreme Court justices did adopt "an internal resolution in which they agreed to follow the Judicial Conference regulations [on gifts and outside income] as a matter of internal practice." While this was an encouraging step, the lack of transparency and enforcement is troubling.

- a. Will you commit that, if confirmed to the Supreme Court, you will continue to follow the Code of Conduct for United States Judges?**

RESPONSE: If confirmed, I would commit to giving a careful consideration to the practice of the Supreme Court on these questions and to consulting with my colleagues about these issues.

- b. Do you believe that the Supreme Court should adopt an official code of conduct?**

RESPONSE: Please see my response to Question 46.a.

47. In 2014, Justice Kennedy testified to Congress that "solitary confinement literally drives men mad." He raised the issue again in a powerful concurring opinion in the 2015 *Davis v. Ayala* case, which involved an inmate who had been on California's death row for 25 years. He noted the following:

Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exacts a terrible price.

He went on to note that “the judiciary may be required... to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”

What is your reaction to Justice Kennedy’s statements about solitary confinement?

RESPONSE: As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case/issue. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on Justice Kennedy’s concurrence in *Davis v. Ayala*.

48. In the 2012 *South Carolina v. United States* case, you were on a three-judge panel considering a preclearance challenge to a new, expanded South Carolina voter ID law. As you know, prior to 2013, preclearance was the process that the Department of Justice used to review changes to voting laws in certain jurisdictions with a history of voting discrimination.

You wrote the opinion, holding that the law was not in violation of the Voting Rights Act (VRA) and that South Carolina could move forward with implementation after the 2012 election.

In your opinion, you noted that “many states—particularly in the wake of the voting system problems exposed during the 2000 elections—have enacted stronger voter ID laws.” However, we’ve also seen that many of these voter ID laws have a concerning, and often discriminatory, impact on voters.

For example, a 2016 analysis of data from the annual Cooperative Congressional Election Study found the following: “The patterns are stark. Where strict identification laws are instituted, racial and ethnic minority turnout significantly declines.” They found that among Latino voters, “turnout is 7.1 percentage points lower in general elections and 5.3 percentage points lower in primaries in strict ID states than it is in other states.”

What is your response to the evidence that strict identification laws harm minority voters?

RESPONSE: I am not familiar with the study you have cited. In keeping with nominee precedent, it would be improper for me as a sitting judge to comment on cases or issues that might come before me, or to opine on a case without thoroughly reviewing the record. In the *South Carolina* case, my unanimous opinion—joined in full by Judge Kollar-Kotelly and Judge Bates—blocked implementation of South Carolina’s law for the 2012 election precisely in order to avoid harming the “disproportionately African-American” voters who lacked qualifying photo IDs at the time. The opinion emphasized that “proper and smooth functioning of the reasonable

impediment provision [of the law] would be vital to avoid unlawful racially discriminatory effects on African-American voters” going forward, and called the Voting Rights Act of 1965 “among the most significant and effective pieces of legislation in American history.”

49. Your colleagues on the panel in the *South Carolina v. United States* case issued a concurrence that discussed the “vital function” that the preclearance process played in this case. The concurrence went on to note the following:

Without the review process... [the law] certainly would have been more restrictive.... The Section 5 [preclearance] process here did not force South Carolina to jump through unnecessary hoops. Rather, the history of [the law] demonstrates the continuing utility of Section 5 of the Voting Rights act in deterring problematic, and hence encouraging non-discriminatory, changes in state and local voting laws.

Unfortunately, the Supreme Court gutted the VRA in the 2013 *Shelby County v. Holder* case by striking down the formula that determined which jurisdictions were subject to Section 5 preclearance. However, they did not find the preclearance provision itself to be unconstitutional.

Why did you refrain from joining this concurrence?

RESPONSE: As I noted above, I wrote the opinion for the Court, which resolved all issues before the panel. Although Judge Kollar-Kotelly and Judges Bates opted to make additional points, they called my opinion “excellent” and joined it in full.

50. **Was President Trump correct in stating that three to five million people voted illegally in the 2016 election?**

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

51. In *Doe ex rel. Tarlow v. District of Columbia*, you examined the circumstances under which the D.C. Department of Disability Services could approve elective surgeries for a patient with intellectual disabilities who has been found to lack the mental capacity to make healthcare decisions. You held that the Department need not consider the known wishes of a patient, but rather could make a decision in the best interests of the patient.

The Bazelon Center for Mental Health Law has noted that your opinion “raises serious concerns about [your] views on the rights and abilities of people with disabilities to determine the course of their own lives.” The Center went on to note that the opinion “is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual’s wishes even if the individual is not legally competent to make the decision.”

Why did you decide that the perspectives and wishes of the individuals in this case could be completely ignored by the D.C. government?

RESPONSE: The plaintiffs in *Tarlow* represented a narrow class of several intellectually disabled people who had “never had the mental capacity to make medical decisions for themselves” and who had “no guardian, family member, or other close relative, friend, or associate” available to provide or withhold consent for surgeries approved by two separate physicians. *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 377 (D.C. Cir. 2007). The unanimous panel for which I wrote explained that allowing people who lack mental capacity to make important medical decisions “would cause erroneous medical decisions ... with harmful or even deadly consequences to intellectually disabled persons.” *Id.* at 382. In part for that reason, no state applies the rule proposed by the plaintiffs in that case.

52. When we met in my office, we talked about the 2011 *Seven-Sky* case, in which you dissented from a decision upholding the Affordable Care Act. In a footnote, you criticized the ACA and argued that, “Under the Constitution, the president may decline to enforce a statute that regulates private individuals when the president deems the statute unconstitutional, even if a court has held or would hold the statute constitutional.”

This is a truly breathtaking claim of presidential power. I think you recognize that because you told me in our meeting that you “could have been clearer” and “explained it better” in the later *Aiken County* case.

But if you had been writing for the majority in *Seven-Sky*, your opinion would be binding law in the DC Circuit and President Trump would have a free pass to ignore laws that he doesn’t like. For someone like you who claims to be a textualist to be so careless with his words is concerning.

a. Do you understand the consequences of using your words so loosely?

RESPONSE: As I explained at the hearing, in my *Seven Sky* opinion, I was referring to the general concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Richard Nixon*, 418 U.S. 683 (1974), and extended to civil enforcement in *Heckler v. Chaney*, 470 U.S. 821 (1985). As I further explained at the hearing, and as I explained in my speech at Marquette in 2015, the limits of prosecutorial discretion are uncertain.

b. Do you stand by your *Seven-Sky* dissent?

RESPONSE: My dissent in *Seven-Sky* expressed no opinion on the merits of the constitutional challenge to the Affordable Care Act, but instead concluded that the court lacked jurisdiction over the suit under the Anti-Injunction Act. The Supreme Court’s decision in *NFIB* is a precedent of the Supreme Court on the merits of that case and is entitled to the respect due under the law of precedent.

53. Last Thursday, when questioned by Senator Leahy about the stolen material you received from Manny Miranda, you said that you “obviously recall the emails—or have seen the emails.”

- a. **Were you referring to having recently seen emails that were given to the Committee through the Bill Burck production process?**

RESPONSE: I assume I was referring to emails referenced by Senator Leahy. And I believe Senator Leahy gave me copies of those emails at the hearing. I may also have previously seen emails that were produced to the Committee. Please see my answer to Question 42.

- b. **After you were nominated by President Trump, did you receive or review any of the emails or documents that were given to the Committee through the Bill Burck production process? Please describe any instances in which you received or reviewed these emails or documents, other than those instances in which Committee members shared emails or documents with you during their question rounds at the hearing.**

RESPONSE: As I explained during the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

54. Last Wednesday, Senator Booker asked you about an email you sent in which you wrote “the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple—and grapple now—with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.”

- a. **During your time in the White House, did you ever provide views, verbally or in writing, on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities?**

RESPONSE: The email states that I “generally favor effective security measures that are race-neutral.”

- b. **Is it possible that there are documents (in addition to the email referenced here) containing your views on whether it was permissible for the government to use race or national origin as a factor in law-enforcement, immigration enforcement or counterterrorism activities in the National Archives?**

RESPONSE: As I explained during the hearing, I was not involved in the processing or production of documents, and I did not participate in any of the decisions made about those documents. Accordingly, I have no personal knowledge as to the contents of the documents in the National Archives.

**Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of
the United States Supreme Court Questions for the Record
Questions for Judge
Kavanaugh**

Submitted September 10, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. In an exchange with Senator Graham during your hearing before the Committee, you explained, “[t]he *Nixon* holding said that, in the context of the specific regulations there, that a criminal trial subpoena to the president for information -- in that case, the tapes -- could be enforced, notwithstanding the executive privilege that was recognized in that case, as rooted in Article II of the Constitution.”

a. What are the “specific regulations” to which you referred when discussing *United States v. Nixon*?

RESPONSE: My response referred to the special-counsel regulations discussed extensively in the *Nixon* decision. See *United States v. Nixon*, 418 U.S. 683, 694-95 & nn.8-9 (1974).

b. Is it your view that the “specific regulations” referenced in (a) were dispositive to the overall holding of the case?

RESPONSE: The opinion in *United States v. Nixon* speaks for itself on this question.

2. On at least five occasions when referencing the *Nixon* precedent during the hearings, you made a point of noting that the subpoena at issue in that case was a criminal trial subpoena.

a. What role did the fact that the subpoena in *Nixon* originated from a district court, rather than a grand jury, play in the Court’s analysis?

RESPONSE: The opinion in *United States v. Nixon* speaks for itself on this question.

b. Was the fact that the subpoena was a trial subpoena dispositive to the Court’s holding that the constitutionally protected executive privilege was not absolute and that the President had to respond thereto?

RESPONSE: Please see my response to Question 2.a.

c. Does *Nixon* control with respect to questions relating to subpoenas of the president issued by a grand jury?

RESPONSE: Please see my response to Question 2.a.

- d. Does *Nixon* control with respect to cases involving congressional subpoenas to the president?

RESPONSE: Please see my response to Question 2.a.

- e. Does *Nixon* control with respect to cases involving administrative subpoenas to the president?

RESPONSE: Please see my response to Question 2.a.

- f. Does *Nixon* control with respect to cases involving subpoenas to the president issued in state trial proceedings?

RESPONSE: Please see my response to Question 2.a.

- g. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state officials?

RESPONSE: Please see my response to Question 2.a.

- h. Does *Nixon* control with respect to cases involving subpoenas to the president issued by state grand juries?

RESPONSE: Please see my response to Question 2.a.

- i. As you know, the *Nixon* case involved a subpoena for tape recordings. Does the precedent apply to cases involving subpoenas for presidential testimony as well as documentary evidence in the president's possession, custody, and control?

RESPONSE: Please see my response to Question 2.a.

- 3. During your hearing and in our private meeting, you stated unequivocally that you had never taken a position on the constitutional question whether a sitting president can be indicted. But as a member of a panel at a 1998 Georgetown Law Review event you were asked "How many of you believe as a matter of law that a sitting president cannot be indicted during the term of office?" You promptly raised your hand. When I asked you to reconcile this seeming conflict, you said: "[t]here's been Department of Justice law," referring to the Office of Legal Counsel's (OLC) opinion, authored by now-judge Randy Moss, that a sitting president cannot be indicted. You also said the OLC opinion is encompassed "within the general concept of law."

- a. Are you aware of any court decisions that refer to OLC opinions or guidance as "law"?

RESPONSE: OLC exercises the Attorney General's authority under the Judiciary Act of

1789 to provide the President and executive agencies with advice on questions of law that are important to the functioning of the federal government. As explained at the hearing, OLC opinions are encompassed within the concept of “law” and are binding on the executive branch. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to otherwise comment on issues that might come before me.

- b. What weight do courts afford OLC opinions and guidance?

RESPONSE: Please see my response to Question 3.a.

- c. Do OLC opinions serve as binding precedent for courts? Are they binding on the D.C. Circuit Court of Appeals? On the Supreme Court?

RESPONSE: Please see my response to Question 3.a.

- d. Is the executive branch bound to follow OLC opinions?

RESPONSE: Please see my response to Question 3.a.

- e. What are the legal repercussions for the executive branch contravening an OLC opinion?

RESPONSE: Please see my response to Question 3.a.

- f. Does a person adversely affected by an executive action in violation of an OLC opinion have a legal cause of action?

RESPONSE: Please see my response to Question 3.a.

- g. What authority does the Attorney General have to decree “law”?

RESPONSE: Please see my response to Question 3.a.

- h. Do OLC opinions go through the notice-and-comment rulemaking process prescribed by the Administrative Procedures Act?

RESPONSE: Please see my response to Question 3.a.

- i. Besides the Randy Moss OLC opinion that you repeatedly mentioned during your testimony, is there any statutory or regulatory authority governing whether a president can be indicted?

RESPONSE: Please see my response to Question 3.a.

- j. As a judge on the DC Circuit, have you ever cited an OLC opinion as

binding law? Have you ever cited the Randy Moss OLC opinion as such?

RESPONSE: Please see my response to Question 3.a.

- k. You have been a prolific legal writer and speaker, including on the separation of powers and executive power. Can you point to any citations in your spoken or written works that describe OLC opinions as “law”?

RESPONSE: Please see my response to Question 3.a.

- l. At our private meeting, you agreed with my assessment that, as a general rule, OLC opinions, as the views of the executive branch, take positions advancing the broadest defensible view of executive power. Could you explain your understanding of why this is the case?

RESPONSE: Please see my response to Question 3.a.

- 4. In your discussion of *Sea World of Florida, LLC v. Perez* with Senator Feinstein, you noted that state tort law provides protection for workers in workplaces in which the Department of Labor is unable to issue safety protections. Specifically, you said, “And I made clear that of course state tort law -- as the NFL has experienced with the concussion issue -- state tort law always exists as a way to ensure or help ensure safety in things like the SeaWorld show.”
 - a. How do state tort law and our civil justice system, in general, help promote workplace safety?

RESPONSE: In general, state tort law and our civil justice system can provide an opportunity for people who are harmed by the actions or negligence of others to recover damages. The tort system thereby helps deter negligent actions and encourages or requires reasonable safety measures. Of course, state tort law is often augmented by state or federal regulation. It was the scope of federal regulation that was at issue in the *SeaWorld* case.

- b. Do state tort law and our civil justice system play a role in promoting public health and safety in other areas, like consumer protection and environmental protections? If so, how?

RESPONSE: Yes. Please see my response to Question 4.a.

- c. Does the fact that state and federal court proceedings are public play a role in promoting public health and safety? If so, how? Does the prevalence of binding pre-dispute arbitration clauses in employment and consumer contracts limit the ability to seek redress in state and federal courts? If so, how?

RESPONSE: Please see my response to Question 4.a. As to arbitration, cases are currently pending in the courts that involve the scope of arbitration clauses. In keeping with nominee

precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- d. Does the fact that many arbitration proceedings occur behind closed doors undermine courts' roles in promoting public health and safety?

RESPONSE: Please see my response to Question 4.c.

- e. The Seventh Amendment ensures the right to a jury "in suits at common law."
 - i. What role does the jury play in our constitutional system?

RESPONSE: The jury plays a significant role in our constitutional system. In addition to the Seventh Amendment guarantee of a jury "in suits at common law," Article III of the Constitution also promises that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and the Sixth Amendment likewise guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The jury safeguards life, liberty, and property.

- ii. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of arbitration clauses?

RESPONSE: In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on the applicability of the Seventh Amendment to the enforceability of arbitration clauses.

- 5. Do you agree with Justice Gorsuch that personal attacks on federal judges from officials in the other branches of government are "demoralizing"?

RESPONSE: As I stated at the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated during the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge, which is to decide cases, not to comment on current events as pundits.

- 6. Under current law, what rights does Congress have to documents, materials,

and testimony *vis-à-vis* claims of executive privilege?

RESPONSE: That question could be the subject of litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me.

7. In response to my questioning regarding your interactions with the media during the Starr investigation, you said, "I spoke to the reporters at the direction and authorization of Judge Starr."

- a. During the Starr investigation, did you ever speak with members of the press or other authors about the investigation without explicit direction from Judge Starr or your superiors?

RESPONSE: As I said at the hearing, I spoke to the reporters at the direction or authorization of Judge Starr and consistent with the law.

- i. If so, do you release the reporters in these instances from any confidentiality obligations related to these conversations?

RESPONSE: No. It would be inappropriate in this context to disregard that foundational privilege and protection for the press.

- b. In your testimony, you said you would let me know whether you are willing to release the reporters from their confidentiality obligations if Judge Starr allows the reporters to disclose the conversations. Whether or not Judge Starr may have a role in releasing reporters from obligations of source-protection confidentiality related to his investigation of the Clintons, are you personally willing to release reporters of any such obligations, separate and apart from whatever obligations Judge Starr may claim?

RESPONSE: Please see my response to Question 7.a.

- c. Were you ever an off-the-record source to the press or other authors? If so, were all these conversations at the explicit direction of Judge Starr?

RESPONSE: Please see my response to Question 7.a.

- d. Did you ever provide non-public information regarding the investigation to reporters off the record?

RESPONSE: Please see my response to Question 7.a.

- e. Did you ever provide information on non-public matters relating to the grand jury, including but not limited to the identity of past or planned witnesses and/or

the nature or content of their testimony, to reporters off the record?

RESPONSE: Please see my response to Question 7.a.

- f. During or since your nomination hearing, have you been in touch with Judge Starr regarding reporters or source-protection confidentiality obligations from that investigation? If so, please explain fully the content of and reason for those communications.

RESPONSE: No.

8. In your testimony, you stated you had ruled for environmental interests in “many cases.” Please list all of the cases in which you ruled for environmental interests on substantive rather than procedural grounds.

RESPONSE: In response to Question 13.b and 13.c in the Senate questionnaire, I provided a list of citations to all opinions I have written, and all cases I have participated in as a member of the panel. There are over 2,000 cases and approximately 11,000 pages of decisions.

A few representative examples in which I ruled for environmental interests include: *National Association of Manufacturers v. EPA*, 750 F.3d 921 (D.C. Cir. 2014) (upholding the EPA’s decision to tighten the primary National Ambient Air Quality Standards for fine particulate matter); *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) (ruling in favor of the Natural Resource Defense Council, the Sierra Club, and other environmental groups in holding that the EPA exceeded its authority when it decided to create an affirmative defense for emitters to use to avoid liability); *Center for Biological Diversity v. EPA*, 722 F.3d 401 (D.C. Cir. 2013) (vacating the EPA’s decision to defer regulation of “biogenic” carbon dioxide); *American Trucking Association v. EPA*, 600 F.3d 624 (D.C. Cir. 2010) (upholding the EPA’s decision to authorize a California rule imposing emissions limits from non-road engines).

- a. Did you rule for environmental interest(s) on substantive ground(s) in *Americans for Clean Energy v. Environmental Protection Agency*, 864 F.3d 691 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Various organizations, companies, and interest groups petitioned for review of EPA’s final rule setting renewable fuel requirements for transportation fuel markets under the Clean Air Act. I authored the unanimous decision, joined by Judge Brown and Judge Millett. We agreed that statute forecloses EPA’s reading of the “inadequate domestic supply” waiver provision. Thus, we granted the petition for review of the 2015 Final Rule, vacated EPA’s decision in the Rule to reduce the total renewable fuel volume requirements for 2016 through use of the “inadequate domestic supply” waiver authority, and ordered remand.

- b. Did you rule for environmental interest(s) on substantive ground(s) in *Center for Biological Diversity v. EPA*, 722 F.3d 401, 2013 WL 3481511 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Environmental groups petitioned for review of an administrative action of the EPA, which deferred regulation of “biogenic” carbon dioxide for period of three years. Judge Tatel authored the decision that vacated the EPA’s deferral rule. I authored a concurring opinion and agreed that the EPA had no statutory basis for exempting biogenic carbon dioxide.

- c. Did you rule for environmental interest(s) on substantive ground(s) in *Coal. for Responsible Regulation Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I did not participate in this panel decision. Chief Judge Sentelle, Judge Rogers, and Judge Tatel issued a *per curiam* decision dismissing the petitions for lack of jurisdiction. I dissented from the denial of rehearing *en banc*. See *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at *14 (D.C. Cir. Dec. 20, 2012). The Supreme Court largely adopted my position in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014).

- d. Did you rule for environmental interest(s) on substantive ground(s) in *Communities for a Better Environment v. EPA*, 748 F.3d 333 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous decision, joined by Judges Brown and Williams. We concluded that the EPA acted reasonably in retaining the same primary standards for carbon monoxide, and that petitioners lacked Article III standing to challenge the EPA’s decision not to set a secondary standard for carbon monoxide.

- e. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the majority decision, joined by Judge Griffith, and Judge Rogers dissented. The court concluded that the EPA had exceeded its statutory authority when it adopted an air pollution rule that imposed massive uniform emissions reductions on upwind states regardless of how much pollution individual states contributed.

- f. Did you rule for environmental interest(s) on substantive ground(s) in *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118 (D.C. Cir. 2015)? If so, please

identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous decision, joined by Judges Rogers and Griffith. We granted the petitions to the extent that some states brought as-applied challenges to the EPA's emissions budgets, and we remanded without vacatur to the EPA for it to reconsider those budgets. We rejected all other arguments raised by the states.

- g. Did you rule for environmental interest(s) on substantive ground(s) in *Energy Future Coalition v. EPA*, 793 F.3d 141 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Biofuel producers petitioned for review of the EPA's final action, arguing that the EPA's test fuel regulation was arbitrary and capricious. I authored the unanimous decision, joined by Judges Tatel and Pillard. We upheld the EPA's fuel regulation.

- h. Did you rule for environmental interest(s) on substantive ground(s) in *Grocery Mfrs. Ass'n v. EPA*, 704 F.3d 1005 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored an opinion dissenting from the denial of rehearing en banc. I disagreed with the panel's decision to throw out the suit on standing grounds. The Supreme Court favorably cited my *Grocery Manufacturers* opinion in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014).

- i. Did you rule for environmental interest(s) on substantive ground(s) in *Howmet Corp. v. EPA*, 614 F.3d 544 (D.C. Cir. 2010)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Brown authored the majority opinion, joined by Judge Sentelle. They concluded that the EPA's interpretation of its "spent material" regulation was not arbitrary and capricious. I dissented because I would have rejected the EPA's interpretation of its regulations.

- j. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451 (D.C. Cir. 2017)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: As that case may still be pending in the courts, I am unable to comment on it.

- k. Did you rule for environmental interest(s) on substantive ground(s) in *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544 (D.C. Cir. 2015)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Pillard authored the majority decision, joined by Judge Rogers. They denied a petition for review of the EPA's rule setting first-time-ever limits on the emission of air pollutants during the production of polyvinyl chloride (PVC). I dissented in part because I would have stayed the wastewater limits of the rule – something the EPA itself did not oppose.

- l. Did you rule for environmental interest(s) on substantive ground(s) in *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710 (D.C. Cir. 2016)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Henderson wrote the majority opinion, joined by Judge Srinivasan. They concluded that the EPA did not violate the law when it withdrew certain disposal areas from a permit. I dissented because the EPA revoked a Clean Water Act permit without considering the costs of doing so, including the costs to coal miners and affected communities, which I determined violated established administrative law principles.

- m. Did you rule for environmental interest(s) on substantive ground(s) in *Natural Resources Defense Council v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: I authored the unanimous opinion, joined by Judges Srinivasan and Edwards. We concluded that the emissions-related provisions of the EPA's rule were permissible but that the EPA exceeded its statutory authority when it created an affirmative defense for private civil law suits.

- n. Did you rule for environmental interest(s) on substantive ground(s) in *Sierra Club v. EPA*, 536 F.3d 673 (D.C. Cir. 2008)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Griffith authored the majority decision, joined by Judge Sentelle. They vacated an EPA rule that prevented state and local authorities from supplementing monitoring requirements. I agreed with the majority opinion about bedrock principles of statutory interpretation but dissented because the relevant statutory language supported the EPA's rule.

- o. Did you rule for environmental interest(s) on substantive ground(s) in *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled.

RESPONSE: Judge Rogers authored the majority decision, joined by Judge Tatel. They concluded that the petitioners lacked Article III standing to challenge the rules, so they dismissed the petitions for lack of jurisdiction. I dissented. In my view, the states had standing and the EPA did not have authority to regulate emissions of greenhouse gases in Texas and Wyoming.

- p. Did you rule for environmental interest(s) on substantive ground(s) in *White Stallion Energy Ctr., LLC v. EPA*, 748 F.3d 1222 (D.C. Cir. 2014)? If so, please identify the environmental interest(s) for which you ruled and the substantive ground(s) on which you ruled?

RESPONSE: Along with Chief Judge Garland and Judge Rogers, I partially joined the *per curiam* opinion that denied petitions challenging emission standards for a number of listed hazardous air pollutants emitted by coal- and oil-fired electric utility steam generating units. I dissented in part because the EPA failed to consider costs. By a 9-0 vote on this point, the Supreme Court subsequently agreed with me that the EPA must consider costs under this statutory scheme. *See Michigan v. EPA*, 135 S. Ct. 2699 (2015).

9. Does a foreign national living in the United States have a First Amendment right to make expenditures on issue advertisements?

RESPONSE: My opinions have not squarely addressed this question, and the question could potentially come before me in future litigation. Therefore, as I discussed at the hearing and in keeping with nominee precedent, I cannot answer the question. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), I wrote an opinion for a unanimous three-judge district court rejecting a First Amendment challenge to a federal statute by “foreign citizens who temporarily live and work in the United States” who sought “to contribute to candidates and political parties and to make express-advocacy expenditures.” *Id.* at 282–83. The challengers in *Bluman* did not seek to make contributions to organizations that make expenditures on issue ads. The opinion made clear that the court’s “holding does not address” whether “Congress might bar” foreign nationals living temporarily in the United States “from issue advocacy and speaking out on issues of public policy.” *Id.* at 284, 292. The Supreme Court unanimously affirmed the decision. *See Bluman v. FEC*, 565 U.S. 1104 (2012).

- a. Do foreign nationals living in the United States have a First Amendment right to make contributions to organizations that make expenditures on issue ads?

RESPONSE: Please see my response to Question 9.

10. You referenced during your testimony that you had overlapped with former FBI Director Robert Mueller during your time in the George W. Bush investigation. What is your opinion of Robert Mueller’s character and work ethic? Do you believe that the investigation he is currently overseeing as Special Counsel is a “witch hunt?”

RESPONSE: As I stated during the hearing, one of the central principles of judicial

independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

11. Are there any debts, creditors, or related items that you did not disclose on your FBI disclosures?

RESPONSE: I have truthfully provided financial information in conjunction with this nomination process and my service in the judicial and executive branches. Since I graduated from law school in 1990, I have worked in public service for 25 of those 28 years. For most of her years of paid employment, my wife likewise has been a federal, state, or local government worker.

During that time, I have filed regular financial disclosure reports as required by law. The Federal Government's required financial disclosure reports list broad ranges for one's assets and debt as of one day or period in time.

At this time, my wife and I have no debts other than our home mortgage. We have the following assets:

- (1) A house minus the mortgage;
- (2) Two Federal Government Thrift Savings Plan retirement accounts (largely accessible to us beginning in 2024), as well as a Texas employees' retirement account;
- (3) A bank account;
- (4) A car that we own and a car that we lease; and
- (5) Ordinary personal furniture, clothing, and belongings.

Since our marriage in 2004, we have not owned stocks, bonds, mutual funds, or other similar financial investments outside of our retirement accounts.

Our annual income includes my income as a federal judge, my income from teaching law each year, and now also my wife's income from being Town Manager of Section 5 of Chevy Chase, Maryland. Our annual income and financial worth substantially increased in the last few years as a result of a significant annual salary increase for federal judges; a substantial back pay award in the wake of class litigation over pay for the Federal Judiciary; and my wife's return to the paid workforce following the many years that she took off from paid work in order to stay with and care for our daughters. The back pay award was excluded from disclosure on my previous financial disclosure report based on the Filing Instructions for Judicial Officers and Employees, which excludes income from the Federal Government. We have not received financial gifts other than from our family which are excluded from disclosure in judicial financial disclosure reports. Nor have we received other kinds of gifts from anyone outside of our family, apart from ordinary non-reportable gifts related to, for example, birthdays, Christmas, or personal hospitality. On the 2018 financial disclosure report, I correctly listed "exempt" for gifts and reimbursements because those are the explicit instructions in the 2018 Filing Instructions for Judicial Officers and Employees.

At this time, we have no debts other than our home mortgage. Over the years, we carried some personal debt. That debt was not close to the top of the ranges listed on the

financial disclosure reports. Over the years, we have sunk a decent amount of money into our home for sometimes unanticipated repairs and improvements. As many homeowners probably appreciate, the list sometimes seems to never end, and for us it has included over the years: replacing the heating and air conditioning system and air conditioning units, replacing the water heater, painting and repairing the full exterior of the house, painting the interior of the house, replacing the porch flooring on the front and side porches with composite wood, gutter repairs, roof repairs, new refrigerator, new oven, ceiling leaks, ongoing flooding in the basement, waterproofing the basement, mold removal in the basement, drainage work because of excess water outside the house that was running into the neighbor's property, fence repair, and so on. Maintaining a house, especially an old house like ours, can be expensive. I have not had gambling debts or participated in "fantasy" leagues.

The Thrift Savings Plan loan that appears on certain disclosure reports was a Federal Government loan to help with the down payment on our house in 2006. That government loan program is available for federal government workers to help with the purchase of their first house. In our case, that loan was paid back primarily by regular deductions from my paycheck, in the same way that taxes and insurance premiums are deducted from my paycheck. That loan has been paid off in full.

I am a huge sports fan. When the Nationals came to D.C. in 2005, I purchased four season tickets in my name every season from 2005 through 2017. I also purchased playoff packages for the four years that the Nationals made the playoffs (2012, 2014, 2016 and 2017.) I have attended all 11 Nationals' home playoff games in their history. (We are 3-8 in those games.) I have attended a couple of hundred regular season games. As is typical with baseball season tickets, I had a group of old friends who would split games with me. We would usually divide the tickets in a "ticket draft" at my house. Everyone in the group paid me for their tickets based on the cost of the tickets, to the dollar. No one overpaid or underpaid me for tickets. No loans were given in either direction.

My wife and I spend money on our daughters and sports, including as members of the Chevy Chase Club, which we joined in recent years. We paid the full price of the club's entry fee, and we pay regular dues in the same amount that other members pay. We did not and do not receive any discounts. The club is a minute's drive from our house, and there is an outdoor ice hockey rink and a very good youth ice hockey program. We joined primarily because of the ice hockey program that my younger daughter participates in, as well as because of the gym.

Finally, it bears repeating that financial disclosure reports are not meant to provide one's overall net worth or overall financial situation. They are meant to identify conflicts of interest. Therefore, they are not good tools for assessing one's net worth or financial situation. Here, by providing all of this additional information, I hope that I have helped the Committee.

12. On your 2015 Financial Disclosure Report dated May 13, 2016,¹ you reported between

¹ <https://fixthecourt.com/2018/07/bmk-fd-all>

1516

\$15,001 - \$80,000 in debt accrued over two credit cards (Chase, Bank of America), and one loan (Thrift Savings Plan). On your 2016 Financial Disclosure Report dated May 5, 2017, you reported having between \$60,004 and \$200,000 in debt accrued over three credit cards (Chase, Bank of America, USSA) and a loan (Thrift Savings Plan). White House Spokesman Raj Shah told the Washington Post that you “built up the debt by buying Washington Nationals season tickets for playoff games for [yourself] and a ‘handful’ of friends.” Shah said some of the debts were also for home improvements.²

- a. What was the total dollar amount of your liabilities in 2015 and 2016, respectively?

RESPONSE: Please see my response to Question 11.

- b. What explains the meaningful increase in your liabilities between 2015 and 2016?

RESPONSE: Please see my response to Question 11.

- c. Was Mr. Shah’s characterization of the sources of your debt wholly accurate? If not, please correct any inaccuracies or omissions.

RESPONSE: Please see my response to Question 11.

- d. Did you tell the White House that you built up the debt by buying Washington Nationals season tickets for playoff games for yourself and a “handful” of friends?

RESPONSE: Please see my response to Question 11.

- e. For how many seasons have you purchased Washington Nationals season tickets?

RESPONSE: Please see my response to Question 11.

- f. How many tickets did you purchase each year? What was the overall cost and cost per ticket?

RESPONSE: Please see my response to Question 11.

² https://www.washingtonpost.com/investigations/supreme-court-nominee-brett-kavanaugh-piled-up-credit-card-debt-by-purchasing-nationals-tickets-white-house-says/2018/07/11/8e3ad7d6-8460-11e8-9e80-403a221946a7_story.html?utm_term=.cc28ff7d0f05

1517

- g. Please identify the individuals for whom you purchased baseball tickets.

RESPONSE: Please see my response to Question 11.

- h. For each individual listed in the previous question, what financial arrangement, if any, was agreed to with respect to your purchase and their reimbursement of the cost of the baseball tickets?

RESPONSE: Please see my response to Question 11.

- i. Did you purchase any baseball tickets for friends in lieu of paying them back for personal debts? If yes, please specify the source and amount of each debt.

RESPONSE: Please see my response to Question 11.

- j. For each of 2015 and 2016, what percentage of your credit card debt would you attribute to home improvements? Please also explain what home improvements were undertaken and when.

RESPONSE: Please see my response to Question 11.

- k. For each of 2015 and 2016, what percentage of the credit card and TSP debt would you attribute to the purchase of baseball tickets?

RESPONSE: Please see my response to Question 11.

- l. Besides baseball season tickets and home improvements, did you have any other sources of personal or household debt from 2015 through 2018? If so, please specify.

RESPONSE: Please see my response to Question 11.

- m. Did you have any creditors, private or otherwise, not listed in your Financial Disclosure Reports?

RESPONSE: Please see my response to Question 11.

13. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. As noted above, the prior year, on your 2016 Financial Disclosure Report dated May 5, 2017, you reported between \$60,004 and \$200,000 in debt accrued over three credit cards and a TSP loan. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years. With respect

to your debt for baseball tickets, White House spokesman Raj Shah told *The Washington Post* that your friends reimbursed you for their share of the baseball tickets and that you have since stopped purchasing the season tickets.

- a. For each debt listed in your 2015 and 2016 Financial Disclosure Reports, (i.e., each credit card and the TSP loan listed in your 2015 and 2016 Financial Disclosure Reports), please identify the date on which the debt was paid and the source of the funds for repayment.

RESPONSE: Please see my response to Question 11.

- b. For the individuals for whom you purchased baseball tickets, please specify the name of each individual, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.

RESPONSE: Please see my response to Question 11.

- c. Beyond the money reimbursed by your friends for baseball tickets, how did you pay off your remaining debt? From what source did this money come?

RESPONSE: Please see my response to Question 11.

14. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote "Exempt."

- a. Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?

RESPONSE: Please see my response to Question 11.

- b. For each gift (if any) you believe is exempt from reporting, please provide a description of the gift, the approximate value, date received, the donor, and the reason you believe the gift was exempt from reporting requirements.

RESPONSE: Please see my response to Question 11.

15. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."

- a. Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?

RESPONSE: Please see my response to Question 11.

- b. For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, the date and amount of any reimbursements that you received for these costs, and the reason you believe the reimbursement was exempt from reporting requirements.

RESPONSE: Please see my response to Question 11.

- 16. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy.

RESPONSE: Please see my response to Question 11.

- 17. Your Bank of America accounts appear to have greatly increased in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.

RESPONSE: Please see my response to Question 11.

- 18. In 2006, you purchased your primary residence in Chevy Chase, MD for \$1,225,000, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during, and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.

- a. Did you receive financial assistance in order to purchase this home? And if so, was the assistance provided in the form of a gift or a personal loan?

RESPONSE: Please see my response to Question 11.

- b. If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and the individual(s) who provided this assistance.

RESPONSE: Please see my response to Question 11.

- c. Was this financial assistance disclosed on your income tax returns, financial disclosure forms, or any other reporting document?

RESPONSE: Please see my response to Question 11.

19. You have disclosed in your responses to the Senate Judiciary Questionnaire that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.

- a. How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?

RESPONSE: Please see my response to Question 11.

- b. Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees? If so, please describe the circumstances.

RESPONSE: Please see my response to Question 11.

- c. If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.

RESPONSE: Please see my response to Question 11.

- d. To the extent such assistance or rate reduction could be deemed a "gift," was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?

RESPONSE: Please see my response to Question 11.

20. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?

RESPONSE: Please see my response to Question 11.

21. Have you ever received a Form W-2G reporting gambling earnings? If so, please list dates and amounts.

RESPONSE: No. Please see my response to Question 11.

22. Have you ever reported a gambling loss to the IRS? If so, please list the dates and amounts.

RESPONSE: No. Please see my response to Question 11.

23. Bill Burck produced to the committee a document from your tenure in the White House Counsel's Office that references a "game of dice." After a reunion with friends in September 2001, you emailed: "Apologies to all for missing Friday (good excuse), and growing aggressive after blowing still another game of dice (don't recall). Reminders to everyone to be very, very vigilant w/r/t confidentiality on all issues and all fronts, including with spouses."

- a. Since 2000, have you participated in any form of gambling or game of chance or skill with monetary stakes, including but not limited to poker, dice, golf, sports betting, blackjack, and craps? If yes, please list the dates, participants, location/venue, and amounts won/lost.

RESPONSE: No. Please see my response to Question 11. The game of dice referred to in that email was not a game with monetary stakes.

- b. Do you play in a regular or periodic poker game? If yes, please list the dates, participants, location/venue, and amounts won/lost.

RESPONSE: Like many Americans, I have occasionally played poker or other games with friends and colleagues. I do not document the details of those casual games.

- c. Have you ever gambled or accrued gambling debt in the State of New Jersey?

RESPONSE: I recall occasionally visiting casinos in New Jersey when I was in school or in my 20s. I recall I played low-stakes blackjack. I have not accrued gambling debt.

- d. Have you ever had debt discharged by a creditor for losses incurred in the State of New Jersey?

RESPONSE: No.

- e. Have you ever sought treatment for a gambling addiction?

RESPONSE: No.

- f. In the email quoted above, please explain what "issues" and "fronts" you wanted your friends to be "very, very vigilant" about "w/r/t/ confidentiality, including with spouses."

RESPONSE: I was referring to my upcoming first date with my now-wife, Ashley, which was scheduled to take place that evening (September 10, 2001). Over the course of the preceding weekend, I had discussed Ashley at some length with my longtime friends. In the email, I was asking my friends not to share my interest in and upcoming date with Ashley with their

spouses.

24. Is lying under oath an impeachable offense for an Article III judge?

RESPONSE: That would be a question for the House and the Senate in the first instance, and it could potentially be the subject of litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me to discuss this issue.

25. Your *PHH v. CFPB* opinion said, “In order to maintain control over the exercise of executive power and take care that the laws are faithfully executed, the President must be able to supervise and direct those subordinate executive officers.”

a. Is it true that the Constitution says nothing explicit about presidential removal power?

RESPONSE: The Supreme Court has held that the “executive power” conferred by Article II of the Constitution includes “a power to oversee executive officers through removal.” *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (internal quotation marks and citation omitted).

b. If Article II contemplated complete presidential control over all administration, why does Article II explicitly allow Congress to appoint inferior officers of the United States?

RESPONSE: The Supreme Court has explained the scope of and limitations on presidential control over the Executive Branch in numerous precedents, including (among others) *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 492 (2010), *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and *Myers v. United States*, 272 U.S. 52 (1926).

c. Is it notable that Congress has long provided for the judicial appointment of prosecutors, including prosecutors to fill certain vacancies in the position of U.S. Attorney?

RESPONSE: Please see my response to Question 25.b above.

26. The justices of the U.S. Supreme Court are the only federal judges not bound by the Code of Conduct for U.S. Judges, which sets rules for when judges must recuse themselves from hearing cases.

a. Do you think the Supreme Court should adopt the Code of Conduct?

RESPONSE: If confirmed, I would commit to careful consideration of the practice of the Supreme Court on this question.

b. What standard would you use as a justice to resolve your own recusal issues?

RESPONSE: Please see my answer to 26.a.

- c. Supreme Court justices rarely divulge their reasons for deciding whether or not to recuse from a given case. Do you agree with that practice, or do you believe that the justices should make clear their rationales in this context?

RESPONSE: Please see my answer to 26.a.

27. In 1992, in his dissent in *Planned Parenthood v. Casey* (1992), Chief Justice Rehnquist wrote: “We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”

- a. What do you understand Rehnquist to have meant by the “traditional approach to *stare decisis* in constitutional cases”?

RESPONSE: The opinion of the three-justice plurality in *Planned Parenthood v. Casey* is the controlling precedent of the Supreme Court, not the dissent. As I explained at the hearing, moreover, *Casey* specifically analyzed the *stare decisis* factors at great length in reaffirming *Roe* and is itself a precedent on precedent.

- b. Do you agree with Justice Rehnquist that it would have been within the traditional approach to *stare decisis* to overrule the opinion in *Roe*?

RESPONSE: Please see my response to Question 27.a.

28. The Supreme Court upheld the essential holding of *Roe* two years ago in its most recent decision on abortion, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In *Whole Woman’s Health*, the Court demonstrated that the undue burden test is a robust check on legislatures that requires courts to examine whether abortion restrictions have benefits that outweigh the burdens they impose and to strike them down if they do not.³ The decision explicitly holds that the test is a form of heightened scrutiny. Proper application of the test requires courts evaluate whether an abortion restriction furthers a valid state interest based on the court’s independent examination of credible evidence set forward in the case. When a law’s burdens outweigh its benefits, it is unconstitutional.

- a. In your view, what is the standard for evaluating whether a restriction violates a woman’s constitutional right to terminate a pregnancy?

³ *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309-10 (2016).

RESPONSE: *Whole Woman's Health* reaffirmed the undue burden standard set forth in *Casey*. *Whole Woman's Health*, like *Casey*, is a precedent of the Supreme Court entitled to respect under the law of precedent.

29. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), you wrote a dissent arguing that all agency actions related to security clearances should be immune from judicial review – even in cases when claims involve evidence of clear racial bias.

- a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are they?

RESPONSE: My opinion speaks for itself.

30. In October 2017, the Department of Justice instructed its attorneys that Title VII's prohibition against sex-based discrimination in hiring or employment practices does not protect transgender workers. Several federal courts, however, have ruled that transgender employees are protected under Title VII.

- a. Do you believe that transgender individuals should be considered a protected class?

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case or issue.

- b. If not, how does being transgender differ from recognized protected classes like gender or race?

RESPONSE: Please see my response to Question 30.a.

- c. What criteria should be used to determine new suspect classifications in equal protection?

RESPONSE: Please see my response to Question 30.a.

31. The National Labor Relations Act (NLRA) sets forth as the public policy of the

United States the support of collective bargaining rights of employees in their unions with their employers.

- a. Do you believe the long-standing precedents protecting exclusive representation should survive?

RESPONSE: As a sitting judge, I am bound to follow Supreme Court decisions subject to the rules of precedent. In keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on the extent to which more recent developments in Supreme Court case law might affect pre-existing Supreme Court precedents on exclusive representation.

- b. Do you believe that the mission of the NLRA to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy, is constitutional?

RESPONSE: Please see my response to Question 31.a.

32. Where in the Constitution's text does it state that corporations should be treated the same as people in terms of equal protection, due process, or first amendment legal protections? Does a strict constructionist view of the Constitution permit such treatment?

RESPONSE: The Supreme Court has long held that the term "person" in the Equal Protection Clause encompasses corporations. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985); *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886). It has also made clear that a corporation is a "person" under the Due Process Clause, holding in cases like *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 176 (1893), that a corporation cannot be deprived of property without due process. The Court has also long held that the First Amendment protects "speech" – not speakers – and that "speech does not lose First Amendment protection "simply because its source is a corporation." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). As discussed at the hearing, "I try to apply all the provisions of the Constitution and all the precedents of the Supreme Court without picking or choosing." Judicial independence prevents me from "giv[ing] a thumbs up or thumbs down" to precedents based on personal views.

33. Many states, including Florida, have enacted laws concerning the possession or ownership of firearms by people with mental illness. Does the 2nd Amendment provide any basis for restriction of ownership or possession of firearms by people with a history of mental illness? If so, what is that basis?

RESPONSE: As I stated during the hearings, and as the Supreme Court held in *District of Columbia v. Heller*, traditional regulations on firearms are constitutionally permissible under *Heller*. During the hearing, I specifically noted that prohibiting the mentally ill from possessing firearms is a traditional, constitutionally permissible regulation, along with, but not limited to, felon-in-possession laws, bans on possession in schools or government buildings, and concealed carry laws, all of which were listed by the Supreme Court in *Heller*.

34. Judge Easterbrook wrote: “relying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren’t commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning it, so that it isn’t commonly owned. A law’s existence can’t be the source of its own constitutional validity.”

- a. What are your views of Judge Easterbrook’s critique of the “common use test”?
- b. Is there ever an instance where you would consider public safety justifications when evaluating a constitutional challenge to a gun safety law?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I would also add that the decisions of the United States Supreme Court, including *District of Columbia v. Heller* and its constituent test, constitute binding precedent and are entitled to all the respect due under the law of precedent.

35. Which regulations did you work on during your time as Staff Secretary from 2003-2006?

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the President’s policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

36. Please answer the following questions regarding your work in the Bush White House, if you answer yes, please describe your role.

- a. Did you work on, provide advice on, or otherwise have involvement in legislation to limit abortion procedures?

RESPONSE: As I explained during the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time, and regardless, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisers. During my tenure in the Counsel's Office, I worked on matters within the scope of my general duties as outlined by Judge Gonzales or other relevant officials.

- b. Did you work on, provide advice on, or otherwise have involvement in hate crimes legislation or the administration's position on pending legislation to expand federal hate crimes laws?

RESPONSE: Please see my response to Question 36.a.

- c. Did you work on, provide advice on, or otherwise have involvement in litigation designed to undermine or limit the holding in *Roe v. Wade*?

RESPONSE: Please see my response to Question 36.a.

- d. Did you work on, provide advice on, or otherwise have involvement in the Bush administration's position on a proposed constitutional amendment defining marriage as between one man and one woman?

RESPONSE: Please see my response to Question 36.a.

- e. Did you have any involvement in the Bush administration's use of taxpayer dollars to fund columnists to promote a proposed constitutional amendment defining marriage as between one man and one woman?

RESPONSE: Please see my response to Question 36.a.

- f. Did you work on, provide advice on, or otherwise have involvement in the issue of so-called "enhanced interrogation measures"?

RESPONSE: As I explained during the hearing, I did not craft the policies regarding enhanced interrogation techniques or the OLC memos justifying them. The Intelligence Committee's report and the report by the Department of Justice's Office of Professional Responsibility confirm that I had no such involvement.

- g. Did you participate in any discussions or edits to documents related to so-called "enhanced interrogation measures" or torture or the applicability of the Geneva Convention?

RESPONSE: Please see my response to Question 36.f. Once these specific matters were publicly disclosed in 2004, please see my response to Question 36.a.

- h. Did you work on, provide advice on, or otherwise have any involvement in the issue of the detention of enemy combatants, at Guantanamo Bay or elsewhere?

RESPONSE: Please see my response to Question 36.a.

- i. Did you have any awareness of the abuses at Abu Ghraib, or similar occurrences elsewhere, before they became public knowledge?

RESPONSE: I was not aware of the abuses at Abu Ghraib before they became public, to the best of my memory. Please see my response to Question 36.a.

- j. Did you work on, provide advice on, or otherwise have involvement in leaking the identity of then-CIA agent Valerie Plame, or the subsequent coverup? Did you have any awareness of these events before they became public knowledge?

RESPONSE: If I understand the first question correctly, the answer is no. On the second question, I am not sure what is encompassed by "these events." Please see my response to Question 36.a.

- k. Did you work on, provide advice on, or otherwise have involvement in the drafting and passage of the Patriot Act?

RESPONSE: I believe I did.

- l. Did you work on, provide advice on, or otherwise have involvement in the post-9/11 domestic surveillance programs, including the NSA warrantless wiretapping and bulk phone records that came to light in December 2005? Were you aware of these programs before they became public knowledge?

RESPONSE: As I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the secret Terrorist Surveillance Program, or TSP, until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I further explained during my hearing, while I do not have specific recollection, I cannot rule out having discussed warrantless surveillance generally in the wake of September 11th.

- m. Did you work on, provide advice on, or otherwise have involvement in proposals to block grant Medicaid?

RESPONSE: Please see my response to Question 36.a.

- n. Did you work on, provide advice on, or otherwise have involvement in discussion

about the privatization of social security?

RESPONSE: Please see my response to Question 36.a.

- o. Did you work on, provide advice on, or otherwise have involvement in any international climate change or control policies, including the Kyoto Protocol?

RESPONSE: Please see my response to Question 36.a.

- p. Did you work on, provide advice on, or otherwise have involvement in the enactment of Executive Order 13233, which limited public access to the records of former Presidents?

RESPONSE: Yes.

- q. Did you work on, provide advice on, or otherwise have involvement in the federal government's response to Hurricane Katrina?

RESPONSE: Please see my response to Question 36.a.

- r. Were you aware of corrupt activities surrounding lobbyist Jack Abramoff before they became public knowledge? Did you ever take a meeting with him?

RESPONSE: I do not believe I have ever met Mr. Abramoff.

- s. Did you work on, provide advice on, or otherwise have involvement in the decision to allow the assault weapons ban to expire? What other matters did you work on related to firearms? Were you involved in any way in speeches or other documents or meetings related to the *Heller* case?

RESPONSE: Please see my response to Question 36.a.

- t. Did you work on, provide advice on, or otherwise have involvement in efforts to limit race-based or gender-based affirmative action through legislative, executive, or judicial action?

RESPONSE: As I explained during the hearing, I provided legal advice and opinions about how certain federal contracting programs would fit within the Supreme Court's existing precedent regarding affirmative action. Please also see answer to 36.a.

- u. Did you work on or provide any advice the Bush administration's amicus briefs in the 2003 University of Michigan equal opportunity in higher education cases *Grutter* and *Gratz* in which the administration took the position that race-conscious considerations were unconstitutional?

RESPONSE: I had some involvement in those amicus briefs during my time in the White House Counsel's Office. The White House Counsel's Office was seeking to implement the President's directives.

- v. Did you work on or provide any advice on the Bush administration's amicus brief in the 2006 *Parents Involved in Community Schools* case in which the administration intervened on behalf of white parents to oppose the limited use of race to help diversify public schools in Seattle and Louisville?

RESPONSE: Please see my response to Question 36.a.

- w. Did you work on any other cases, policies, or matters that aimed to restrict the use of race-conscious criteria in any federal, state, or local contracting, employment, or educational programs?

RESPONSE: Please see my response to Question 36.a.

- x. Did you work on any cases, policies, or matters in which you advanced the argument that native Hawaiians or other indigenous people were not entitled to the same legal and constitutional protections as Native Americans?

RESPONSE: Please see my response to Question 36.a.

- y. Did you work on any cases, policies, or matters in which you advanced arguments consistent with your statement in a 1999 press interview that within the next 10-20 years courts would declare "we are all one race in the eyes of government"?

RESPONSE: Please see my response to Question 36.a.

- z. Did you work on, provide advice on, or otherwise have involvement in the U.S. Attorney firings that were the subject of a September 2008 Department of Justice OIG report?

RESPONSE: I left the White House in May 2006 to become a judge. The firings occurred in December 2006. Beyond that, please see my response to Question 36.a.

- aa. Did you work on, provide advice on, or otherwise have involvement in the systems of politicized hiring at the Department of Justice that were the subject of three DOJ OIG reports in June and July of 2008?

RESPONSE: Please see my response to Question 36.a.

- bb. Did you work on, provide advice on, receive any documents or communications

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about, or otherwise have involvement in issues pertaining to Purdue
Pharmaceuticals, Giuliani Partners, or the Oxycontin investigation?

RESPONSE: Please see my response to Question 36.a.

Senate Judiciary Committee

“The Nomination of Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States”

Questions for the Record

September 10, 2018

Senator Amy Klobuchar

Independent Judiciary

You referred to our independent judiciary as “the crown jewel of our constitutional republic.”

- What three opinions would you name that best demonstrate your independence as a judge?

RESPONSE: *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012) (vacating the military commission conviction of Salim Hamdan, Osama bin Laden’s driver, for providing material support for terrorism); *Republican National Committee v. FEC*, 698 F. Supp. 2d 150 (D.D.C. 2010) (rejecting a challenge brought by the RNC to limits on political-party fundraising); *United States v. Burwell*, 690 F.3d 500 (D.C. Cir. 2012) (en banc) (dissenting to argue that a convicted bank robber could not face a mandatory 30-year sentence because the government failed to prove that he had the requisite *mens rea*—i.e., criminal intent).

Precedent

During your testimony, you referenced “precedent,” “precedent on precedent,” “entrenched precedent,” and cases like *Brown v. Board of Education*, which you acknowledged as “settled law.”

- What Supreme Court precedents from the last three decades – if any – would you consider to be settled law?

RESPONSE: As I discussed at the hearing, the law of precedent is not a judicial policy but rather is rooted in Article III of the Constitution. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary. With respect to more recent cases from the Supreme Court and their significance—as I discussed at the hearing and in keeping with nominee precedent—it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

Executive Power

I asked you about the view that you expressed in *Seven-Sky v. Holder* that the President can decline to enforce a law regulating private individuals, even if a court has found it to be constitutional.

- Can the President ever decline to enforce a law – even if a court has found it to be constitutional – outside of the context of prosecutorial discretion?

RESPONSE: As I said at the hearing, it would be inappropriate for me to respond to hypothetical questions. Footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1(D.C. Cir. 2011) refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). The Supreme Court in *Nixon* said that the executive branch has the “exclusive authority and absolute discretion to decide whether to prosecute a case.” In *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court said this principle applies to civil enforcement as well. The limits of prosecutorial discretion are uncertain.

- Article II, Section 3 of the Constitution, says that the President “shall take care that the laws be faithfully executed.” If a President does not faithfully execute a law – outside of the context of prosecutorial discretion – can a person seek to enforce that provision of the Constitution in court?

RESPONSE: See my response to the previous question. Beyond that, whether the Take Care Clause of Article II, Section 3 provides an independent cause of action for private individuals is the subject of pending litigation in the federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

Constitutional Avoidance

Justice Brandeis said in his 1936 opinion in *Ashwander v. Tennessee Valley Authority*: “The Court will not pass upon a constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.”

- You have said that the Court should “consider jettisoning” the canon of constitutional avoidance. Have you consistently used the canon of constitutional avoidance as a judge on the D.C. Circuit, and would you describe yourself as a jurist who decides cases on the narrowest possible grounds?

RESPONSE: I explained at the hearing that I made the quoted observation in the context of an article discussing “the problem of ambiguity as a trigger for certain canons of statutory interpretation.” As a judge, I have consistently applied constitutional avoidance where appropriate. See, e.g., *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

Administrative Law

We also discussed your views on executive agencies, including your writings on the deference that should be given to agency interpretations of statutes and your record on overruling agency actions. Although you responded that you have also upheld agency actions in administrative law cases, you have ruled against agencies in an overwhelming majority of cases involving areas such as environmental law.

- Do you believe your record suggests that you are skeptical of agency actions to implement health and safety protections, and if not, why not?

RESPONSE: As I explained at the hearing, my record shows that I have ruled both for and against agency actions in the areas you describe. In each case, I have followed the law.

In the hearing, you replied to Senator Lee that the non-delegation doctrine holds that “at some point, Congress can go too far in how much power it delegates to an executive or independent agency.” But the Court has not applied this doctrine since 1935.

- Do you believe that the non-delegation doctrine is still good law?

RESPONSE: On March 5, 2018, the Supreme Court granted a petition for a writ of certiorari in *Gundy v. United States* (No. 17-6086). The question presented is: Whether the federal Sex Offender Registration and Notification Act’s delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913 violates the nondelegation doctrine. Because this case is pending before the Supreme Court, I cannot provide my views of the nondelegation doctrine.

Campaign Finance

In a March 2002 email from your previous work in the White House that was provided to the Committee, you discussed your views on campaign finance laws.

- Is it still your view that limits on contributions to candidates have “some constitutional problems”?

RESPONSE: As a judge, I apply Supreme Court precedent governing the constitutionality of limitations on campaign contributions. The Supreme Court has explained the constitutional analysis that applies to such limitations in *Buckley v. Valeo*, 424 U.S. 1 (1976), and subsequent precedents. As I explained at the hearing, the Supreme Court has struck down limitations on campaign contributions as unconstitutional in several cases subsequent to my 2002 email, including *Randall v. Sorrell*, 548 U.S. 230 (2006), and *McCutcheon v. FEC*, 572 U.S. 185 (2014). Each of these cases is a precedent of the Supreme Court entitled to the respect due under the law of precedent.

Antitrust

During the hearing, you said that you “don’t get to pick and choose” which Supreme Court precedents to follow. But your dissent in the 2008 *Whole Foods* case cited none of the relevant Supreme Court precedent and only cited three federal cases, discussing just one at significant length. In contrast, the majority applied the Supreme Court’s decisions in *Brown Shoe*, *Philadelphia National Bank*, and other relevant binding precedent in reaching their conclusions.

- Why did you choose not to apply these Supreme Court precedents in your dissent?

RESPONSE: In *Whole Foods*, as in all cases, I sought to faithfully apply binding Supreme Court and D.C. Circuit precedent. The fact-specific question in *Whole Foods* was how to define the relevant market. In particular, did Whole Foods compete with traditional grocery stores? After an extensive hearing, the district court—Judge Paul Friedman, an appointee of President Clinton—concluded yes. I agreed based on my analysis of the record. My opinion relied on “basic economic principles that, according to the Supreme Court, must be considered under modern antitrust doctrine.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1059 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (citing, *inter alia*, *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007), and *State Oil Co. v. Khan*, 522 U.S. 3 (1997)). I therefore followed the most recent and binding Supreme Court precedents applicable to the question presented in the case.

- How was your decision not to apply *Brown Shoe* and *Philadelphia National Bank* in the *Whole Foods* case consistent with your claim that you follow all Supreme Court precedent?

RESPONSE: Please see my answer to Question 9.

During the hearing, you said that in the 1970s, the Supreme Court “moved away from the analysis” in *Brown Shoe* and *Philadelphia National Bank*.

- Does that mean that you do not consider these cases binding Supreme Court precedent?

RESPONSE: As I said at the hearing, the Supreme Court instructed us in subsequent antitrust cases, beginning in the 1970s, to examine the effects on competition, which *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) did not do in the same way. As I explained in my opinion in *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), the Supreme Court’s landmark decisions in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), together with other modern antitrust jurisprudence, marked a shift in antitrust analysis toward a focus “on the effects on the consumers of the product or service” of the merging parties and away from the “strict anti-merger approach that the Court had employed in the 1960s in cases such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).” *Anthem*, 855 F.3d at 376 (Kavanaugh, J., dissenting).

- *Brown Shoe* and *Philadelphia National Bank* have been consistently cited and applied by the courts since the late 1970s, and they remain important legal tools for enforcers challenging anticompetitive mergers to this day. Are other circuits and federal judges mistaken in continuing to apply these precedents?

RESPONSE: As I explained in my responses to the three previous questions, lower-court judges must apply the most recent and binding Supreme Court precedent. In the fact-specific circumstances presented to me in *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008) and *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017), I concluded that I was required to apply the principles of 1970s decisions like *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), and *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

Affirmative Action

I asked you about an email in which you said you thought that a federal program to encourage the participation of minority- and women-owned businesses in transportation contracting was unconstitutional. You responded that your arguments were rooted in the precedent established by *Crosen v. City of Richmond*. In *Crosen*, the Court held that the government could not institute “rigid” racial quotas in the awarding of contracts without “direct evidence of race discrimination.” However, the program that was discussed in your email did not involve quotas.

- Is it your view that *Crosen* should be extended to prohibit any preferences in federal contracting for minority-owned businesses?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

- Do you think that using race as a factor in federal contracting is consistent with the Fourteenth Amendment?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

**Nomination of Judge Brett Kavanaugh
to be Associate Justice of the United States Supreme Court Questions for the Record**

Submitted September 10, 2018

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

a. Would you consider whether the right is expressly enumerated in the Constitution?

RESPONSE: As I discussed at the hearing, the Constitution protects unenumerated rights, and I agree with Justice Kagan that *Washington v. Glucksberg*, 521 U.S. 702 (1997), provides the primary test that the Supreme Court has relied on for forward-looking future recognition of unenumerated rights. I will seek to follow and apply the law and precedents as faithfully as I am able.

b. You indicated that you would consider whether the right is deeply rooted in this nation's history and tradition. What types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

RESPONSE: Please see my response to Question 1.a.

c. Would you consider whether the right has previously been recognized by Supreme Court or a court of appeals?

RESPONSE: Please see my response to Question 1.a.

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent?

RESPONSE: Please see my response to Question 1.a.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? See *Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

RESPONSE: Please see my response to Question 1.a.

f. What other factors would you consider?

RESPONSE: Please see my response to Question 1.a.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across

race and gender, or does it only require racial equality?

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

RESPONSE: As I stated at the hearing, the text, history, and tradition of the Fourteenth Amendment require equal protection under law for all Americans. No matter who you are, no matter where you come from, no matter your gender, everyone is entitled to equal justice under law. I would follow the Supreme Court's precedents subject to the rules of stare decisis.

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

RESPONSE: Please see my response to Question 2.a.

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

RESPONSE: As I stated at the hearing, the text, history, and tradition of the Fourteenth Amendment require equal protection under law for all Americans. Justice Kennedy wrote in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans as inferior in dignity and worth are over. In any case concerning the Fourteenth Amendment's application to gay and lesbian couples, I would consider the briefs and arguments of the parties, the record, and the precedent of the Supreme Court. In keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

RESPONSE: Please see my response to Question 2.c.

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

RESPONSE: The Supreme Court so held in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). At the hearing, I stated that I agreed with Chief Justice Roberts and Justice Alito about those cases.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

RESPONSE: The Supreme Court held as much in *Roe v. Wade*.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

RESPONSE: The Supreme Court held as much in *Lawrence v. Texas*.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

RESPONSE: Please see my response to Question 3 above.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, “[h]igher education at the time was considered dangerous for women,” a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, “As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.” This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate for judges to consider evidence that sheds light on our changing understanding of society?

RESPONSE: This answer to this question depends on the nature of the case before a court. There is no one-size-fits-all answer. I of course would consider relevant evidence on relevant issues.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

RESPONSE: Please see my response to Question 4.a.

5. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the “circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light” on the amendment’s original meaning, “it is not enough to resolve the problem with which we are faced. At best, they are inconclusive We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.” 347 U.S. at 489, 490-93.

a. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

RESPONSE: Yes. As I discussed at the hearing, *Brown* “lived up to the text of the Equal Protection Clause” and was dictated by the text of the Fourteenth Amendment.

b. How do you respond to the criticism of originalism that terms like “‘the freedom of speech,’ ‘equal protection,’ and ‘due process of law’ are not precise or self-defining”? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, <https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism> (last visited September 9, 2018).

RESPONSE: The problem of ambiguity in constitutional and statutory text is one with which every judge must grapple. In my experience, careful attention to text, history, structure, tradition, and precedent is useful in seeking to clarify ambiguous constitutional and statutory provisions.

c. Should the public’s understanding of a constitutional provision’s meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

RESPONSE: As I explained at the hearing, I believe the original public meaning of the Constitution—as informed by history, and tradition, and precedent—is an important consideration in constitutional interpretation. As Justice Kagan has said, we are all originalists now, and we are all textualists now.

d. Does the public’s original understanding of the scope of a constitutional provision constrain its application decades later?

RESPONSE: Please see my response to Question 5.c.

e. What sources would you employ to discern the contours of a constitutional provision?

RESPONSE: Please see my response to Question 5.c

6. You have been highly critical of *Morrison v. Olson*, 487 U.S. 654 (1988), on both policy and constitutional grounds.

a. Which provisions of the independent counsel statute at issue in that case caused you to call the law a “constitutional travesty,” and why did you object to those provisions so strongly?

b. Why did you single out *Morrison* as a case you would overrule?

c. Please explain why you believe the independent counsel statute should have been struck down.

d. Do you think the for-cause removal provision of the independent counsel statute was unconstitutional?

e. Do you believe that the Constitution requires the President to be able to remove any Executive Branch official at will?

RESPONSE: I have discussed these issues at length at the hearing and in my writings. I have nothing to add here.

7. You repeatedly turned to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), in response to my questions about *Morrison v. Olson*. You said that *Humphrey's Executor* was "an important precedent of the Supreme Court that [you] have applied many times and reaffirmed." Do you believe that *Humphrey's Executor* was correctly decided?

RESPONSE: As I explained at the hearing, *Humphrey's Executor* is a precedent of the Supreme Court entitled to respect under the law of precedent.

8. In a 2017 speech at the American Enterprise Institute, you praised Chief Justice Rehnquist's approach to substantive due process cases, both in *Washington v. Glucksberg*, 521 U.S. 702 (1997), and more generally.

a. Do you agree that Justice Rehnquist's approach in substantive due process cases focused on whether asserted constitutional rights were deeply rooted in history and tradition?

RESPONSE: I agree with Justice Kagan that Chief Justice Rehnquist's decision in *Washington v. Glucksberg* provides the primary test that the Supreme Court has relied on for forward-looking future recognition of unenumerated rights.

b. Do you believe that this is the sole test for determining whether a right should be protected under the Fourteenth Amendment's Due Process Clause?

RESPONSE: Please see my response to Question 8.a.

c. Which substantive due process rights that are currently protected under Supreme Court precedent can be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.

RESPONSE: Please see my response to Question 8.a.

d. Which substantive due process rights that are currently protected under Supreme Court precedent cannot be justified using Justice Rehnquist's approach in *Glucksberg*? Please put stare decisis aside in answering this question.

RESPONSE: Please see my response to Question 8.a.

9. During my last round of questions with you, I asked you about Chief Judge Rehnquist's approach to identifying liberty interests protected by the Fourteenth Amendment's Due Process clause in *Washington v. Glucksberg*, 521 U.S. 702 (1997), the so-called *Glucksberg* test. During that round of questioning, and in response to the questions of other Senators, you seemed to suggest that this test is the exclusive governing test according to Supreme Court precedent. You further seemed to suggest that this approach had been endorsed by Justice Kagan during her confirmation hearing and by Justice Kennedy, given that he joined the majority in *Glucksberg*. However, Justice Kennedy wrote in the majority opinion in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015), which Justice Kagan joined: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry

and the rights of gays and lesbians. See *Loving* 388 U. S., at 12; *Lawrence*, 539 U. S., at 566-567.”

a. Do you agree that the Supreme Court declined to apply the *Glucksberg* test in critical substantive due process decisions subsequent to *Glucksberg* that were written by Justice Kennedy, including *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)?

RESPONSE: The decision of the Court in *Lawrence v. Texas* does not cite *Glucksberg*. In *Obergefell*, the Court noted that the approach utilized by *Glucksberg* was not utilized in certain cases including *Loving v. Virginia*, 388 U.S. 1 (1967), *Turner v. Safley*, 482 U.S. 78 (1987), and *Zablocki v. Redhail*, 434 U.S. 374 (1978). In her 2010 confirmation hearing, Justice Kagan stated that “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

b. Given the approach to substantive due process in these two recent cases, why did you repeatedly suggest that the *Glucksberg* test is the appropriate, or only, approach to deciding substantive due process?

RESPONSE: As Justice Kagan stated in her confirmation hearing, “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

c. *Obergefell* explicitly rejected that the *Glucksberg* test was the sole test for identifying liberty interests protected by the Due Process Clause. The Court stated that the *Glucksberg* “approach may have been appropriate for the asserted right there involved (physician-assisted suicide),” but “it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.” In light of this statement, do you agree that it is inaccurate to characterize *Glucksberg* as the governing test for assessing liberty interests under substantive due process? Why or why not?

RESPONSE: Please see my response to Question 9.b

d. Why did you not refer to any of these more recent cases when discussing substantive due

process?

RESPONSE: *Glucksberg* is a governing test for assessing liberty interests in cases where substantive due process rights are asserted. The Supreme Court has not overruled *Glucksberg*, and it is entitled to all the respect due under the law of precedent.

e. Do you believe these more recent substantive due process cases (*Lawrence*, *Obergefell*) were correctly decided?

RESPONSE: As a sitting judge, I am bound to follow all Supreme Court decisions subject to the rules of precedent. As Justice Kagan said at her confirmation hearing, it would be inappropriate to offer a thumbs up or thumbs down on particular precedents like these.

10. Recent Supreme Court cases addressing capital punishment under the Eighth Amendment and the privacy of same-sex intimacy under the Fourteenth Amendment have made reference to the opinions of foreign courts or foreign practices to affirm conclusions that were otherwise supported by the record, as well as relevant U.S. case law and practices. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). Do you agree that foreign court decisions and foreign practices of democratic countries that follow the rule of law are appropriate to consider and cite in opinions interpreting the Constitution?

RESPONSE: I agree with Justice Sotomayor's answer to written questions submitted by members of this Committee during her confirmation process. In response to a question submitted by then-Senator Sessions, Justice Sotomayor wrote, "American courts should not 'use' foreign law in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas however, does not constitute 'using' those decisions to decide cases." In response to a question submitted by Senator Grassley, Justice Sotomayor wrote, "[f]oreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas."

11. Chief Justice Warren wrote that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This doctrinal standard explicitly calls on the Court not to limit its Eighth Amendment analysis to the meaning of "cruel and unusual punishments" when the Amendment was ratified in 1791, a time when firing squads and hanging were prevalent methods of execution. Applying *Trop*'s evolving standard, the Court has prohibited practices once thought to be constitutional, such as the execution of minors and the execution of individuals with intellectual disabilities.

a. In your view, what is meant by the Eighth Amendment's prohibition against "cruel and unusual punishments"?

b. Does the phrase "cruel and unusual punishments" have the same meaning from the Eighth Amendment's ratification in 1791 until now, or has our understanding changed?

c. Do scientific advancements in our understanding of psychology, pain, and death alter what constitutes “cruel and unusual punishments”?

d. If it were permissible at the time of the Founding to execute eight-year-old children, would a commitment to originalism as the exclusive theory of constitutional interpretation mean that it would be similarly permissible to execute eight-year-old children today?

RESPONSE: The meaning of “cruel and unusual punishments” under the Eighth Amendment is the subject of ongoing litigation and is likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

12. All federal judges – except Supreme Court justices – are required to comply with the Code of Conduct for United States Judges. This code ensures that judges avoid the appearance of impropriety, refrain from political activity, and make financial disclosures.

a. If confirmed, will you support the establishment of a code of conduct for Supreme Court justices?

RESPONSE: If confirmed, I would give careful consideration to the practice of the Supreme Court regarding these questions, and I would consult with my colleagues regarding these issues.

b. In the absence of a binding code of conduct for Supreme Court justices, will you commit to continue adhering to the Code of Conduct for United States Judges applicable to federal judges on district courts and circuit courts?

RESPONSE: Please see my response to Question 12.a.

c. Will you commit to filing the same financial and travel disclosures that you currently file, should you be confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 12.a.

13. Pro bono representation of litigants plays a vital role in providing access to justice. The American Bar Association suggests that each lawyer render at least 50 hours of pro bono legal services per year. Please describe every pro bono matter you worked on over the course of your career.

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, most notably the Adat Shalom synagogue and Elian Gonzalez’s American relatives.

I represented pro bono Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland before Judge Andre Davis. The district court decided

the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the county. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

I represented pro bono the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for a stay in the Supreme Court of the United States, and petition for a writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, stay application, and petition for a writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference that should be accorded to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in essence, that the court's original decision granting an injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for a writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

In 2000, I briefly represented pro bono a criminal defendant on appeal to the Fourth Circuit. The defendant had been convicted of conspiracy to harbor an alien and harboring an alien. I filed an appearance in the Fourth Circuit on behalf of the defendant but withdrew from the case before any briefs were filed. I withdrew because I had taken a new job at the White House in January 2001.

I also filed pro bono amicus briefs in several significant Supreme Court cases involving religious liberty. In *Santa Fe Independent School District v. Doe*, I filed an amicus brief on behalf of Congressmen Steve Largent and J.C. Watts in support of the petitioner, arguing that because the school policy at issue did not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind (or prevent the student from doing so), the policy was neutral toward religion and religious speech and therefore did not violate the Establishment Clause. In *Good News Club v. Milford Central School*, I filed an amicus brief on

behalf of Sally Campbell in support of the petitioners, arguing that the discriminatory policy enacted by the school district targeted religious speech for a distinctive burden and was therefore unconstitutional. In *Rice v. Cayetano*, I filed an amicus brief on behalf of the Center for Equal Opportunity, the New York Civil Rights Coalition, and two professors in support of petitioners, arguing that an explicit racial classification that restricted the right to vote in statewide elections for state officials was unconstitutional.

The majority of my legal career has been spent in public service in a variety of capacities. Many of these positions, including particularly my service on the D.C. Circuit, have limited my opportunities to engage in traditional pro bono legal work. Nonetheless, I have sought—and will continue to seek—other avenues by which I can live up to the professional obligation of an attorney to help the less fortunate.

Since my youth, I have devoted significant time to helping the disadvantaged. My goal has always been to be, in the words of my high school's motto, a "man for others." In high school, I served meals at soup kitchens and tutored intellectually disabled children at the Rockville public library. In college, I tutored children at Roberto Clemente Middle School. In law school, I participated at times in the Green Haven Prison Project, which involved visiting and discussing issues with inmates at a New York prison.

As a judge, I have tutored at J.O. Wilson School and the Washington Jesuit Academy. I now serve as a director of the Washington Jesuit Academy. For the last several years, I have regularly served meals to the homeless at Catholic Charities in D.C. And I participated in community work on occasion, such as participating in an all-day playground build in Washington, D.C.

14. The U.S. Court of Appeals for the Federal Circuit has exclusive jurisdiction over appeals from civil actions involving claims "arising under . . . any Act of Congress relating to patents." 28 U.S.C. § 1295(a)(1). Decisions of the Federal Circuit are reviewable by the Supreme Court. As a judge on the U.S. Court of Appeals for the D.C. Circuit, your docket was unlikely to include cases relating to patent law issues, but if you are confirmed to the Supreme Court, such cases will now have the potential to come before you.

a. Please describe any legal instruction (including at law school and afterwards) you have had in patent law.

RESPONSE: In preparing to hear and decide cases involving issues of intellectual property law (including those discussed below at Question 14.c.), I carefully read the parties' briefs, review relevant precedents, and familiarize myself with fundamental principles of intellectual property law.

b. Please describe any legal instruction (including at law school and afterwards) you have had in other areas of intellectual property law.

RESPONSE: Please see my response to Question 14.a.

c. Please describe any experience you have had working on intellectual property issues since graduating law school.

RESPONSE: Several of the cases that I have decided as a judge have implicated intellectual property issues. In *FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018), I wrote an opinion resolving an attorney-client privilege dispute arising from an FTC investigation into a reverse-payment settlement between a drug patent holder and a generic competitor. In *Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury*, 638 F.3d 794, 795 (D.C. Cir. 2011), I wrote an opinion addressing a dispute over the renewal of certain trademarks. And I have written several opinion reviewing decisions of the Copyright Royalty Board. See, e.g., *Independent Producers Group v. Librarian of Congress*, 792 F.3d 132 (D.C. Cir. 2015); *Recording Industry Association of America, Inc. v. Librarian of Congress*, 608 F.3d 861 (D.C. Cir. 2010).

d. Please list any speeches or public presentations in which you have discussed intellectual property law.

RESPONSE: A list of my public speeches and presentations appears in response to Question 12.d. of my Senate Judiciary Questionnaire. Although I do not believe that any of these speeches or presentations focused on intellectual property law, the topic may have arisen in the course of my discussions.

15. Are patents property rights?

RESPONSE: The Supreme Court recently discussed this issue in *Oil States Energy Services v. Greene's Energy Group*, 138 S. Ct. 1365 (2018). Questions related to the issue could come before me in future litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would therefore be improper for me as a sitting judge and a nominee to comment on further on this issue.

16. Are federal copyrights property rights?

RESPONSE: Questions related to this issue could come before me in future litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would therefore be improper for me as a sitting judge and a nominee to comment on further on this issue.

17. Please describe the sources and methods you believe a judge should use in order to determine whether a claimed invention in a patent is an abstract idea that is not patent eligible.

RESPONSE: The Supreme Court has addressed this principle in a number of precedents, including recently in *Alice Corp. Pty. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014). If I were called upon to resolve a case in this area, I would consider relevant statutes, judicial precedent, the briefs and arguments of the parties and amici, and all other relevant authority bearing on the topic.

18. Do you believe it is unduly burdensome for an individual inventor in possession of an issued U.S. patent to prevent infringement by a large corporation? Why or why not? If yes, what steps should be taken to make enforcement easier?

RESPONSE: As I stated at the hearing, members of the judiciary must faithfully apply the laws passed by Congress. Judicial independence requires that nominees refrain from opining on matters of policy. In keeping with those principles and the nominee precedent of prior nominees, I therefore cannot provide my views on this issue.

19. The Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. 97-164. “Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to ‘provide nationwide uniformity in patent law.’” *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (quoting H.R. REP. NO. 97–312, p. 20 (1981)).

a. In light of this intent behind creating an intermediate appellate court that has nationwide subject matter jurisdiction over patent law, what, if any, deference or consideration should the Federal Circuit receive for doctrinal developments in this area of law?

RESPONSE: As a D.C. Circuit Judge, I have not had the opportunity to consider in detail questions concerning the Supreme Court’s review of Federal Circuit decisions. If confirmed to the Supreme Court, I would consider all applicable statutes, judicial precedents, and other legal authority in this area, as well as the arguments of parties and *amici*, and the views of my colleagues.

b. Does your answer change depending on whether the patent law issue in question is based on an interpretation of any part of Title 35 of the U.S. Code or if it is, instead, based upon a common law patent doctrine?

RESPONSE: Please see my response to Question 19.a.

c. Resolving circuit splits is often viewed as one of the Supreme Court’s core responsibilities in order to ensure uniform rules nationwide so that case outcomes are not simply the result of where a case is filed. Because the Federal Circuit is the only intermediate appellate court to hear patent cases, however, there is no possibility of a circuit split on these issues. What other factors would you look to in order to determine whether to grant a writ of certiorari in patent law cases?

RESPONSE: Please see my response to Question 19.a.

20. During your nomination hearing, you referred to the “reliance interest” that must be considered (among other factors) when the Supreme Court decides whether it should overturn precedent. Do you agree that this same type of interest has particular relevance when considering whether to make substantial changes to patent law (even if no precedent is directly overturned), given that significant research and development investments are often predicted on the certainty of a federal patent grant?

RESPONSE: As I discussed at the hearing, reliance interests are among the factors the Supreme Court considers in applying the law of precedent. Adherence to precedent ensures stability and predictability in the law, and reinforces the impartiality and independence of the judiciary.

21. How frequently do you communicate with Judge Kozinski? If the frequency of your

communications has changed over time, please provide estimates for different time periods.

RESPONSE: I was asked and answered questions regarding the frequency of my communications with Judge Kozinski at the confirmation hearing.

a. At least 15 women have accused Judge Kozinski of sexual harassment. Do you believe that Judge Kozinski treated women inappropriately?

RESPONSE: As I said at the hearing, I have no reason to doubt the claims of these women.

b. During the entire course of your relationship with Judge Kozinski, did you ever witness him engaging in inappropriate behavior? Please explain any such incident(s).

RESPONSE: Judge Kozinski was known to be a tough boss, but I did not witness him engaging in inappropriate behavior of a sexual nature.

c. Did you ever see Judge Kozinski mistreat a law clerk or law clerk candidate? Please explain any such incident(s).

RESPONSE: Over the course of my relationship with Judge Kozinski, I never saw him sexually harass a law clerk or law clerk candidate.

d. Did Judge Kozinski ever use demeaning language when discussing women?

RESPONSE: I do not remember hearing Judge Kozinski use demeaning language of a sexual nature when discussing women.

e. Did anyone ever raise concerns with you about Judge Kozinski's behavior? Who? When?

RESPONSE: To the best of my memory, no one ever raised concerns with me regarding inappropriate behavior of a sexual nature on the part of Judge Kozinski. Judge Kozinski worked in a small courthouse in Pasadena with ten other judges, numerous law clerks, and court employees. Apparently, none of them knew of any misconduct, or they presumably would have reported it.

f. Did your clerkship spot with Judge Kozinski become available when another student resigned or was fired from his clerkship with Judge Kozinski? If so, please explain your understanding of the circumstances around the former clerk's departure.

RESPONSE: Yes. I replaced another male clerk. I am not aware of the precise circumstances surrounding the former clerk's departure.

g. It has been reported that Judge Kozinski had a sexually explicit email list, called the Easy Rider Gag List. Did you ever receive an email from this list? If it is necessary to refresh your recollection, please review your email accounts before answering this question.

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge

Kozinski.

h. Have you conducted a search of your email accounts and/or correspondence with Judge Kozinski in an effort to provide an accurate response to the preceding question? If not, why not?

RESPONSE: I do not remember receiving inappropriate emails of a sexual nature from Judge Kozinski.

i. Judge Kozinski also had a personal website with explicit postings. When did you first become aware of Judge Kozinski's personal website?

RESPONSE: I believe that I first became aware of this website when news of the website broke publicly in news outlets, which led to the 2008-2009 judicial misconduct investigation.

j. At any time, did you provide information related to an inquiry regarding Judge Kozinski's behavior?

RESPONSE: No.

22. Which cases, theories, or legal issues were you asked about during the judicial selection process for the D.C. Circuit and for the Supreme Court (including conversations with the White House or outside advisors)? Please provide a comprehensive response.

RESPONSE: In my Senate Judiciary Questionnaires filed in 2004 and 2018 and at my hearings, I have explained my selection process. I made no commitments to anyone on matters that might come before me.

23. President Trump published an initial list of names from which he would select future Supreme Court nominees in May 2016. You were not on that initial list. Between that time and November 2017, when you were added to the list, what actions, if any, did you take to have your name added?

a. Did you speak to anybody about being added to the list? If yes, please list with whom you spoke and what you discussed.

RESPONSE: I understand that many people thought I should be considered and said as much.

b. Did you agree to give any speeches in order to be added to the list?

RESPONSE: No.

c. Did you select the subject matter of your speeches in order to be added to the list?

RESPONSE: No.

d. Did the possibility of being added to the list impact your decisions in any cases before you?

RESPONSE: No.

24. In my office, you confirmed that the Third Circuit decided *Planned Parenthood v. Casey*, 947 F.2d 682 (1991), while you were clerking for Judge Stapleton. Did you work on this case? Please seek permission to answer this question if necessary.

RESPONSE: I am not at liberty to discuss the internal deliberations of the Third Circuit while I was clerking.

25. In the speech you gave on the night your Supreme Court nomination was announced, you said that “[n]o president has ever consulted more widely, or talked with more people from more backgrounds, to seek input about a Supreme Court nomination.”

a. Who wrote that line of your speech?

RESPONSE: As I said at my confirmation hearing, those were my own words.

b. How do you know that this is a true statement?

RESPONSE: I addressed this question at the hearing.

c. Did you do any research to verify those assertions?

RESPONSE: Yes.

d. When did you first meet Leonard Leo, and how frequently do you communicate with him?

RESPONSE: As I stated in my testimony before the Committee, I have known Leonard Leo for more than 25 years. I have communicated with Mr. Leo from time to time.

26. On what legal or other basis did you advise Ken Starr that he should demand a public apology from President Clinton as one condition of giving him “breaks” in questioning him?

RESPONSE: I do not recall the basis for that statement.

27. You told me that you drafted the “grounds” section of the Starr report, which contained perjury allegations. Has your interpretation of what constitutes perjury changed since you drafted the Starr report?

RESPONSE: Any question about potential grounds for impeachment would be a question for the House and the Senate in the first instance, and such a question could arise in litigation before me. As I stated at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to discuss such an issue.

28. If a judge provides intentionally false testimony to Congress on an issue of significance, is impeachment the appropriate remedy?

RESPONSE: That is a question for the House and the Senate.

29. In my office, we spoke about how important it is for the President of the United States to be truthful in everything he says.

a. Please explain why it is so important for the President to be truthful.

RESPONSE: I believe I explained that in our discussion.

b. Does President Trump tell the truth?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political issues.

c. Has President Trump made any statements that you would condemn?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political issues.

d. You recounted an episode in the White House where President Bush was criticized for a statement that was, in your words, "literally true but misleading in context." Please review the transcript of your hearing and identify any statements that you made that were literally true but misleading in context.

RESPONSE: I have told the truth, to the best of my memory.

30. In a March 27, 2001 email that you wrote while serving in the White House Counsel's Office, you referred to your "ideal of how a unitary executive should work." Please explain your ideal of how a unitary executive should work.

RESPONSE: That email referred to and reinforced the specific procedures in place at the time that generally defined the Solicitor General's role in determining the legal position of the United States.

31. Why did you testify during your hearing that you have "never taken a position on the constitutionality of indicting or investigating a sitting President" when, in the *American Spectator* in 1999, you described as "constitutionally dubious" the "transfer of investigative responsibility" from Congress to a criminal prosecutor?

RESPONSE: As I explained at the hearing, I have never taken a position on the constitutionality of indicting the president while in office. In a 2009 Minnesota Law Review article, I made a series of legislative proposals for Congress to consider. As to the constitutional question, however, I have made clear that if a constitutional question came to me, I would have an open mind. I have repeatedly referred to the constitutional question of whether a sitting President can be indicted as an open question. Specifically, in my 1998 Georgetown Law Journal article, I stated that "[w]hether the Constitution *allows* indictment of a sitting President is debatable." In my 2009

Minnesota Law Review article, I stated that “a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office.”

32. During your hearing, Sen. Whitehouse asked you if the President must comply with a grand jury subpoena.

a. Does the President have to comply with a grand jury subpoena?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

b. If your answer is anything other than “yes,” do you believe this question is not controlled by the holding in *United States v. Nixon*, 418 U.S. 683 (1974)?

RESPONSE: Please see my response to Question 32.a. above.

c. Please identify any case law where a federal court has distinguished between a trial court subpoena and a grand jury subpoena.

RESPONSE: Please see my response to Question 32.a. above.

33. At your hearing, you testified that your past criticism of *United States v. Nixon*, 418 U.S. 683 (1974), was taken out of context. Here is what you said at the roundtable where you discussed *United States v. Nixon*:

— “Maybe *Nixon* was wrongly decided.”

— “*Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. . . . And the Court said, ‘We’re going to take away that right.’ Maybe the tension of the time led to an erroneous decision.”

— “There should be more focus on the merits of *Nixon* than there has been.”

— “Should *United States v. Nixon* be overruled[?] . . . [M]aybe so.”

You made many statements critical of *Nixon*, and you articulated a rationale in support of your criticisms – specifically, the theory of the unitary executive that Justice Scalia articulated in his dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), which you have cited approvingly many times as a sitting judge. Given all of your statements, reproduced above, why did you assert that your criticism of *Nixon* was taken out of context?

RESPONSE: As I said at the hearing, *United States v. Nixon* is one of the four greatest decisions in the history of the Supreme Court. I have said that repeatedly and publicly for many years.

34. During the hearing, I stated, “[At] Georgetown, [on] a panel in 1998 you wrote it makes no sense at all to have an independent counsel investigate the President, if the President were a sole subject of investigation, nobody should investigate that. Is that your view, if there is evidence that what President committed crime no one should investigate it?” You replied, “That’s not what I said, Senator.” In a recording of that panel, at approximately the one- hour-and-20-minute mark, you state, “If the president were the sole subject of a criminal investigation. I would say, no one should be investigating that. That should be turned over immediately to the Congress. Most criminal investigations involve multiple subjects however, so the criminal investigation goes forward. But if it ever gets to a point where the president is the sole subject, the Congress needs to take the lead.” Independent Counsel Structure & Function, February 19, 1998, available at <https://www.c-span.org/video/?101055-1/independent-counsel-structure-function>.

a. Please explain your testimony during the hearing and why you denied stating this.

RESPONSE: My writings and testimony speak for themselves. In your question, you said “nobody.” But in my panel remarks, I said, “Congress.”

b. Please answer the question whether it remains your view that if the President is the sole subject of an investigation, no prosecutor or law enforcement officials should investigate it.

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me

35. Please explain how your testimony that you have not opined on the constitutionality of indicting a President is consistent with your prior writings that “the Constitution itself seems to dictate” that criminal prosecution occur only after the President has left office.

RESPONSE: Please see my response to Question 31.

36. You characterized your approach in *Garza v. Hargan*, 874 F. 3d 735 (D.C. Cir. 2017), as simply trying in good faith to apply Supreme Court precedent. Yet your approach in that case appears to be inconsistent with Supreme Court precedent in at least two ways.

a. How is your approach consistent with *Bellotti v. Baird*, 443 U.S. 622 (1977), given that J.D. had already obtained a judicial bypass in state court and had met all of the requirements under state law to have an abortion?

RESPONSE: My dissent in *Garza* sought to faithfully apply the most closely analogous Supreme Court precedent. I explained this in detail at the hearing.

b. Why did you not apply the Court’s holding in *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), which requires a reviewing court to balance the burden imposed by an abortion restriction (such as an additional required delay) against the benefit of the restriction?

RESPONSE: I carefully applied the undue burden standard, as I have explained at length.

c. What does it say about your view about a woman's right to make her own decisions about her health care when you required J.D. to wait at least another 11 days to have an abortion, when federal officials had already delayed her access to reproductive services almost seven weeks?

RESPONSE: I answered this question at the hearing.

d. Given that federal officials had already made J.D. wait almost seven weeks to obtain an abortion, why did you characterize J.D.'s constitutional claim as seeking a right to "abortion on demand"?

RESPONSE: As I stated at the hearing, Chief Justice Burger used the phrase "abortion on demand" in his concurrence in *Roe v. Wade*.

e. Under what circumstances do you believe a women's right to choose to have an abortion is not "abortion on demand"?

RESPONSE: Please see my response to Question 36.d.

f. In your view, is there any point at which delaying a minor's right to abortion services becomes an undue burden on that right?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

37. Please respond to Judge Millett's concern that the interpretation of the law in your dissent in *Garza v. Hargan* 874 F. 3d 735 (D.C. Cir. 2017), "would require a troubling and dramatic rewriting of Supreme Court precedent to make the sufficiency of someone's 'network' an added factor in delaying the exercise of reproductive choice even after compliance with all state-mandated procedures."

RESPONSE: At the hearing, I explained at length how my dissent in *Garza* applied Supreme Court precedent.

38. In your dissent in *Priests for Life v. Department of Health and Human Services*, 772 F.3d 229 (2014), you wrote that "when the Government forces someone to take an action contrary to his or her sincere religious belief . . . or else suffer a financial penalty . . . the Government has substantially burdened" the exercise of religion. Did you intend to include any action, irrespective of how burdensome it is to take that action?

RESPONSE: As I wrote in my dissent from denial of rehearing in the *Priests for Life* case, there was no dispute that the plaintiffs in that case would be subject to huge financial penalties for adhering to their religious beliefs and refusing to submit the form. In keeping with the Supreme Court's precedent in *Hobby Lobby v. Burwell*, my dissenting opinion argued that the imposition of

financial penalties for refusing to take an action contrary to one's sincere religious belief was a substantial burden. I also emphasized, however, that the Government had a compelling interest under Supreme Court precedent in facilitating access to contraceptives. The case therefore turned on whether the Government had less restrictive means to ensure that the women employees had access to contraception at the same cost.

39. The Supreme Court has not recognized a constitutional right to health care protected under the liberty provision of the Due Process Clause. However, Congress passed the Affordable Care Act, which protects health care access regardless of preexisting conditions. Is it constitutional for Congress to prohibit insurers from denying individuals coverage based on preexisting conditions?

RESPONSE: As I explained in *Seven-Sky v. Holder*, 661 F.3d 1, 52 (D.C. Cir. 2011), “[t]he elected Branches designed [the Affordable Care Act] to help provide all Americans with access to affordable health insurance and quality health care, vital policy objectives.” I further noted that “[c]ourts must afford great respect to that legislative effort and should be wary of upending it.” *Id.* at 53. Nevertheless, as I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment further on a matter that may come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way.

40. In your 2011 dissent in *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), you explained that you would have struck down D.C.’s firearms registration requirements, concluding that “[r]egistration of all lawfully possessed guns . . . has not traditionally been required in the United States and even today remains highly unusual.” Please cite any other circuit court decisions that have interpreted the Supreme Court’s *Heller* decision in this way.

RESPONSE: In *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011), I strictly and carefully followed the Supreme Court precedent as set forth in *District of Columbia v. Heller*, 554 U.S. 570 (2008).

41. Does the government have a compelling interest in eradicating discrimination against racial minorities, women, or LGBT individuals sufficient to justify denial of federal funding to schools that discriminate against any such individuals based on sincerely held religious beliefs?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their case in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

42. Why did you author a concurrence in *Klayman v. Obama*, 805 F.3d 1148 (D.C. Cir. 2015)?

RESPONSE: I answered this question at the hearing.

43. In your concurrence to the denial of rehearing en banc in *Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010), you opined that courts have no role in interpreting an ambiguous statute with reference to international law unless Congress makes a clear statement that they must do so. Has the Supreme Court ever agreed with this view?

RESPONSE: My concurrence in *Al-Bihani v. Obama* explained that “[i]nternational-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President’s authority under the” 2001 Authorization for Use of Military Force. 619 F.3d 1, 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc). As I explained in the opinion, I reached this conclusion in reliance on the Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* and Justice Jackson’s opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which I noted “reinforces the traditional roles of Congress, the President, and the Judiciary in national-security-related matters.

44. In *Saleh v. Titan*, 580 F.3d 1 (D.C. Cir. 2009), you joined the majority’s opinion extending sovereign immunity to private military contractors sued in conjunction with abuses at Abu Ghraib. Chief Judge Garland’s dissent noted that the majority lacked any statutory or judicial authority for extending sovereign immunity to private military contractors. Please respond to this critique.

RESPONSE: The opinion speaks for itself.

45. Why did you decline to join the analysis in the concurrence in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), which recognized the importance of the Voting Rights Act of 1965?

RESPONSE: I wrote the opinion for the court, which resolved all issues before the panel. My opinion called the Voting Rights Act of 1965 “among the most significant and effective pieces of legislation in American history.” Although Judge Kollar-Kotelly and Judge Bates opted to make additional points, they called my opinion “excellent” and joined it in full.

46. In *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), when you explicitly stated that the Court’s decision did not apply to certain types of speech by foreign nationals related to U.S. elections, did you anticipate that foreign entities would cite these limitations in future litigation?

RESPONSE: My decision for the three-judge district court in *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), resolved the challenge brought by the litigants in that case. My opinion for a unanimous panel rejected a First Amendment challenge to a federal statute by “foreign citizens who temporarily live and work in the United States” who sought “to contribute to candidates and political parties and to make express-advocacy expenditures.” *Id.* at 282-83. The challengers in *Bluman* did not seek to make contributions to organizations that make expenditures on issue ads. The opinion made clear that the court’s “holding does not address” whether “Congress might bar” foreign nationals living temporarily in the United States “from issue advocacy and speaking out on issues of public policy.” *Id.* at 284, 292. The Supreme Court unanimously affirmed the decision. *See Bluman v. FEC*, 565 U.S. 1104 (2012).

47. In *United States Telecom Association v. Federal Communications Commission*, 855 F.3d 381 (D.C. Cir. 2017), you dissented from the D.C. Circuit's decision to deny rehearing en banc. In your dissent, you noted that the First Amendment offers broad editorial discretion to Internet Service Providers. However, the only party that raised a First Amendment argument would never have been bound by the FCC's net neutrality rule because the provision did not apply to a broadband provider unless it held itself out as a neutral, indiscriminate conduit to any Internet content of a subscriber's own choosing. Why did you find it appropriate to address a point that was not necessary to resolve the case?

RESPONSE: As I discussed at the hearing, and as you recognize, the First Amendment issue was raised by a party in briefs in the case. I thought it was important to explain Supreme Court precedent—*Turner Broadcasting*—that seemed on point and was raised in the case.

48. Did you ever meet with law enforcement, volunteer information, provide documents, or cooperate in any way with the investigation into Manuel Miranda's theft of documents from Senate Judiciary Committee Democrats in any way?

a. If not, why did you decline to come forward to offer to assist the investigation, given your frequent communications with Manuel Miranda regarding judicial nominations and the likelihood that he shared stolen information with you?

b. Were your documents searched for information relevant to the investigation? If not, why not?

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

49. Have you had any communications with William Burck since your nomination was announced?

RESPONSE: I saw Mr. Burck at a social event on the Saturday after my nomination.

a. Did you have any involvement in the document production being overseen by William Burck in relation to this hearing?

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

b. If you did have involvement in the document production being overseen by William Burck, please describe your role.

RESPONSE: Please see my answer to Question 49.a.

c. Were there others involved in the document review process being overseen by William

Burck? If yes, who were they and what was their role?

RESPONSE: Please see my answer to Question 49.a.

50. Are you aware of who paid for the in the document production being overseen by William Burck? If yes, who paid for it? What was the approximate amount of the expense?

RESPONSE: Please see my answer to Question 49.a.

51. Did you see any of the documents from the document production being overseen by William Burck prior to their release by the Senate Judiciary Committee? If yes, what documents did you see? If yes, were any of the documents that you saw designated "Committee Confidential" when you viewed them?

RESPONSE: As I stated in my testimony before the Committee, I was not involved in the document review process. In the course of preparing for the hearing, I spoke to a number of people and reviewed a number of documents. I cannot recall the specific number of documents that I reviewed; however, I am advised that it was a small subset of documents produced to the Senate. The vast majority of those documents were publicly produced. I was informed that I might be asked about documents designated "committee confidential" in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions I was shown some documents that were designated "committee confidential."

52. As Staff Secretary, did you create documents?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of the substance of my work, my role was not to replace the President's policy or legal advisors, but was to make sure that the President had the benefit of the views of his policy and legal advisors. I was not ordinarily an originator of documents.

a. Did you revise or add your views to other documents before they went to the President?

RESPONSE: Please see my answer to Question 52.

b. Please provide a list of the most substantive contributions that you made as White House Staff Secretary.

RESPONSE: Please see my answer to Question 52.

c. Are there documents that you created or contributed to during your time as White House Staff Secretary that bear on any of the issues that were discussed in the hearing?

RESPONSE: Please see my answer to Question 52.

d. Please provide a list of all of the signing statements you contributed to in any way while in the White House.

RESPONSE: Please see my answer to Question 52.

53. During our private meeting, you defended the refusal by Senate Republicans to request and release your Staff Secretary records from your time in the White House of President George W. Bush based on what you called "nominee precedent."

a. Please explain whether and why you stand by your defense of the current refusal by Senate Republicans to request and release your Staff Secretary records.

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. As I further stated at the hearing, I do not take a position regarding the release of documents, which I believe is an issue for the Senate, the Executive Branch, and President Bush. As a matter of nominee precedent, I am aware that neither Chief Justice Roberts's, Justice Alito's, or Justice Kagan's documents from the Solicitor General's Office nor Justice Scalia's and Justice Alito's documents from the Office of Legal Counsel were turned over to the Committee during their confirmations.

b. Do you agree that your Staff Secretary records will eventually become public, at which time one will be able to determine whether you were truthful during your Supreme Court confirmation hearing?

RESPONSE: I have told the truth, to the best of my memory.

54. Given that, pursuant to the Presidential Records Act, documents from your time in the Bush White House will be released in the coming years, please answer the following questions regarding your Staff Secretary documents:

a. Are there going to be emails or other documents that pertain to torture?

RESPONSE: As I explained at the hearing, I was not read into the program involving the controversial enhanced interrogation techniques during the Bush Administration, nor the crafting of the legal memos justifying that program. That is why I was not mentioned in either of the reports, by the Senate Select Committee on Intelligence and the Justice Department Office of Professional Responsibility, respectively, on those matters. As Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk, but my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

b. Are there going to be emails or other documents that pertain to detainee treatment?

RESPONSE: Please see my response to Question 54.a.

c. Are there going to be emails or other documents that pertain to rendition?

RESPONSE: Please see my response to Question 54.a.

d. Are there going to be emails or other documents that pertain to ballot initiatives on marriage, the 2003 Proclamation of Marriage Protection Week, the May 17, 2004 Statement calling for a constitutional amendment barring marriage equality, or the July 12, 2004 Statement of Administrative Policy on S.J. Res. 40 also known as the "Federal Marriage Amendment"?

RESPONSE: Please see my response to Question 54.a.

e. Are there going to be emails or other documents that pertain to Plan B contraception?

RESPONSE: Please see my response to Question 54.a.

f. Are there going to be emails or other documents that pertain to CIA operative Valerie Plame?

RESPONSE: Please see my response to Question 54.a.

55. When you worked in the White House Counsel's Office on judicial nominations, did the Bush administration have a preference for nominees inclined to end busing orders designed to racially integrate schools?

RESPONSE: As I explained during my confirmation hearing in 2006, my understanding was that President Bush sought judges from diverse backgrounds who would faithfully apply the law and who understood the distinction between the policymaking role and the judicial role. I have no specific recollection or independent knowledge of the policy preferences of all potential judicial nominees considered by the Bush administration during my service in the White House Counsel's Office.

56. During your time in the White House, several senior staff members were using Republican National Committee and campaign email addresses and servers that did not preserve their emails, as required by law.

a. Did you have any email addresses during your time in the White House other than your official White House email address?

RESPONSE: In addition to my White House email address, I had a personal email address that I may have used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use

my personal email address for official matters, although I cannot rule out isolated emails.

b. Did you use any other email addresses other than your official White House email address to conduct official business? If so, please provide it.

RESPONSE: Please see my response to Question 56.a.

57. Did you prepare for these hearings?

RESPONSE: Yes.

58. Assuming you prepared for these hearings, how many preparation sessions did you have? Approximately how long did you spend preparing?

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends.

59. During any part of your preparation for these hearings, were there any individuals from the White House present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

60. During any part of your preparation for these hearings, were there any individuals from the Department of Justice present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

61. During any part of your preparation for these hearings, were there any individuals from any other part of the Executive Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

62. During any part of your preparation for these hearings, were there any individuals from Congress (including both Members and staffers) present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

63. During any part of your preparation for these hearings, were there any individuals from the Judicial Branch present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

64. During any part of your preparation for these hearings, were there any individuals from outside of the federal government present? If yes, please provide their identities and describe their role in your preparations. Please also provide the source of their compensation for their work on your preparation for this hearing.

RESPONSE: Please see my response to Question 58.

65. During any part of your preparation for these hearings, were you given guidance on what questions you should not answer? If yes, what was the guidance?

RESPONSE: Please see my response to Question 58. I made my own decisions about what to say at the hearing.

66. During any part of your preparation for these hearings, were you shown documents?
a. How many documents were you shown?

RESPONSE: In the course of preparing for the hearing, I spoke to a number of people and reviewed a number of documents. I cannot recall the specific number of documents that I reviewed; however, I am advised that it was a small subset of documents produced to the Senate, and that the vast majority of those documents were publicly produced. As I stated in my testimony, decisions concerning the production of documents were made by the Committee, the Executive Branch, and the Bush Library.

b. Have all of these documents been produced to the Senate Judiciary Committee?

RESPONSE: Please see my response to Question 66.a.

c. Are all of these documents publicly available?

RESPONSE: Please see my response to Question 66.a.

d. Will you agree to produce any documents that haven't been given to the Senate Judiciary Committee and make them publicly available?

RESPONSE: Please see my response to Question 66.a.

67. Has the testimony that you have provided during this hearing been 100 percent truthful?

RESPONSE: Yes, to the best of my memory.

68. Has the testimony that you have provided during this hearing been 100 percent accurate?

RESPONSE: Yes, to the best of my memory.

69. At any point during this hearing, did you answer a question a certain way to avoid disclosing relevant information?

RESPONSE: I have tried to be forthcoming with the Committee, consistent with my obligation to maintain judicial independence.

70. Is anyone helping you to provide answers to these written questions?

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice and other attorneys from the Department of Justice, and the White House Counsel's Office, as well as my former clerks. My answers to each question are my own.

71. If anyone is helping you to provide answers to these written questions, please provide their names, how they are helping you, and who is compensating them for their work on your answers.

RESPONSE: Please see my response to Question 70.

72. Have you read and verified the answer to each one of these questions?

RESPONSE: I have done the best to provide answers in the time allotted.

73. Is the answer to each one of these questions 100 percent accurate?

RESPONSE: I have done the best I could to provide accurate responses to all questions.

**Questions for the Record for Brett M. Kavanaugh
Submitted by Senator Richard Blumenthal
September 10, 2018**

1. In a response to a question from Senator Cruz regarding your dissenting opinion in *Priests for Life v. HHS*, you referred to contraceptives as “abortion-inducing drugs.”
 - Do you believe contraceptives are abortion-inducing drugs?**
 - If yes, which ones?**
 - What is the basis for this belief?**

RESPONSE: That was the position of the plaintiffs in that case, and I was accurately describing *the plaintiffs’* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only when recounting the plaintiffs’ own assertions.

2. During the hearing, Fred Guttenberg, the father of a slain Parkland student, approached you to shake your hand. Video footage of the incident shows you turning around and walking away as soon as he greets you.
 - Did you ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**

RESPONSE: No.

- Did anybody acting at your request or on your behalf ask the Capitol Police to remove Mr. Guttenberg from the hearing room?**

RESPONSE: No one acted at my request. If someone purported to act on my behalf, they did so without my knowledge and contrary to my wishes.

3. **Did you participate in practice questioning or mooting with any Senators or Senate staff prior to the hearing? If so, whom?**

RESPONSE: In preparation for my testimony before the Judiciary Committee, various people have provided me with advice, including senators, Administration personnel, former law clerks, and friends. As I noted in my testimony before the Committee, prior to the hearing I met with 65 senators, including most of the members on the Committee. I have made no commitments to anyone on matters that might come before me as judge.

4. **Has anyone paid off any of your debts in the last 10 years? Who? Have you ever incurred any debt worth over \$5000 from gambling?**

RESPONSE: I have truthfully provided financial information in conjunction with this nomination process and my service in the judicial and executive branches. Since I graduated from law school in 1990, I have worked in public service for 25 of those 28 years. For most of her years of paid employment, my wife likewise has been a federal, state, or local government worker.

During that time, I have filed regular financial disclosure reports as required by law. The Federal Government's required financial disclosure reports list broad ranges for one's assets and debt as of one day or period in time.

At this time, my wife and I have no debts other than our home mortgage. We have the following assets:

- (1) A house minus the mortgage;
- (2) Two Federal Government Thrift Savings Plan retirement accounts (largely accessible to us in beginning in 2024), as well as a Texas employees' retirement account;
- (3) A bank account;
- (4) A car that we own and a car that we lease; and
- (5) Ordinary personal furniture, clothing, and belongings.

Since our marriage in 2004, we have not owned stocks, bonds, mutual funds, or other similar financial investments outside of our retirement accounts.

Our annual income includes my income as a federal judge, my income from teaching law each year, and now also my wife's income from being Town Manager of Section 5 of Chevy Chase, Maryland. Our annual income and financial worth substantially increased in the last few years as a result of a significant annual salary increase for federal judges; a substantial back pay award in the wake of class litigation over pay for the Federal Judiciary; and my wife's return to the paid workforce following the many years that she took off from paid work in order to care for our daughters. The back pay award was excluded from disclosure on my previous financial disclosure report based on the Filing Instructions for Judicial Officers and Employees, which excludes income from the Federal Government. We have not received financial gifts other than from our family, which are excluded from disclosure in judicial financial disclosure reports. Nor have we received other kinds of gifts from anyone outside of our family, apart from ordinary non-reportable gifts related to, for example, birthdays, Christmas, or personal hospitality. On the 2018 financial disclosure report, I correctly listed "exempt" for gifts and reimbursements because those are the explicit instructions in the 2018 Filing Instructions for Judicial Officers and Employees.

At this time, we have no debts other than our home mortgage. Over the years, we carried some personal debt. That debt was not close to the top of the ranges listed on the financial disclosure reports. Over the years, we have sunk a decent amount of money into our home for sometimes unanticipated repairs and improvements. As many homeowners probably appreciate, the list sometimes seems to never end, and for us it has included over the years: replacing the heating and air conditioning system and air conditioning units, replacing the water heater, painting and repairing the full exterior of the house, painting the interior of the house, replacing the porch flooring on the front and side porches with composite wood, gutter repairs, roof repairs, a new refrigerator, a new oven, ceiling leaks, ongoing flooding in the basement, waterproofing the basement, mold removal in the basement, drainage work because of excess water outside the house that was running into the neighbor's property, fence repair, and so on. Maintaining a house, especially an old house like ours, can be expensive. I have not had gambling debts or participated in "fantasy" leagues.

The Thrift Savings Plan loan that appears on certain disclosure reports was a Federal Government loan to help with the down payment on our house in 2006. That government loan program is available for federal government workers to help with the purchase of their first house. In our case, that loan was paid back primarily by regular deductions from my paycheck, in the same way that taxes and insurance premiums are deducted from my paycheck. That loan has been paid off in full.

I am a huge sports fan. When the Nationals came to D.C. in 2005, I purchased four season tickets in my name every season from 2005 through 2017. I also purchased playoff packages for the four years that the Nationals made the playoffs (2012, 2014, 2016, and 2017.) I have attended all 11 Nationals home playoff games in their history. (We are 3-8 in those games.) I have attended a couple of hundred regular season games. As is typical with baseball season tickets, I had a group of old friends who would split games with me. We would usually divide the tickets in a "ticket draft" at my house. Everyone in the group paid me for their tickets based on the cost of the tickets, to the dollar. No one overpaid or underpaid me for tickets. No loans were given in either direction.

My wife and I spend money on our daughters and sports, including as members of the Chevy Chase Club, which we joined in recent years. We paid the full price of the club's entry fee, and we pay regular dues in the same amount that other members pay. We did not and do not receive any discounts. The club is a minute's drive from our house, and there is an outdoor ice hockey rink and a very good youth ice hockey program. We joined primarily because of the ice hockey program that my younger daughter participates in, as well as because of the gym.

Finally, it bears repeating that financial disclosure reports are not meant to depict one's overall net worth or overall financial situation. They are meant to identify conflicts of interest. Therefore, they are not good tools for assessing one's net worth or financial situation. Here, by providing all of this additional information, I hope that I have helped the Committee.

5. Can the President offer someone a pardon in exchange for a promise not to testify against him?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on hypotheticals or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

6. During the hearing, you testified that you were following the so-called "Kagan rule" of refusing to give either a "thumbs up" or "thumbs down" to any Supreme Court precedents. Yet you told Senator Coons that *Morrison v. Olson* was "wrong." You claimed in a conversation with Paul Gigot at the American Enterprise Institute that *Morrison v. Olson* had "been effectively overruled" and you "would put the final nail in"

it.

- Why did you make an exception for *Morrison* by giving it a “thumbs down” during the hearing?**

RESPONSE: I have previously spoken and written about *Morrison* and therefore referred to what I had said before, which is the approach that prior Supreme Court nominees have taken in similar circumstances.

- Which case or cases effectively overruled *Morrison*?**

RESPONSE: I have addressed this question at the hearing and in my writings.

7. During the hearing, you stated that *Humphrey's Executor* was “entrenched precedent.” You’ve described *Roe v. Wade* as “existing precedent.”
 - Please explain the distinction between “entrenched precedent” and “existing precedent.”**

RESPONSE: Both *Humphrey's Executor* and *Roe v. Wade* are precedents of the Supreme Court entitled to respect under the law of precedent. *Roe v. Wade* was expressly reaffirmed in *Planned Parenthood v. Casey*, which is precedent on precedent.

8. During Independent Counsel Kenneth Starr’s investigation of President Clinton, there were numerous accusations that Mr. Starr’s staff leaked grand jury information to the press. At least one reporter, Dan Moldea, asserts that you were the designated person that Mr. Starr made available to the press.
 - Did you leak protected grand jury information to the press when you were on Mr. Starr’s staff?**

RESPONSE: No.

- To the extent you spoke with reporters on background or off the record about the Starr investigation, are those reporters free to describe their interactions with you?
Will you take this opportunity to explicitly and clearly release them from any commitment to keep their communications with you secret?**

RESPONSE: No. It would be inappropriate in this context to disregard that foundational privilege and protection for the press. And as I stated at the hearing, I spoke with the reporters at the direction or authorization of Judge Starr.

9. In your dissenting opinion in *Priests for Life v. HHS*, you discuss why courts must accept employers’ claims that their religious beliefs have been substantially burdened even when those claims may be based on beliefs that are incorrect either as a legal or a factual matter. You quoted a lower court judge to say that as long as an employer’s beliefs are sincere, courts have “no choice” but to accept an employer’s claim that its religious

beliefs have been substantially burdened.

- **When should courts refuse to defer to a plaintiff's claim that his or her religious beliefs have been substantially burdened by a law?**
- **How should a court determine whether the burden placed on a plaintiff's religious beliefs is substantial?**

RESPONSE: As I stated in my dissent from denial of rehearing in *Priests for Life*, the “key inquiry” in assessing substantial burden is whether the mandated action “actually contravenes plaintiffs’ sincere religious belief.” The Supreme Court has “emphasized that judges in RFRA cases may question only the sincerity of a plaintiff’s religious belief, not the correctness or reasonableness of that religious belief.” The Supreme Court has given guidance on the types of consequences that are sufficient to qualify a burden as “substantial.” For example, as I wrote in my dissent from denial of rehearing in *Priests for Life*, it is “settled that a direct monetary penalty on the exercise of religion constitutes a ‘substantial burden.’” *Priests for Life*, 808 F.3d 1, 16-17 (D.C. Cir. 2105) (Kavanaugh, J., dissenting from reh’g en banc). Of course, the Government may impose even a substantial burden on religious exercise when that burden is the least restrictive means of furthering a compelling governmental interest. I repeatedly emphasized that point in *Priests for Life*.

10. The Supreme Court stated in *Burwell v. Hobby Lobby* that the impact of a religious person’s actions on third parties is relevant in deciding a RFRA claim. The Court said, “[I]n applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries.’” Justice Kennedy’s concurrence in this case stated that, in deferring to the right to religious exercise, courts may not “unduly restrict other persons, such as employees, in protecting their own interests, interests the law deems compelling.”
 - **How do you take “adequate account” of the burdens on “non-beneficiaries” in analyzing a religious group’s requested accommodation to a law?**

RESPONSE: I emphasized in my dissent from denial of rehearing in *Priests for Life* that courts must take “adequate account of the burdens a requested accommodation may impose on non-beneficiaries.” As stated in that opinion, quoting the Supreme Court’s opinion in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014), the burdens on non-beneficiaries can “inform the analysis of the Government’s compelling interest and the availability of a less restrictive means of advancing that interest.” *Priests for Life*, 808 F.3d at 24.

11. After the Supreme Court’s decision in *Hobby Lobby*, various entities have claimed that they should be exempt from laws under RFRA because of their religious beliefs. In many cases, they seek to be exempt from antidiscrimination laws. Businesses that serve the public are also claiming that they should be exempt from antidiscrimination laws under the First Amendment’s free exercise clause. In *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court reaffirmed that states may continue to enforce anti-discrimination protections for LGBTQ individuals so long as they are “neutral” towards the religious viewpoint.

- How would you evaluate whether a government action or law is “neutral” towards a religious viewpoint in assessing a claim made under the First Amendment’s free exercise clause?**

RESPONSE: As a sitting judge, I follow all Supreme Court precedent, including *Masterpiece Cakeshop*, under the law of precedent.

12. In *Bluman v. FEC*, you authored the majority opinion for a three-judge panel rejecting a constitutional challenge to the foreign national ban on campaign contributions under 52 U.S.C. § 30121. The challenge was brought by individuals residing in the U.S. on temporary visas who wished to donate to certain candidates and to spend money on flyers expressly advocating for President Obama’s re-election. You acknowledged the government’s interest in preventing foreign interference in elections, but you also went out of your way to interpret the ban to only apply to “certain form[s] of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending money in order to *expressly advocate for or against* the election of a candidate.” You went on to declare that “[t]his statute, as we interpret it, does not bar foreign nationals from issue advocacy — that is, speech that does not expressly advocate the election or defeat of a specific candidate.”

- The intelligence community has determined that Russia’s election interference in the 2016 elections included spending that can be described as “issue advocacy.” Is it your position that current law cannot prevent such election spending?**

RESPONSE: *Bluman*, which was decided in 2011, did not address the fact pattern set forth in this question. Because the question could potentially come before me in future litigation, it would be improper for me to take any position on the matter. That approach is consistent with nominee precedent and with central principles of judicial independence.

13. In the last decade, the Supreme Court has repeatedly rejected First Amendment challenges to laws requiring political disclosure—from a federal statute requiring the reporting of donors financing candidate-related ads to a state measure allowing for the disclosure of signatories of ballot initiative petitions. Justice Scalia has stated in a 2010 opinion that “requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously. . . . This does not resemble the Home of the Brave.” Notably, even in the *Citizens United* decision, eight justices voted to uphold the federal electioneering communications disclosure law that requires groups to report their donors if they run broadcast ads referencing federal candidates shortly before a primary or general election.

- Are there constitutional limits on political disclosure laws?**

RESPONSE: As the question states, the Supreme Court has addressed disclosure requirements

in *Citizens United v. FEC*, 558 U.S. 310 (2010), and many other cases. In *Citizens United*, the Court framed the constitutional analysis this way: “Disclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities, and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *Id.* at 366-67 (citations and internal quotation marks omitted).

- Can campaign finance disclosure laws regulate speech other than express advocacy?**

RESPONSE: This is a question that may be litigated before me as a sitting judge. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

14. In *McConnell v. FEC*, the Court upheld the so-called “soft money” limits on contributions to federal party committees on grounds that they prevented corruption and the appearance of corruption—this part of the decision is still good law today. In so holding, the Court rejected a “crabbed view of corruption” that “limit[ed] Congress’ regulatory interest only to the prevention of . . . actual or apparent quid pro quo corruption,” declaring that this view “ignores precedent, common sense, and the realities of political fundraising.” More recently in *Citizens United* and *McCutcheon*, however, the Court spoke of the corruption interest in narrower terms, suggesting that campaign finance laws could “target” only “what we have called ‘quid pro quo’ corruption.” As Chief Justice Roberts wrote in *McCutcheon*, “government regulation may not target the general gratitude a candidate may feel towards those who support him or his allies, or the political access such support may afford.”

- What is the proper conception of corruption—the one articulated in *McConnell*, or the one articulated in *Citizens United*/*McCutcheon*?**
- Do you have a different theory that would reconcile the two articulations of corruption?**

RESPONSE: These are questions addressed by the Supreme Court in *Citizens United*, *McCutcheon*, and *McConnell*. Those cases are precedents of the Supreme Court entitled to the respect due under the law of precedent.

15. You have described your role as White House Staff Secretary from July 2003 to May 2006 as “the most interesting and, in many ways, among the most instructive” work you did in preparation for the federal bench. As you know, President George W. Bush made it a priority to get an immigration reform bill passed during his second term.

- As White House Staff Secretary, did you have any role in the**

President's immigration agenda?

- If yes, what was the nature of your role?
- Did you advocate in favor or against any immigration policies as part of this role?
- If yes, what were those positions?

RESPONSE: As I explained at the confirmation hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 to May 2006—with the exception of a few covert matters—would have crossed my desk on its way to the President. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of what I did, my role was not to replace the President's policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

16. Your dissent in *United States Telecom Association v. Federal Communications Commission* has two main points. First, you stated that there is no clear congressional authorization for "major rules" of the kind the FCC adopted. You argued that Congress has never adopted net-neutrality legislation or clearly authorized the FCC to regulate Internet service providers (ISPs) as common carriers. Second, you argued that the net-neutrality rule violated the First Amendment rights of ISPs, stating that the rule infringes on the editorial discretion of ISPs.

- Does any issue relating to the economy that creates a "major rule" require a specific congressional authorization for agencies to promulgate regulations?

RESPONSE: As I said at the hearing, the major rules doctrine, or major questions doctrine, is rooted in Supreme Court precedent. The "godfather" of the major rules doctrine is Justice Breyer, who wrote about it in the 1980s as a way to apply *Chevron*. The Supreme Court adopted the doctrine in *FDA v. Brown & Williamson Tobacco Corp.* and applied it in *Utility Air Regulatory Group v. EPA* ("UARG"). UARG indicates that Congress may delegate various matters to the executive agencies to create rules, but on questions of major economic or social significance, the Court expects Congress to speak clearly before such a delegation. With respect to the FCC's net neutrality rule, I concluded that Congress had not spoken clearly.

- Does the absence of a "major rule" mean that regulatory agencies are barred from protecting public interests that generally fall under their enabling acts?

RESPONSE: The Supreme Court's precedents explain the major rules doctrine.

- How and in what areas can ISPs exercise editorial discretion?

RESPONSE: As I said at the hearing, under the Supreme Court's decision in *Turner Broadcasting*, if a company exercising editorial discretion in the telecommunications arena has market power, then the government has broad authority to regulate. Likewise, pursuant to *Turner Broadcasting*, if a company does not have market power, then the First Amendment restricts (but does not eliminate) the government's ability to regulate the company's speech.

While *Turner Broadcasting* directly addressed cable operators, I explained in my opinion in *United States Telecom Association* that the principles announced in *Turner Broadcasting* applied in the closely analogous internet service provider context.

17. For nearly sixty years since its inception in 1925, the Federal Arbitration Act (FAA) was presumed to apply only in cases involving commercial disputes between businesses with relatively equal bargaining power. The Supreme Court has reinterpreted the FAA broadly in recent years, resulting in the proliferation of arbitration agreements in consumer, financial, and employment contracts.
- Are there any limits to when individuals can be subjected to forced arbitration?**
 - If so, what are they?**

RESPONSE: Questions involving the interpretation of the FAA and the limitations on arbitration agreements are actively litigated and could come before me. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on such questions.

18. You were the lone dissenter in *Lorenzo v. SEC*. Your opinion articulated a standard for proving intent in securities fraud cases that would create an extremely high bar for plaintiffs. Specifically, you stated that only the original “maker” of the false or misleading statements would have the requisite intent to be liable for securities fraud. This means that even senior officials that are actively engaged in the fraud, sending emails incorporating the misleading statements to their clients in their capacity as an investment banker, would not have the requisite intent to prove securities fraud.
- Can senior officials avoid liability for securities fraud if they claim ignorance as to their misstatements?**
 - Do these officials have a duty to ensure the information they are providing to shareholders and the public is correct?**

RESPONSE: The *Lorenzo* case is now pending before the Supreme Court, so it would not be appropriate for me to comment on it.

19. As the lone dissent in *Doe v. Exxon Mobil Corp.*, you argued that a mere mention by the State Department that an issue involved foreign policy interests was enough to block the case from its day in court. In that case, Indonesian villagers were trying to recover damages from Exxon Mobile for injuries inflicted by Exxon’s security forces such as murder, torture, sexual assault, battery, and false imprisonment. The court contacted the State Department for an opinion on the foreign policy interests involved. The State Department concluded that there were foreign policy interests involved in the case, but did not ask the court to dismiss the case.
- You felt it was appropriate to intercede and evoke foreign policy interests on the Executive’s behalf. How did you make that judgement?**

RESPONSE: My opinion speaks for itself.

20. Please see attached a list of tweets by President Trump attacking the judiciary – to be submitted for the record.

- Which statements do you agree with?
- Which statements do you disagree with?

RESPONSE: As I stated during the hearing, it would be generally inappropriate for me—as a sitting judge and as a nominee—to comment on something a politician has said or to be drawn into political controversy.

21. During the 2016 presidential campaign, President Trump stated that the Federalist Society and Heritage Foundation were providing him a list of potential nominees to the Supreme Court and that he would select a nominee from that list.¹ You were not on the initial list of potential nominees but were added on November 17, 2017.

- What communications, if any, did you, or anyone on your behalf, have with members of the board of directors, staff, or members of the Federalist Society or Heritage Foundation concerning your omission from the initial list? Did you or anyone on your behalf advocate for your name to be added? Please describe the participants in the conversations, the dates, the substance of the conversations, and any other relevant details. Please be specific.**

RESPONSE: As I testified at the hearing, it is my understanding that many judges and lawyers who know me suggested to various individuals that they thought I should be considered based on my judicial record.

- If your answer is yes, were your views on any legal issues discussed? What were those legal issues, and what were your views? Please be specific.**

RESPONSE: N/A

- Have you discussed any of your legal views with any member of the board of directors or staff of the Federalist Society or Heritage Foundation? If so, please describe the participants in and substance of those communications, as well as the dates. Please be specific.**

RESPONSE: Over the years, I have spoken at a number of events, including events sponsored by the Federalist Society and the Heritage Foundation.

22. During the hearing I asked you what happened in the period between when President

¹ Bob Woodward and Robert Costa, *In a revealing interview, Trump predicts a 'massive recession' but intends to eliminate the national debt in 8 years*, WashingtonPost.com (Apr. 2, 2016), https://www.washingtonpost.com/politics/in-turmoil-or-triumph-donald-trump-stands-alone/2016/04/02/8c0619b6-f8d6-11e5-a3ce-f06b5ba21f33_story.html.

Trump released his list of potential Supreme Court nominees in May 2016, and when he released a subsequent list of nominees in November 2017. Your name does not appear on the first list, but it appears on the second. You responded that a number of your friends, specifically judges and lawyers that you know, made clear to the President that you should be considered for a Supreme Court nomination and be added to that list.

- What are the names of the individuals who recommended you for this list?**

RESPONSE: As I testified at the confirmation hearing, it is my understanding that many judges and lawyers who know me suggested to various individuals that they thought I should be considered based on my judicial record.

23. During the time you were serving in the George W. Bush White House, some White House officials communicated about official business using a non-government email server run by the Republican National Committee.

- Please identify all email accounts that you used from 2001-2006, the time of your service in the White House. Of these accounts, please identify those that were used to communicate about your work in the White House.**

RESPONSE: In addition to my White House email address, I had a personal email address that I used on occasion for personal matters. That personal account was not affiliated with any email server run by the Republican National Committee. I did not have a personal device that could access personal emails. And White House employees were not able to access personal emails from our work computers, as I recall. To the best of my recollection, it was not my practice to use my personal email address for official matters, although I cannot rule out isolated emails.

- For any communications you may have sent using a non-governmental server, please provide copies of these communications to the Committee.**

RESPONSE: Please see my answer to the above subpart.

24. Do you have, or have you ever had, a Republican National Committee email account or an account maintained or associated with any other political party, official, or candidate for political office? If so, please identify each account and the time period used.

RESPONSE: Not that I am aware of.

25. White House spokesman Raj Shah told the *Washington Post* that you went into debt buying tickets for the Washington Nationals over the past decade.

- For how many seasons have you purchased Nationals season tickets?**
- How many tickets did you purchase each year? What was the overall cost**

and cost per ticket?

- Please identify the other individuals in the group for whom you purchased tickets, when each repaid you for his/her tickets, the amount that each repaid, and whether any other individual or entity paid any part of the debt that you attribute to the purchase of baseball tickets.**

RESPONSE: Please see my response to Question 4.

26. White House also stated that, in addition to the season tickets, you accrued debt on your credit cards from expenditures on "home improvements."

- What is the percentage of the credit card debt you would attribute to these home improvements? Please also explain briefly what improvements were undertaken and when.**

RESPONSE: Please see my response to Question 4.

- What percentage of the credit card debt would you attribute to the purchase of baseball tickets? If these two categories (home improvements and baseball tickets) do not account for your total debt, please explain any other reasons for your debt.**

RESPONSE: Please see my response to Question 4.

27. On your Financial Disclosure Report dated July 15, 2018, you do not report any liabilities. The prior year, you reported between \$60,004 and \$200,000 in liabilities between three credit cards and a loan from your Thrift Savings Plan (TSP) account. Your annual disclosures indicate that the TSP loan maintained a balance between \$15,001 and \$50,000 for at least 12 years.

- For each debt (i.e., each credit card and the TSP loan), please identify the date upon which the debt was paid and the source of the funds for repayment.**

RESPONSE: Please see my response to Question 4.

- Did you report any of the money obtained by you to pay off these debts on your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

28. On your Financial Disclosure Report dated July 15, 2018 in Section V. Gifts, you did not check the box for no reportable gifts, you simply wrote "Exempt."

- Does this response indicate that you received a gift(s) but considered that gift(s) exempt from the reporting requirements?**

RESPONSE: Please see my response to Question 4.

- For each gift (if any) you believe is exempt from reporting, please provide a description of the gift, the approximate value, the date received, and the donor.

RESPONSE: Please see my response to Question 4.

29. On your Financial Disclosure Report dated July 15, 2018, you did not list any reimbursements. Instead you simply wrote "Exempt."

- Does this response indicate that you received reimbursement(s) but considered that reimbursement(s) exempt from the reporting requirements?

RESPONSE: Please see my response to Question 4.

- For each reimbursement you believe is exempt from reporting, please provide a description of the costs incurred, reasons for the costs, and the date and amount of any reimbursements that you received for these costs.

RESPONSE: Please see my response to Question 4.

30. In 2014, federal judges received a lump sum equal to the amount of their delayed cost of living adjustments. For you, this was estimated at \$150,000. This amount does not appear to be reported anywhere in your financial disclosures. Please explain this discrepancy. Please also provide to the Committee, on a confidential basis, a complete copy of your state and federal tax returns for the three previous tax years.

RESPONSE: Please see my response to Question 4.

31. Your Bank of America accounts appear to have doubled in value between 2008 and 2009. Your Financial Disclosure Report dated May 15, 2009 reflected a value in the range of \$15,001 - \$50,000. Your Financial Disclosure Report dated May 14, 2010 reflected a value in the range of \$100,001 - \$250,000. You did not report any increase in Non-Investment Income, nor did you report any gifts during this period. Please explain the source of the funds that accounts for the difference reflected in these accounts between your 2008 and 2009 Financial Disclosure Reports.

RESPONSE: Please see my response to Question 4.

32. In 2006, you purchased your primary residence for \$1,225,000 in Chevy Chase, MD, however, the value of assets reportedly maintained in your "Bank of America Accounts" in the years before, during and after this purchase never decreased, indicating that funds used to pay the down payment and secure this home did not come from these accounts.

- Did you receive financial assistance in order to make this down payment? And if so, was the assistance provided in the form of a gift or a personal loan?

RESPONSE: Please see my response to Question 4.

- If you received financial assistance, please provide details surrounding how this assistance was provided, including the amount(s) of the assistance, date(s) on which the assistance was provided, and who were the individual(s) that provided this assistance.**

RESPONSE: Please see my response to Question 4.

- Was this financial assistance disclosed in your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

33. You have disclosed in your responses to the SJQ that you are currently a member of the Chevy Chase Club. It has been reported that the initiation fee to join this club is \$92,000 and annual dues total more than \$9,000.

- How much was the initiation fee required for you to join the Chevy Chase Club? What are the annual dues to maintain membership and is this the amount that you pay?**

RESPONSE: Please see my response to Question 4.

- Did you receive any financial assistance or beneficial reduction in the rate to pay the initiation or annual fees?**

RESPONSE: Please see my response to Question 4.

- If you received financial assistance, please disclose the amount of the assistance, the terms, the dates the assistance was provided, and the individual(s) or entity that provided the assistance.**

RESPONSE: Please see my response to Question 4.

- To the extent such assistance or rate reduction could be deemed a "gift," was it reflected on your income tax returns, financial disclosure forms, or any other reporting document?**

RESPONSE: Please see my response to Question 4.

34. To date, you have not disclosed that you or your wife own any listed or unlisted securities, including but not limited to stocks, bonds, mutual funds or other investment products outside of those included in your retirement accounts. Is that accurate?

RESPONSE: Please see my response to Question 4.

35. In 2004, you were asked by Senator Hatch whether “Mr. Miranda ever share[d], reference[d], or provide[d] you with any documents that appeared to you to have been drafted or prepared by Democratic staff members of the Senate Judiciary Committee?” You replied that he had not. At your Supreme Court confirmation hearing you reaffirmed your previous testimony
- Did Manuel Miranda ever send you talking points that Mr. Miranda attributed to “Dem staffers”?
 - Prior to, or in preparation for, your testimony in 2004, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Prior to, or in preparation for, your testimony at your 2006 confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Prior to, or in preparation for, your testimony at this year’s confirmation hearing, did you review any emails you had received from Mr. Miranda to ensure that you would be able to accurately answer questions about your work with him?
 - Would you like to amend or retract your assertion that Mr. Miranda never shared with you any documents drafted by Democratic staff?

RESPONSE: During the hearing, I truthfully answered numerous questions regarding Mr. Miranda, and I refer you to those answers.

36. Should Supreme Court justices be bound by the same professional code of conduct that other federal judges are required to follow? If so, why, and if not, why not?

RESPONSE: If confirmed, I would commit to give careful consideration to the practice of the Supreme Court on these questions, and I would want to hear what my colleagues have to say.

37. What are some ways you would work to make the Supreme Court, and the judiciary as a whole, more open to and understood by the larger public?

RESPONSE: As I indicated at the hearing, I believe proposals for having same-time audio or video in the courtroom for the announcement of Supreme Court decisions (as distinct from oral arguments) are worth exploring. If confirmed, I would want to hear what my colleagues have to say about the benefits and detriments of such a change. I also discussed at the hearing how, each time I write an opinion, I work hard on “[t]he clarity of the opinion[] [and] the thoroughness of the opinion,” because I want “someone who just picks up the decision . . . to be able to read it and understand it and get it and to be able to follow it.” One method I believe often helps members of the public understand judicial opinions is “hav[ing] an introductory paragraph or few pages . . . where they could just read the introduction, [and] say ‘I got it.’”

38. What do you believe are the driving forces behind racial disparities in federal sentencing? Do you believe racial bias — implicit or otherwise — exists in the federal judicial system? What role do judges have in confronting and eliminating it?

RESPONSE: While a student in law school, I wrote a Note for the *Yale Law Journal* discussing the issue of racial bias, including the potential for implicit racial bias, in the justice system. That Note is included in an appendix to my Senate Judiciary Questionnaire. As I noted during the hearing, the long march for racial equality in the United States is not over. Judges must adhere to the judicial oath we take to administer justice without respect to persons, to do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all duties under the Constitution and the laws of the United States.

39. Immediately prior to my questioning on the second day of hearings (the first day you answered questions), we took an unexpected recess.

- During that recess, did anybody discuss with you an email from your time in the Bush Administration in which you wrote that you were “not sure that all legal scholars refer to Roe [v. Wade] as the settled law of the land at the Supreme Court level”? If so, who?**
- During that recess, did anybody help prepare you to answer a question regarding whether *Roe v. Wade* is settled law? If so, who?**
- During that recess, did anybody suggest that I would ask you about abortion, *Roe v. Wade*, or related issues? If so, who?**

RESPONSE: I was of course prepared to discuss that issue. I do not recall that precise recess as affecting or altering my preparation. That email refers to the claims of legal scholars, not my own views.

40. You have expressed skepticism about *Chevron* deference, arguing that it allows the Executive Branch to effectively rewrite laws.

- Is any deference due to agency expertise and democratic accountability?**

RESPONSE: *Chevron* is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

- If *Chevron* deference were eliminated by judicial fiat, should any allowances be made for decades of laws passed by Congress against the backdrop of *Chevron* deference?**

RESPONSE: *Chevron* is a precedent of the Supreme Court entitled to the respect due under the law of precedent. As I explained at the hearing, and in keeping with the approach of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on hypothetical issues of the kind raised in your question.

- If deference to agencies is contrary to Congressional intent, why has Congress never passed legislation instructing the courts not to employ *Chevron* deference?**

RESPONSE: As I explained at the hearing, our constitutional structure separates power among

the legislative, executive, and judicial branches. It would be improper for me as a sitting judge and nominee to offer an opinion as to why Congress has passed, or not passed, legislation on any particular issue.

**The Nomination of Brett M. Kavanaugh to be an Associate Justice of the
Supreme Court of the United States
Questions for the Record**

Senator Mazie Hirono

1. In response to a question from Senator Feinstein on your position on *Roe v. Wade*, you said *Planned Parenthood v. Casey* is “precedent on precedent,” which in your view “is quite important as you think about stare decisis in this context.” Please explain what you meant by these statements. By the term “precedent on precedent,” did you simply mean that *Casey* discusses “in great detail” when the Supreme Court should and should not overrule its past precedents or did you mean that *Casey* has stronger status as precedent because it reaffirmed *Roe*?

RESPONSE: As I testified at the hearing, the majority in *Planned Parenthood v. Casey* specifically reconsidered *Roe v. Wade*, analyzed the stare decisis factors, and decided to reaffirm *Roe*. As a result, *Casey* is important “precedent on precedent.”

2. When Senator Feinstein asked you whether you believed *Roe v. Wade* was correctly decided, you refused to answer, saying that you “studied very carefully what nominees have done in the past, what I’ve referred to as nominee precedent, and Justice Ginsburg” and that “I need to follow that nominee precedent here.”
 - a. At Justice Ginsburg’s nomination hearing, she said, “It is essential to woman’s equality with man that she be the decisionmaker, that her choice be controlling. If you impose restraints that impede her choice, you are disadvantaging her because of her sex.” Based on your own standard for “nominee precedent,” her statement falls within the scope of what you can discuss as a nominee. Do you agree with her statement? Yes or no.

RESPONSE: As I discussed at the hearing, it would be inconsistent with judicial independence, rooted in Article III, to provide answers on cases or issues that could come before the Supreme Court. This means no forecasts or hints, as Justice Ginsburg said during her confirmation hearing, and no thumbs up or thumbs down when discussing precedent, as Justice Kagan said during her confirmation hearing. Justice Ginsburg had previously written on that question. The other seven justices have not answered that question.

- b. During Chief Justice Roberts’ confirmation hearing, he agreed with the statement in *Casey v. Planned Parenthood* that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” Based on your own standard for “nominee precedent,” his statement falls within the scope of what you can discuss as a nominee. Do you agree with his statement? Yes or no.

RESPONSE: Please see my response to Question 2.a. above.

3. At your hearing, Senator Feinstein asked you if you agreed with Justice O’Connor, that a woman’s right to control her reproductive life impacts her ability to, “participate equally in the economic and social life of the nation.” You did not answer her. This question does not require you to prejudge any case that could come before the court. It asks only whether you agree about a particular impact of a woman’s right to decide whether and when to have

children. Please answer the question.

RESPONSE: Please see my response to Question 2.a. above.

4. At the hearing, Senator Blumenthal asked you whether you agreed with the President's statements attacking the Judiciary, including that Justice Ginsburg's "mind is shot." When you refused to answer and stated that you decide cases and controversies as a judge, I asked you whether "disagreeing with the President [was] a concern to you when it's not a case in front of you." Such a question goes to your ability to be an independent and unbiased Justice. You refused to answer, claiming that you were "[f]ollowing the lead of the judicial canons." Please explain which specific judicial canon prohibits you from answering that question. How is your refusal to answer my question consistent with your duty to provide information to the Senate to enable Senators to fulfill their constitutional advice and consent responsibilities?

RESPONSE: As stated at the hearing, it would not be appropriate for me to comment on something a politician has said, or to be drawn into political controversy. As I further stated at the hearing, judges stay out of commenting on current events because doing so risks confusion about the role of the judge—which is to decide cases, not to comment on current events as pundits.

5. Senator Harris asked you at the hearing whether you believed "there was blame on both sides," as the President had claimed, regarding an incident in Charlottesville where a rally by white supremacists left a young woman dead. You refused to answer, citing the "principle of the independence of the judiciary." Please explain how the "principle of the independence of the judiciary" applies in a Senate confirmation hearing for a Supreme Court Justice and how it constrains you from answering this question. Is it your view that statements equating the actions of white supremacists with those protesting against them are simply, as you describe it, a "political controversy," between Republicans and Democrats?

RESPONSE: Please see my response to Question 4.

6. At the hearing, you repeatedly refused to answer hypothetical questions about potential cases, citing to your position "as a sitting judge and as a nominee to the Supreme Court." However, since becoming a judge in 2006, you have regularly volunteered strongly-worded opinions on a variety of topics, including gun control, campaign finance, abortion rights, and oversight of the Executive Branch. You have even gone as far as to forecast which of Justice Scalia's dissents will become law. Please explain how your refusal to answer questions during the confirmation hearing is consistent with your actions and public speaking appearances while you have been a judge.

RESPONSE: As I explained at the hearing, it would be a violation of judicial independence for me to give the appearance of pre-committing to decide a case a particular way – or of viewing certain arguments with favor or hostility – in exchange for the vote of any Senator. Judges base their decisions on the law, not on politics. I have therefore followed the precedent of every sitting Supreme Court Justice in declining to give hints, forecasts, or previews about how I will rule in cases that come before me.

7. When Senator Leahy asked you whether you believe the President has the power to pardon himself if he becomes the subject of a criminal investigation, you refused to answer and stated that the "question of self-pardons is something I have never analyzed. It's a question

that I have not written about.” In your past writings and speeches, however, you have repeatedly adhered to a very expansive view of Presidential power. In 1999, you called the President, rather than the Attorney General, “the chief law enforcement officer.” In 2013, you wrote that the Constitution gives the President “an extraordinary and unfettered power to pardon,” and further describe his pardon power as “absolute, unfettered, unchecked.” In 2016, you referred to the President’s “raw constitutional power to pardon.”

Please explain how these writings and statements are consistent with what you stated at the hearing. Why isn’t the logical conclusion of these writings and statements that you would consider the scope of the pardon power to include the authority of the President to pardon himself?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. Additionally, as I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

8. Why did you treat the case of *Garza v. Hagan* as a “parental consent” case if the young woman in the case had already received a judicial bypass? At your hearing you relied on the fact that the woman was a minor, but that was irrelevant once she received the bypass. The validity of the Texas bypass procedure was not at issue in the case, and so any precedent on such cases was not applicable.

RESPONSE: I answered this at the hearing, and my dissent speaks for itself.

9. At your hearing Senator Hatch asked you how often you spoke on the phone to Judge Kozinski and how often you saw him in person. You only responded that you did not speak to him or see him often. Can you please be specific?

- a. About how many times each year, on average, do you think you saw Judge Kozinski in the years between the end of your clerkship and the public revelations of his misconduct? Please include any annual reunions, conferences, or other meetings, as well as any one-on-one meetings.
- b. About how many times each year, on average, do you think you spoke to Judge Kozinski in that same period? Please include any conversations about Justice Kennedy clerks or collaborating on books or articles, as well as conversations of a more personal nature.
- c. Did you and Judge Kozinski email one another during that period of time? How frequently?
- d. Did you and Judge Kozinski ever text one another? If so, how frequently?

RESPONSE: As I stated at the hearing, I did not communicate with Judge Kozinski very often and did not see him in person very often. We and ten other judges were co-authors of a book on precedent. For the last 30 years, Justice Kennedy asked Judge Kozinski to lead his law clerk hiring process. I would communicate with Judge Kozinski as part of that process at times. I do not have detailed records of my interactions with Judge Kozinski.

10. Judge Kozinski was quoted as saying he was heartened by having heard from some former clerks after his misconduct was revealed in public. Were you among them? Did you contact him after the revelations were made public? When was the last time you were in contact with him?

RESPONSE: I contacted Judge Kozinski shortly after he resigned because I was concerned about his mental health.

11. You told me at your hearing that you did not remember having received emails from Judge Kozinski sent to the so-called “gag list.” Could you look at your email accounts and refresh your memory and tell me whether you in fact received any of those emails containing obscenity and obscene jokes?

RESPONSE: At this time, I do not remember such emails.

12. At the hearing, I asked you to clarify your misstatement of the holding in *Rice v. Cayetano*. In your response to Senator Tillis, you stated that in *Rice*, the Supreme Court held that the voting structure for the Office of Hawaiian Affairs “was a straightforward violation of the 14th and 15th amendments of the U.S. Constitution.” When I asked you where in the *Rice* decision does the Court rely on the 14th Amendment to justify its holding, you avoided answering my question and vaguely responded that “the 14th and 15th Amendments, I think, both prohibit restrictions on voting on the basis of race.” Did you incorrectly inform Senator Tillis that the Supreme Court found a violation of the

14th Amendment in *Rice*?

RESPONSE: The Supreme Court has held that state discrimination on the basis of race in voting violates the 14th Amendment. State discrimination on the basis of race in voting also violates the 15th Amendment. It is also important to note the narrow scope of the Supreme Court's decision in this case. The Supreme Court's 7-2 opinion 18 years ago in *Rice v. Cayetano* had no effect on the rights and privileges of American Indians and Alaska natives that the Court had long recognized. In fact, the Supreme Court has recognized that Congress has the ability to fulfill its treaty obligations with Native Alaskan Regional or Village Corporations and American Indian tribes through legislation specifically addressed to their concerns. Unlike indigenous peoples of Hawaii, Congress has explicitly recognized in statute that "Indian tribe" includes any recognized "Indian or Alaska Native tribe, band nation, pueblo, village or community." 25 U.S.C. § 5130. Indeed, my amicus brief made exactly that point, stating that "Hawaiians are not a federally recognized Indian tribe." Br. at 29. Native Alaskans are Indian Tribes and therefore enjoy all of the relevant rights and benefits that come with their trust relationship with the United States. Moreover, *Rice* dealt with an election for a position within the Hawaii state government. The case had nothing to do with the sovereign rights of Alaska Natives and American Indians to run their own government affairs, including administering Tribal elections.

13. During the hearing, I asked you about an email you wrote in 2002 during your time as an associate White House counsel opining on the constitutionality of programs benefitting Native Hawaiians. As you know, the Senate Judiciary Committee did not receive any documents from the National Archives before the hearing. All of the White House documents we received were filtered and selectively produced by a Republican lawyer, William A. Burck. Moreover, we were denied access to all of the documents of your record during your tenure as Staff Secretary in the White House during the George W. Bush administration.

Given that we have been blocked from accessing more than 90 percent of your White House record, please confirm whether there are any documents that pertain to *Rice v. Cayetano* or Native Hawaiians in the withheld portion of your record as an associate White House counsel and Staff Secretary. Please also identify any and all such documents that you are aware of.

RESPONSE: I do not know.

14. In *Garza v. Hargan*, before the case was decided by the full D.C. Circuit, you authored a panel opinion that would have delayed an immigrant teenager's access to an abortion that was in full compliance with Texas law. When the full court reversed your order, you dissented and wrote that allowing this young woman to exercise her right to choose created "a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand." *Garza v. Hargan*, 874 F.3d 735, 752 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). Based on your statements in *Garza*, particularly the politicized language that you use, and the statements you have made in speeches, why should this be viewed as anything other than a signal that you are willing to overturn

Roe v. Wade?

RESPONSE: As I stated during the hearing, Chief Justice Burger used the phrase “abortion on demand” in his concurrence in *Roe v. Wade*.

15. At your hearing you told Senator Blumenthal that one reason you were put on the November, 2017 version of Donald Trump’s list of pre-approved Supreme Court nominees and not the May, 2016 list was because, “Mr. McGahn was White House counsel and the president had taken office,” implying that Mr. McGahn had only just had the opportunity to put you on the list. But Mr. McGahn is reported to have been involved in the Trump campaign by May, 2016, so his ability to put someone on the list was nothing new in November, 2017. Could it be that you were placed on this list after you demonstrated your commitment to restricting or eliminating a woman’s reproductive rights in your *Garza v. Hagan* decision and your subsequent dissent in that case?

RESPONSE: As I explained at the hearing, I am generally aware that a number of judges and lawyers recommended that the President consider me for a vacancy to the Supreme Court based on my 12-year record on the U.S. Court of Appeals for the D.C. Circuit.

16. At the hearing, you referred to contraceptives as “abortion-inducing drugs,” in your discussion with Senator Cruz about your *Priests for Life* dissent. Specifically, you stated that the plaintiffs “said filling out the form would make them complicit in the provision of *the* abortion-inducing drugs” (emphasis added).
- a. During the hearing you reiterated that you believe words matter. Regardless of whether the term “abortion-inducing drugs” was used by a party, do you believe that birth control or contraceptives are “abortion-inducing drugs”?
- b. If you don’t believe that birth control or contraceptives are “abortion-inducing drugs,” do you believe that your dissent is, in your words, “based on a mistake in premise or a mistake in factual premises” that could justify reconsideration of your opinion?

RESPONSE: That was the position of the plaintiffs in the case, and I was accurately describing *their* position. At the hearing, I was not expressing an opinion on whether particular drugs induce abortion; I used that phrase only to accurately recount the plaintiffs’ own assertions.

17. In response to Senator Cruz, you explained that you thought your decision in *Priests for Life* was “an opportunity” to find a “win-win” situation. Do you believe your dissent in that case was a “win-win” situation? Yes or No. If yes, please explain what about your dissent specifically was a “win-win” situation, when your argument would have left female workers without coverage for contraceptives. What information did you have about the practicality of the alternative form you discussed?

RESPONSE: As I discussed with Senator Cruz, the third prong of the Religious Freedom

Restoration Act is an opportunity to see whether a “win-win” alternative to the substantial burden at issue is available. As my dissent from the denial of rehearing in *Priests for Life* stated, the “least restrictive means requirement, properly applied, allows religious beliefs to be accommodated *and* the Government’s compelling interests to be achieved—a win-win resolution of these often contentious disputes.” *Priests for Life v. U.S. Dept. of Health and Human Servs.*, 808 F.3d 1, 23 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of reh’g en banc) (original emphasis). I concluded that the government in *Priests for Life* had not satisfied RFRA’s least-restrictive-means requirement, because the Supreme Court’s decision in *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), had identified an alternative notice that would be less burdensome on the plaintiffs while still providing the same level of contraceptive coverage to employees. *Id.* at 23-25.

18. You agreed with Senator Cruz that in *Priests for Life*, “you sided with” the “little guy”— which you viewed as the employer objecting to having to provide contraceptive coverage to its female workers—“against the almost all-powerful federal government.” You then added, “I think a lot of the religious freedom cases the Supreme Court has had that has been the case.”
 - a. In your view, where the “little guy” is the employer, who represents the female workers who are being denied access to the contraceptive coverage that is granted to them under the Affordable Care Act?
 - b. Please identify the “little guy” in these recent “religious freedom cases” in the Supreme Court: *Burwell v. Hobby Lobby Stores* and *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

RESPONSE: As I stated in my discussion with Senator Cruz, my dissent from the denial of rehearing in *Priests for Life* reflected the analysis and conclusions that I believed were required by the Religious Freedom Restoration Act and by Supreme Court precedent. I emphasized that the law protects people regardless of the popularity of their religious beliefs. I will avoid commenting on particular parties in the cases you have mentioned to avoid giving the mistaken impression that my sympathies for a particular litigant plays any role in my judging.

19. At the hearing, you informed Senator Sasse that “dissents often speak to the next generation.” What messages did you intend to pass on to the next generation in your dissents in the following cases: *Garza v. Hargan*; *Priests for Life v. U.S. Department of Health & Human Services*; and *Agri Processor v. National Labor Relations Board*?

RESPONSE: As I explained at the hearing, all three of those dissents flowed from my careful attention to Supreme Court precedent. As I explained at the hearing, my *Garza* dissent was based on what I viewed as the “closest body of law on point”: the Supreme Court’s parental consent decisions, which apply *Casey*’s “undue burden” standard in a situation analogous to that at issue in *Garza*. My *Priests for Life* dissent was, in my view, dictated by Supreme Court precedent in *Hobby Lobby* and *Wheaton College*. Likewise, my *Agri Processor* dissent was

compelled by the Supreme Court's decision in *Sure-Tan*.

20. At the hearing, I asked you about the reversal of well-established precedent in *Janus* based in part on the "notice" of "misgivings" about that precedent that Justice Alito had provided in a few prior decisions over a six-year period. You simply recited what you called "established" factors that the Court considers in reconsidering its precedent: "whether the prior decision was grievously wrong, whether it is deeply inconsistent with subsequent precedent that's developed around it, the real-world consequences, the workability of the decision as well as reliance in."

You did not address whether you believe it is appropriate for a Justice to negate the reliance factor by expressing "misgivings" about a well-established precedent a few times over a few years. By contrast, you told Senator Sasse that "[p]recedent is important for stability and predictability" and that it is important that "the rules are set ahead of time" so that "you're not making up the rules as you go along in the heat of the moment, which will seem unfair, which will seem like you're a partisan." Do you agree that *Janus* changed the rules for how to analyze precedent, particularly the reliance factor? Yes or no. Please explain

RESPONSE: As discussed at the hearing, I believe the factors that the Supreme Court considers in applying stare decisis are established, and that those established factors include an attention to reliance interests.

21. At the hearing, you referred to *Humphrey's Executor* as "entrenched" precedent.
- a. What did you mean by "entrenched" precedent?

RESPONSE: As I said at the hearing, *Humphrey's Executor* is the Supreme Court precedent that judges must follow in the independent agency context, as well as the case that allows independent regulatory agencies to exist. I have previously referred to it as "entrenched" in light of its age and the frequency with which it is applied.

- b. Do you believe that entrenched precedent cannot or should not be overturned?

RESPONSE: As I explained at the hearing, I have "reaffirmed repeatedly . . . and I have applied repeatedly the precedent of *Humphrey's Executor* for traditional independent agencies and have never suggested otherwise."

- c. Since you shared that you believe *Humphrey's Executor* is entrenched precedent, do you believe *Roe v. Wade* is entrenched precedent?

RESPONSE: As I discussed at the hearing, based on the principle of judicial independence and the precedent set by previous Supreme Court nominees, it is important that I not offer hints, forecasts, or previews of my approach to any particular case. That said, I have explained that *Roe* is a precedent entitled to respect under principles of *stare decisis*. Importantly, *Roe* was

reaffirmed in 1992 in *Planned Parenthood v. Casey*. *Casey* in turn is precedent on precedent.

22. At your hearing you told Senator Cornyn that, “*Plessy* was wrong the day it was decided.” What other cases do you believe were wrongly decided? If you refuse to answer this question, please explain why you could say that to Senator Cornyn, but you won’t answer my question.

RESPONSE: *Dred Scott v. Sandford*, 60 U.S. 393 (1857), was a horrific decision that was corrected in part by the Thirteenth and Fourteenth Amendments. *Korematsu v. United States*, 323 U.S. 214 (1944), was likewise gravely wrong and inconsistent with the American rule of law.

23. At the hearing, you repeatedly refused to answer questions about hypothetical situations, particularly from Democratic Senators, but you did not hesitate to answer questions about hypothetical situations from Republican Senators. You refused, for example, to answer Senator Leahy’s question about whether you believe the President can pardon someone in exchange for a promise from that person to not testify against the President, claiming you could not answer a hypothetical question because there was no record, briefs, or arguments from the parties. By contrast, when Senator Sasse asked you “a hypothetical” about whether you believe the President is immune from civil or criminal liability for killing someone while driving drunk, you did not hesitate to respond, “no” and then provide your explanation. You also answered Senator Lee’s question about a hypothetical situation involving the nondelegation doctrine. Please explain your basis for differing responses to questions involving hypothetical scenarios.

RESPONSE: As I explained at the hearing, it would be a violation of judicial independence for me to give the appearance of pre-committing to decide a case a particular way – or of viewing certain arguments with favor or hostility – in exchange for the vote of any Senator. Judges base their decisions on the law, not on politics. I have therefore followed the precedent of every sitting Supreme Court Justice in declining to give hints, forecasts, or previews about how I will rule in cases that come before me.

24. When Senator Klobuchar asked you whether you believe there’s evidence of voter fraud, you did not answer her question. She cited to studies reported by the Brennan Center and the Washington Post and informed you that those studies found no evidence of widespread voter fraud. The Washington Post article by Professor Justin Levitt reported finding only 31 credible allegations of voter fraud from 2000 through 2014 out of more than 1 billion ballots were cast. The Brennan Center reported that “fraud by voters at the polls is vanishingly rare.” You also stated that you have looked at Professor Hasen’s election law blog, but you did not provide an answer, claiming that you wanted to “see a record” with respect to a particular case.
- a. Please answer the question about voter fraud generally instead of in the context of a potential future case. Do you agree with the findings of the Brennan Center and the Washington Post article referenced by Senator Klobuchar?

- b. Are you aware of any credible reports of voter fraud significant enough to affect any election?
- c. Do you believe the President's claim that "millions and millions of people" voted fraudulently in the 2016 presidential election? If yes, what is the basis for that belief?

RESPONSE: As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. Moreover, in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

- 25. In reply to Senator Feinstein's question about your dissent in *SeaWorld of Florida v. Perez*, you said you were following "precedent of the Labor Department." You also stated that you decided that the Department of Labor could not regulate the workplace safety of SeaWorld because the Department would not regulate "the intrinsic qualities of a sports or entertainment show."
 - a. What did you mean by "precedent of the Labor Department"?

RESPONSE: As I explained in my *SeaWorld* dissent, "the Department of Labor's action [in that case] depart[ed] without acknowledgment or explanation from longstanding administrative precedent [and was] therefore arbitrary and capricious," since an "agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). In this case, the Department had departed from its own precedent in a case called *Pelron Corp.*, 12 BNA OSHC 1833 (1986), which held that "some activities, though dangerous, are among the 'normal activities' intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause." *SeaWorld of Fla.*, 748 F.3d at 1219.

- b. Do you always follow "precedent" of federal agencies?

RESPONSE: Under the Supreme Court's precedent in *FCC v. Fox Television Stations, Inc.*, "[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." 556 U.S. 502, 515 (2009).

- c. Please explain how the workplace safety measures you argued against in *SeaWorld* are "intrinsic" to the killer whale shows at *SeaWorld* when SeaWorld self-imposed similar safety measures for its shows with the killer whale who had killed the trainer.

RESPONSE: As I explained in my *SeaWorld* dissent, "[t]he Department [of Labor] cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR. The Department's sole justification for the distinction is that SeaWorld

could modify (and indeed, since the Department's decision, has had to modify) its shows to eliminate close contact with whales without going out of business. But so too, the NFL *could* ban tackling or punt returns or blocks below the waist. And likewise, NASCAR *could* impose a speed limit during its races. But the Department has not claimed that it can regulate those activities. So that is not a reasonable way to distinguish sports from SeaWorld. The Department assures us, however, that it would never dictate such outcomes in those sports because 'physical contact between players is intrinsic to professional football, as is high speed driving to professional auto racing.' Br. for Secretary of Labor 52. But that ipse dixit just brings us back to square one: Why isn't close contact between trainers and whales as intrinsic to SeaWorld's aquatic entertainment enterprise as tackling is to football or speeding is to auto racing? The Department offers no answer at all." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014) (original emphasis).

26. At the hearing, Senator Feinstein asked you how you would feel about a President who said he could authorize worse than waterboarding. You responded, "Senator, I'm not going to comment on and I don't think I can, sitting here."

a. On what basis did you refuse to answer this question?

RESPONSE: The question from Senator Feinstein to which you are referring was: "Today, we have a President who said he could authorize worse than waterboarding. How would you feel about that?" As I understood it, Senator Feinstein's question attributed a statement to President Trump and asked my opinion of this supposed statement. As I stated at the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies, and also on hypothetical cases.

b. Do you believe the current President may actually authorize torture worse than waterboarding such that the issue may come before the Supreme Court?

RESPONSE: Please see my response to Question 26.a.

c. Do you believe a President can authorize waterboarding or torture worse than waterboarding?

RESPONSE: Please see my response to Question 26.a.

27. During the hearing, Senator Sasse asked you if a sitting President is immune from criminal prosecution. You responded by saying a President would not be immune, but that it is "just [a] timing question." In essence, you said that you believe a criminal indictment may have to wait until after the President has left, or been removed, from office. However, our judicial system is filled with statutes of limitations that set a time limit on long after a crime is committed charges must be brought. How do you reconcile your belief that a prosecution against a sitting President may have to wait until after she or he leaves office with these various statute of limitations provisions? In your view, when should

the investigation of the criminal conduct take place to avoid stale, lost, or destroyed evidence?

RESPONSE: As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

28. During Justice Gorsuch's confirmation hearing, he labeled some of President Trump's attacks on the judiciary "demoralizing" and "disheartening." During Chief Justice Roberts' confirmation hearing, he said that personal attacks on judges are "not appropriate" and "beyond the pale." Senator Blumenthal asked whether you agreed with then-Judge Gorsuch's sentiments, and you did not answer, claiming, "I'm not sure the circumstances." Regardless of the circumstances, do you believe the President's attacks on the judiciary "demoralizing" and "disheartening"? Do you agree with Chief Justice Roberts' comments? If you do, how do you reconcile those statements with your praise of President Trump's "appreciation for the vital role of the American judiciary"?

RESPONSE: Please see my response to Question 4.

29. After you were nominated and before the hearing, did you see or discuss any documents that were provided to the Senate Judiciary Committee by Bill Burck? Which documents did you see or discuss? Were any of these documents designated "Committee Confidential" in the version that you reviewed?

RESPONSE: I was informed that I might be asked about documents designated "committee confidential" in the closed session and potentially also in the public sessions (as I ultimately was). To prepare for these potential questions, I was shown some documents that were designated "committee confidential."

30. Senator Leahy asked you about information provided to you by Manny Miranda, who had "regularly hacked into the private computer files of six Democratic Senators" and stolen material from the Democratic Senators. The stolen information he sent you included "highly specific information regarding what [Senator Leahy] or other Democratic senators were planning in the future to ask certain judicial nominees" and information marked "confidential." You claimed that you "[n]ever knew or suspected" because the type of information Manny Miranda provided was "very common." In your preparation for the hearing, did anyone provide you with any information about what the Democratic Senators or staff intended to do similar to the type and format of information that former Republican Senate Judiciary Committee staffer Manny Miranda provided to you when you were working on judicial nominations in the White House?

RESPONSE: I am grateful to have had the opportunity to meet with many Senators on both

sides of the aisle in regards to my nomination, and I appreciate that members of this Committee and others shared with me some of their concerns and issues that they planned to ask about during my hearing. Additionally, as I mentioned at the hearing, it has been my experience that preparation for judicial confirmation hearings regularly involves discussion of the issues that Senators might ask about during the hearing. Much of that information is shared. It is relatively rare that a Senator tries to spring a surprise on a nominee, although it obviously happens on occasion.

31. In multiple speeches to law students, including at Federalist Society events, you repeatedly urged students to highly value loyalty. You noted: “[w]ho you work for and who works for you can make or break you. Whenever you are thinking about taking a job or hiring someone, you need to think about whether you want to be associated with that person for years to come, like forever.” You also instructed: “[b]e loyal. Never trash your boss.” You shared your view that “loyalty is a key to advancement in this profession.” President Trump also highly values loyalty. Before he fired FBI Director Comey, the President told him, “I need loyalty, I expect loyalty.”
- a. Has the President ever asked you for your loyalty or suggested or implied that you might owe him anything for nominating you to the Supreme Court?

RESPONSE: No. In all of my discussions with law students and my clerks, including those referenced in your question, I couple my discussion of loyalty with an admonition about not letting loyalty lead you off an ethical or legal cliff.

- b. Have you discussed your views on presidential pardon power, presidential immunity, or other forms of Executive power with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?

RESPONSE: As reflected in section 12.a. and 12.d. of my Senate Judiciary Questionnaire, I have given speeches and written articles on matters of executive power. Details on those articles and speeches have been provided in my completed questionnaire.

32. The Foreign Emoluments Clause broadly prohibits federal office holders from accepting emoluments from foreign governments unless Congress has consented. It reads as follows:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

- a. What is an “emolument?”

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending

litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- b. Does faithful adherence to the textualist, originalist judicial philosophies you espouse require you to interpret the clause consistent with founding-era dictionaries, which generally defined the term broadly to include any “profit” or “advantage?”

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- c. Do you believe that the President qualifies as a “Person holding any Office of Profit or Trust” within the meaning of the Foreign Emoluments Clause?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- d. Do you believe that, as a general matter, is the Foreign Emoluments Clause judicially enforceable? In other words, if an individual or organization can satisfy the constitutional and jurisprudential standing requirements, is it within the power of the courts to consider such an individual’s or organization’s claims that they have been injured by an officeholder’s violation of the Emoluments Clause?

RESPONSE: The meaning of the Foreign Emoluments Clause is the subject of pending litigation in federal courts. As I discussed at the hearing, and in keeping with nominee precedent, it would therefore be improper for me as a sitting judge and a nominee to comment on this issue.

- e. If one of the cases alleging President Trump has violated the Emoluments Clause were to reach the Supreme Court, do you believe you could impartially hear that case even though it would involve the man who nominated you to the Supreme Court?

RESPONSE: I am an independent judge.

- f. How would you decide whether your recusal from such a case would be appropriate, and what factors would you consider?

RESPONSE: I would follow the relevant law and precedents, and consult with my colleagues as appropriate.

33. You wrote in 2009 in a Minnesota Law Review article that “the political ideology and policy views of judicial nominees are clearly unrelated to their fitness as judges, and those matters therefore appear to lie outside the Senate’s legitimate range of inquiry.”
- a. Do you still believe there are some questions that are legitimate for Senators to ask and others that are not?

RESPONSE: As a nominee before this Committee, it is not my place to comment on how this Committee and each individual Senator conduct their business.

- b. What is the constitutional basis for your assertion that there is a range of legitimate inquiry for a Senator in evaluating a judicial nomination?

RESPONSE: The Constitution.

34. The National Rifle Association (NRA) has made their support of your nomination clear. Their commercials highlight that there are currently four Justices who favor gun control and four Justices who oppose gun control. They then explain, “President Trump chose Brett Kavanaugh to break the tie.” Are you aware of anyone in the White House or the Department of Justice who have spoken to the NRA regarding your nomination?

RESPONSE: I am an independent judge. As I stated in response to Question 26.c. of my Senate Judiciary Questionnaire, I have made no representations to any individuals or organizations as to how I might rule, if confirmed.

35. In *Heller v. District of Columbia*, you argued that gun laws must have a long history in order to be constitutional under the Second Amendment. Under your view, you would have struck down Washington, DC’s assault weapons ban and gun registration requirement even though—as the majority noted—“[t]he District has banned all semi-automatic firearms shooting more than twelve shots without reloading and has required basic registration since 1932.” In your view, how old must a gun law be to be constitutional under the Second Amendment?

RESPONSE: I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with these principles and the nominee precedent of prior nominees, I cannot answer this hypothetical.

36. You wrote in *Heller v. District of Columbia* that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles.” In recent years, countless mass shootings have been perpetrated with semi-automatic rifles— not handguns. Moreover, military-style semi-automatic rifles (such as the AR-15) are far more lethal than handguns because they fire bullets at greater velocity. In

view of this evidence, do you stand by your statement that “[t]here is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles?”

RESPONSE: The constitutional protections afforded to different classes of firearms is a subject that could, and is likely to, come before me as a judge. As such, and as I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such an issue.

37. Your track record shows that your instinct is to defer to the Executive Branch any time it claims it is motivated by national security concerns, regardless of that claim’s merits. In *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012), for example, your dissent argued that all agency actions related to security clearances should be immune from judicial review—even claims presenting evidence of clear racial bias. This sort of blind deference calls to mind the Court’s shameful decisions in *Korematsu v. United States*, 323 U.S. 214 (1944), and, more recently, in *Trump v. Hawaii*, 138 S.Ct. 2392(2018).

a. Are there other categories of cases in the area of national security that you believe should be judicially unreviewable? If so, what are those categories?

RESPONSE: As I explained in my dissenting opinion in *Rattigan v. Holder*, I believed that I was bound by the Supreme Court’s precedent in *Department of the Navy v. Egan* (1988), which held that security clearance decisions are committed to the broad discretion of the relevant governmental agency. I observed that in *Egan* the Court recognized that “Congress could override the presumption of unreviewability that attached to security clearance decisions, but . . . that Congress had not done so” in the context of the case. *Rattigan v. Holder*, 689 F.3d 764, 773 (D.C. Cir. 2012) (Kavanaugh, J., dissenting). As I discussed at the hearing, the President remains subject to the limits set out in the Constitution and the laws passed by Congress. My writings have said the President does not have the authority to disregard statutes passed by Congress regulating war efforts except in certain narrowly described circumstances that are historically rooted, such as the command of troops in battle.

b. Is there a national security exception to the Bill of Rights?

RESPONSE: No.

c. Under what circumstances should a court look behind the President’s stated justifications?

RESPONSE: That question could come before me in litigation. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me.

d. In your view, how do courts ultimately determine whether a case involves an issue of national security? If courts are to show blind deference to the Executive

Branch's assertion that national security is at stake, how are we to avoid a second *Korematsu*?

RESPONSE: As I discussed at the hearing, national security is not a blank check for the President. See *Boumediene v. Bush*, 553 U.S. 723 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

38. In a speech to the American Enterprise Institute (AEI) in 2017, in tribute to the late Chief Justice William H. Rehnquist, you said:

He advocated for other remedies for police mistakes or misconduct, but he believed that freeing obviously guilty violent criminals was not a proper remedy and, in any event, was surely not a remedy required by the Constitution. Rehnquist of course did not succeed in calling for the overruling of the exclusionary rule, and not many people today call for doing so, given its firmly entrenched position in American law.

Is it your view that Chief Justice Rehnquist should have "succeed[ed]" in overruling the exclusionary rule? In other words, would you like to see the exclusionary rule overturned?

RESPONSE: My aim in my 2017 AEI speech was to spell out the consequential impact of Chief Justice Rehnquist's work, by describing "five different areas of his jurisprudence."

39. In your 2017 AEI speech, you also said of late Chief Justice William H. Rehnquist:

It is fair to say that Justice Rehnquist was not successful in convincing a majority of justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of stare decisis. But he was successful in stemming the general tide of free-wheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition.

Which free-wheeling judicially-created unenumerated rights were you referring to? Please be specific in identifying the unenumerated rights.

RESPONSE: As I discussed at the hearing, it is well-settled that the Constitution protects unenumerated rights. This speech was intended to spell out the consequential impact of Chief Justice Rehnquist's work, by describing "five different areas of his jurisprudence, where he had helped the Supreme Court achieve . . . a common sense middle ground that has stood the test of time . . ." I did not discuss particular unenumerated rights in my speech. Rather, in describing Chief Justice Rehnquist's important contributions to the law with *Washington v. Glucksberg*, 521 U.S. 702 (1997), I agree with Justice Kagan that the decision provides the primary test that "the Supreme Court has relied on for forward-looking future recognition of unenumerated rights" – and *Glucksberg* cited *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973).

40. President Trump has weighed in on a woman's right to choose, and has even promised to appoint "pro-life" Justices to the Supreme Court who will overturn *Roe v. Wade*. During one of the presidential debates, then-candidate Trump said that once he put "two or maybe three" Justices on the Supreme Court, *Roe* would be overturned "automatically."
- a. Have you promised or suggested to President Trump or any other individual in or associated with his administration that, given the opportunity, you would vote to overturn or undermine *Roe v. Wade* and its progeny?

RESPONSE: No.

- b. Have you discussed your views on abortion, *Roe v. Wade*, the Affordable Care Act, health care, or religious freedom with the President, anyone who works on judicial nominations in the Executive Branch, or anyone from the Federalist Society or Heritage Foundation since September 2016?

RESPONSE: As reflected in section 12.a. and 12.d. of my Senate Judiciary Questionnaire, I have given speeches and written articles on several areas of law. Details on those articles and speeches have been provided in my completed questionnaire. I have also discussed numerous legal issues with a number of people, including most notably 65 Senators. As I stated in response to Question 26.c. of my Senate Judiciary Questionnaire, I have offered no hints or forecasts on particular cases and made no commitments to any individuals or organizations as to how I might rule on particular cases, if confirmed.

41. Throughout this hearing, you have repeatedly praised the judicial philosophy of textualism. During Senator Lee's questioning, you said that "[j]udging is paying attention to the text." The text of Article II, Section 3 of the Constitution unequivocally states that the President "shall take Care that the Laws be faithfully executed."

Despite the apparent clear meaning of this words, you have said that "the President may decline to follow the law unless and until a final Court order dictates otherwise." *In re Aiken County*, 725 F.3d 255, 259 (D.C. Cir. 2013). You also went out of your way in a dissent to say that, "[u]nder the Constitution, the President may decline to enforce a statute that regulates private individuals when the President deems the statute unconstitutional, even if a court has held or would hold the statute constitutional." *Seven Sky v. Holder*, 661 F.3d 1, 50 fn.43 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

- a. How do you reconcile your position as stated in *Seven Sky* and *In re Aiken County* with the "take care" clause of the Constitution?

RESPONSE: As I said at the hearing, footnote 43 of my opinion in *Seven-Sky v. Holder*, 661 F.3d 1, 50 (D.C. Cir. 2011) refers to the concept of prosecutorial discretion, which was recognized by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974). The Supreme Court in *Nixon* said that the executive branch has the "exclusive authority and absolute discretion whether to prosecute a case." *Id.* at 693. In *Heckler v. Chaney*, 470 U.S. 821 (1985), the

Supreme Court said this principle applies to civil enforcement as well. The limitations of prosecutorial discretion are uncertain.

- b. Which text in the Constitution supports your view that the President can decide for himself that a statute is unconstitutional, and can choose not to enforce a law passed by Congress and deemed constitutional by a court?

RESPONSE: Please see my response to Question 41.a.

42. If you are confirmed to the Supreme Court, your views on the Constitution's "take care" clause may take concrete form in the context of the Affordable Care Act (ACA). Despite providing access to health care of millions of previously uninsured Americans, the ACA has been under assault from the right from the day of its passage. Despite the various attacks, the Supreme Court has upheld the law as constitutional and the ACA has endured. However, President Trump has made no secret of his desire to dismantle the ACA. Under your view of the "take care" clause articulated in *Seven Sky* and *In re Aiken*, can the President ignore his constitutional duty to "take Care that the Laws be faithfully executed" and unilaterally repeal the ACA by choosing not to enforce that law or actively undermine the implementation of the ACA?

RESPONSE: If such a case were to come before me as a judge, I would analyze it under the principles of the Supreme Court, consistent with the principles of stare decisis, and the arguments of the parties.

43. During an AEI speech, you spoke about the view of the Constitution as a living document, and contrasted it to your own textualism. You said:

In the views of some, the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times. For those of us who believe that the judges are confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we too believe in a Constitution that lives and endures and in statutes that live and endure. But we believe that changes to the Constitution and laws are to be made by the people through the amendment process and, where appropriate, through the legislative process – not by the courts snatching the constitutional or legislative authority for themselves.

- a. If, as you say, you are committed to interpreting the Constitution as it was understood at the time it was written, please explain how you justify deeming segregation and sexual discrimination unconstitutional?

RESPONSE: As I explained to Senator Lee, the text of the Fourteenth Amendment guarantees "equal protection." *Brown v. Board* applied that text. I explained at length why I agreed with *Brown*, the single greatest decision in American history.

- b. Under your view, how are the bundle of due process rights—the right to marry who you want, the right to love who you want, the right to use contraception in and out of marriage, the right for women to control their own bodies—guaranteed?

RESPONSE: The Supreme Court has grounded its decisions bearing on these rights in the due process clauses of the Fifth and Fourteenth Amendments.

- c. How would your views on original intent inform your thinking on a case that involved a direct conflict between precedent and original meaning? For example, suppose *Katz v. United States*, 389 U.S. 347 (1967), came before you today, and suppose the government argued that the Fourth Amendment’s prohibition against warrantless searches and seizures cannot apply to telephone calls, because the Framers of the Fourth Amendment clearly did not understand a “search” to include wiretapping. How would you approach such a case?

RESPONSE: As I explained at the hearing, I have not endorsed interpreting constitutional provisions based upon original intent as opposed to the original meaning of the text. Moreover, as a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events, particularly involving a controlling precedent of the Supreme Court. Moreover, if confirmed, I would respect the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

- d. Under your view of originalism, how would you think through a case involving an indictment of a sitting president? Assuming there is no controlling precedent, what sorts of arguments and considerations would you take most seriously?

RESPONSE: As a sitting judge and nominee, principles of judicial independence prevent me from speculating about hypothetical contingent events or providing hints, forecasts, or previews of how I would decide a case. As I explained at the hearing, I have never taken a position on the constitutionality of that question and would have an open mind to any such issue, drawing on the briefs and arguments.

44. You have been nominated for Justice Kennedy’s seat on the Supreme Court. In *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), Justice Kennedy wrote:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.

- a. Do you agree with Justice Kennedy that the Fourteenth Amendment provides a path to protect liberty as a society evolves?

RESPONSE: As I stated in my opening statement, Justice Kennedy established a legacy of liberty for ourselves and our posterity. I will follow precedent subject to the rules of precedent.

- b. Do you believe that the Fourteenth Amendment protects individual rights regardless of a person's sexual orientation?

RESPONSE: The Supreme Court stated last term in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over.

45. A number of cases on reproductive rights coming up through the courts involve narrowing the protections afforded by *Roe* and *Casey*. One is pending now in Hawaii federal district court. In a case called *Chelius v. Azar*, the ACLU of Hawaii is challenging unnecessarily restrictive laws about how and when women can be treated with medical abortion pills. How would you analyze a case where a new burden on the right to choose is being challenged?

RESPONSE: As discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. As a general principle, I would seek to apply the most relevant precedent to the facts at hand.

46. In a 2016 speech at Catholic University titled "The Judge as Umpire: Ten Principles," you acknowledged that constitutional adjudication is not always a mechanical process, but often entails an exercise of judicial discretion. After going through your ten principles, you said:

Having said all that, there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision.

- a. What interpretative and decisional tools do you believe should guide this exercise of discretion?

RESPONSE: As I explained in that same article, in cases where there is discretion—such as when it comes to construing what is "reasonable" under the Fourth Amendment, or what is a "compelling government interest" under the Religious Freedom Restoration Act—one of the most important tools for judges is precedent.

- b. Should a Justice bring his or her own values to bear?

RESPONSE: As the thesis of my article makes clear, I believe that in a system of even-handed justice dedicated to the rule of law, our aspiration should be to decide like cases alike and to

apply consistent and objective criteria, rather than subjective beliefs or popular values.

- c. Do the values of the President who nominated Justice carry special weight? If not, whose values count?

RESPONSE: See my answer to Question 46.b.

- d. What should a Justice do when the values at issue are in tension with each other (e.g., women's reproductive rights and the right of autonomy versus religious liberty)?

RESPONSE: See my answer the Question 46.b.

47. At the hearing, I asked you about Chief Justice Roberts' statement in *Trump v. Hawaii* that "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—has no place in law under the Constitution." You answered that Chief Justice Roberts was recognizing that *Korematsu* "was no longer good law." In your 1999 amicus brief in *Rice v. Cayetano*, however, you cited *Hirabayashi v. United States*, 320 U.S. 81 (1943), to support your argument. *Hirabayashi*, which was decided the year before *Korematsu*, held that curfews imposed on Japanese Americans during World War II were constitutional. Why did you cite *Hirabayashi* when there are many other Supreme Court cases that state the principle for which you cited *Hirabayashi*? In fact, you included citations to those cases in your amicus brief, which made your citation to *Hirabayashi* repetitive.

RESPONSE: The amicus brief did not cite the majority opinion in *Hirabayashi v. United States*, 320 U.S. 81 (1943). It cited Justice Murphy's concurrence in that case, which emphasized that "[d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals." *Id.* at 110 (Murphy, J., concurring).

48. Two professors, Elliott Ash and Daniel L. Chen, performed an empirical study of all your judicial opinions since 2006. They found the following:
- Compared to other Supreme Court Justices when they were circuit court judges, you rank in the top 1st percentile of partisan dissents (defined by dissents in which the other judges on the panel are appointed by the opposing party).
 - You dissented along partisan divisions at twice the rate of your colleagues.
 - You rank in the top 1st percentile of total number of dissents authored during election season.
 - Specifically, you dissented fifteen percent of the time before presidential elections, whereas other judges in your circuit dissented three percent of the time before presidential elections.
 - You were "extremely polarizing" in how you voted in cases and the language you used in your opinions was more partisan than your colleagues.
 - You justified your decisions with conservative doctrines "far more frequently" than your colleagues.

- The authors of the study conclude that you are “radically conservative” compared to other federal circuit judges and that you are “highly divisive in [your] decisions and rhetoric.”
- a. How do you explain these findings in this data-driven study?

RESPONSE: I am not familiar with that study and the methodology by which it reached its conclusions. I am proud of my over 300 opinions and my high rate of agreement with all of my colleagues on the D.C. Circuit.

- b. Do you think these findings help to explain why you were nominated for this position by Donald Trump?

RESPONSE: I am not familiar with that study and thus cannot comment on its methodologies and conclusions. I am proud of my over 300 opinions and my high rate of agreement with all of my colleagues on the D.C. Circuit.

49. In 2012, you approved South Carolina’s voter ID law under the Voting Rights Act’s preclearance regime that required South Carolina to get approval before changing its voting laws. South Carolina initially enacted a restrictive voter ID law that would disproportionately impact African-American voters. But during the preclearance process, South Carolina agreed to implement it in a way that would reduce its negative impact on African-American voters. In a concurring opinion, your colleague Judge Bates observed, “one cannot doubt the vital function that Section 5 of the Voting Rights Act has played here.” He explained that “[w]ithout the review process under the Voting Rights Act, South Carolina’s voter photo ID law certainly would have been restrictive.”
- a. You were the only judge of the three-judge panel that did not join Judge Bates’ concurrence. Why did you decline to affirm the vital role Section 5 of the Voting Rights Act plays in protecting minorities from being disenfranchised?

RESPONSE: I wrote the unanimous majority opinion in *South Carolina v. United States*, which addresses all issues before the panel. Both Judges Kollar-Kotelly and Bates joined my opinion in full. In my opinion, I noted that “[t]he Voting Rights Act of 1965 is among the most significant and effective pieces of legislation in American history.” *South Carolina v. United States*, 898 F. Supp. 2d 30, 32–33 (D.D.C. 2012). Both Judges referred to my opinion as “excellent.”

- b. Did you disagree with Judge Bates’ opinion?

RESPONSE: Please see my response to Question 49.a.

50. Over the objection of all of its Democratic Members, the Senate Judiciary Committee requested only a limited subset of records from your time working in the White House and specifically excluded records during your time serving as Staff Secretary of the White House during the George W. Bush administration. Yet, you said in a speech:

When people ask me which of my prior experiences has been most useful to me as a judge, I...do not hesitate to say that my five and a half years in the White House – and especially my three years as Staff Secretary for President Bush – were the most interesting and in many ways among the most instructive.”

- a. Why was your work as Staff Secretary most useful and most instructive to you as a judge?

RESPONSE: As I explained at the hearing, my role as Staff Secretary involved seeing any issue that crossed the President’s desk, with the exception of a few covert matters. It also permitted me to travel extensively with the President. I learned a great deal about policy, legislation, the political process, the Congress, federal agencies, the media, and world leaders.

- b. Regardless of what role you had in the document request, in your opinion, should documents from your time as Staff Secretary be released so that the Senate and the public can see your full record?

RESPONSE: As I explained at the hearing, it is my understanding that officials in the Administration, members of the Senate Judiciary Committee, and lawyers working for President Bush made the decisions regarding the processing and production of documents related to my nomination. I cannot speak knowledgeably to the details of the document production.

- c. At the hearing you stated that you studied the nominations of recent Supreme Court nominees. In addition, you have extensive experience working on judicial nominations. Are you aware of any confirmation process for any of the Justices currently on the Supreme Court where the Ranking Member of the minority party has been denied access to documents that she or he believed were critical to review to determine the fitness of the nominee to be a Supreme Court Justice?

RESPONSE: Please see my response to Question 50.b.

51. In the same speech as above, you said, “As Staff Secretary...I saw and participated in the process of putting legislation together, whether it was terrorism insurance or Medicare prescription drug coverage or attempts at immigration reform.” The American people care about your views on Medicare, terrorism, and immigration reform. As a self-described “independent” and “pro-law” judge, you likely want your nomination process to be transparent and fair. What issues did you work on substantively while you were Staff Secretary? Please be as detailed as possible.

RESPONSE: As I testified at the hearing, while I was Staff Secretary, any issue that reached the President’s desk from July 2003 to May 2006, with the exception of a few covert matters, would have crossed my desk as well. That applies to the President’s speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that I worked on during this time. In any event, my role as Staff Secretary was not to replace the President’s policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors.

52. When President Obama nominated your colleague, Merrick Garland, to the Supreme Court, Majority Leader McConnell summarily blocked Judge Garland's nomination. Mr. McConnell left the Supreme Court seat vacant for more than a year, saying, "[t]he American people should have a voice in the selection of their next Supreme Court Justice." Do you think a confirmation process that allows a Supreme Court nominee to be summarily blocked is working as it should? Do you think this is a fair process?

RESPONSE: That is a decision for the Senate.

53. In May 2002, you quoted President Bush, saying "[e]very judicial nominee deserves a prompt hearing and a fair vote, no matter who lives in the White House and no matter which party controls the Senate." In fact, you went further to say, "there is simply no justification, in our view [for] circuit court nominees to wait a year for a hearing." Based on these statements, do you believe Senate Republicans were wrong to deny Merrick Garland a hearing for nearly a year? Does your view of what is a "prompt hearing and a fair vote" change depending on which party controls the Senate?

RESPONSE: That is a decision for the Senate.

54. In *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 5 (2016), you wrote that the Consumer Financial Protection Bureau (CFPB) is a "threat to individual liberty." Your opinion focused primarily on the costs of compliance to a company accused of illegal behavior, but CFPB has returned nearly \$12 billion to 29 million people who were cheated out of their hard-earned money by companies that broke the law. On issues ranging from clean air and water to occupational health and safety to consumer protection, you have opposed Congress' grants of authority to executive agencies to create safeguards based on their expert analysis of risks and potential solutions. In short, your writings on liberty and freedom seem to translate to rulings for the liberty of polluters and freedom from regulation. Is your conception of individual liberty expansive enough to also account for ordinary Americans' expectations that they will be free to earn a living or enjoy clean air and water because our laws are being enforced?

RESPONSE: As I explained at the hearing, I concluded in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1, 5 (D.C. Cir. 2016), the Consumer Financial Protection Bureau was unconstitutionally structured. As a single-Director independent agency exercising substantial executive authority, the Bureau was the first of its kind and a historical anomaly. *PHH Corp.*, 839 F.3d at 17. In light of the historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, I concluded that *Humphrey's Executor* could not be stretched to cover the Bureau's novel agency structure. *Id.* at 8.

55. In *Chevron v. Natural Resources Defense Council*, the Supreme Court wrote that "federal judges – who have no constituency – have a duty to respect legitimate policy choices made by those who do." The Court laid out the doctrine of "*Chevron* deference,"

holding that, when an agency's organic statute is silent or ambiguous with respect to a specific issue, a reviewing court should consider only whether the agency's answer is based on a permissible construction of that statute. However, you have written that *Chevron* deference is "an a textual invention by the courts" that is "nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch." In your opinion, courts should "simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes." Brett Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 Notre Dame L. Rev 1907, 1910- 1912 (2017).

Your opposition to *Chevron* deference appears to reflect a more general hostility to agency regulations, particularly when those regulations are often critical to protecting workers, consumers, and the environment, for example.

- a. Why do you believe a reviewing court should substitute its own judgment for that of Congress, or of the experts and scientists at the EPA, or of the Nuclear Regulatory Commission, or of the National Highway Transportation and Safety Authority, or of the Federal Communications Commission, or for any of the independent agencies that Congress has created?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

- b. How does your theory of allowing courts to "determine the best reading" of a law avoids inconsistent interpretations that are based solely on the subjective views of judges on a particular case?

RESPONSE: Please see my answer to Question 55.a.

56. You have acknowledged the serious problem posed by climate change, saying "the task of dealing with global warming is urgent and important at the national and international level." Do you agree, as a general principle, that someone who is injured or imminently will be injured by climate change has standing to challenge government regulations relating to climate change? Please provide one or more concrete examples of "injury-in-fact" resulting from climate change that would establish standing.

RESPONSE: This issue is the subject of ongoing litigation. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

57. Forced arbitration clauses are ubiquitous in modern agreements, including credit card

contracts, cell phone contracts, online click-through “agreements,” employee handbooks, and nursing home admissions forms to name a few. These clauses restrict Americans’ access to justice by stripping them of their constitutional right to go to court. The Federal Arbitration Act (“FAA”), as originally drafted and passed by Congress in 1925, was intended to apply—and for nearly 60 years had been presumed to apply—only in cases involving commercial disputes between two businesses with relatively equal bargaining power. Congress did not intend to force individual American consumers, employees, and patients into secret, private arbitration as a means of depriving them of their constitutional right to trial by jury. Despite the original intent of the FAA, the Supreme Court in recent years has reinterpreted the FAA more broadly, leading more and more individuals to be shut out of courts and forced into arbitration. Given the Act’s history and the fact that these clauses now apply to every aspect of American life, are there any limits to when individual consumers, nursing home residents, and workers should be subject to forced arbitration? What are those limits?

RESPONSE: The limits under the FAA on the enforceability of arbitration agreements include those noted by the Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001), namely that Section 1 of the FAA provides “exemption from coverage” for certain kinds of contracts, including “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” To the extent that the existence of other limits has not yet been explicated by the Supreme Court, the question could come before me in the future either on the D.C. Circuit or on the Supreme Court. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on any other such limits.

58. You served as Co-Chair of the Federalist Society’s School Choice Subcommittee, Religious Liberties Practice Group from 1999 to 2001. Please describe your involvement in that subcommittee’s conferences, symposia, publications, speaking engagements, litigation and the like during that time.

RESPONSE: I do not recall the specifics of my involvement in that particular subcommittee. But as I explained at the hearing, my experience with the Federalist Society has generally been that it hosts many panels and discussions at which people of various perspectives offer commentary and debate on legal and policy issues. Such events educate and enrich the legal community.

**Nomination of Brett M. Kavanaugh
Supreme Court of the United States
Questions for the Record
Submitted September 10, 2018**

QUESTIONS FROM SENATOR BOOKER

1. During last week’s hearing, I asked you about your insistence to several members of the Committee that you had “never” taken a position on the constitutionality of criminally investigating or indicting a sitting President, “period.” However, you have addressed the constitutionality issue a number of times in your writings and public statements. In particular, you have written:
 - “*The Constitution itself seems to dictate*, in addition, that congressional investigation must take place *in lieu of* criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur *only* after the President has left office.”¹
 - “During the impeachment ordeal, the president’s congressional supporters and foes agreed—*consistent with the Constitution, which appears to preclude indictment of a sitting president*—that the government should consider indicting Bill Clinton after he leaves office.”²
 - “If the President does something dastardly, the impeachment process is available. *No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.* Moreover, an impeached and removed President is still subject to criminal prosecution afterwards. In short, *the Constitution establishes a clear mechanism* to deter executive malfeasance; we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions. . . . I think this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal investigations.”³

In addition, in 1998, you participated in a panel discussion at the Georgetown University Law Center on the future of the independent counsel statute.⁴ During the

¹ Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2158 (1998) (emphases added).

² Brett M. Kavanaugh & Robert J. Bittman, *Indictment of an Ex-President?*, WASH. POST, Aug. 31, 1999, at A12 (emphasis added), available at <https://www.justsecurity.org/wp-content/uploads/2018/07/Brett-Kavanaugh-Indictment-of-an-Ex-President-Washington-Post-1999.pdf>.

³ Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1461-62 & n.35 (2009) (emphasis added) (footnotes omitted).

⁴ *Independent Counsel Statute Future*, C-SPAN (Feb. 19, 1998), <https://www.c-span.org/video/?101056-1/independent-counsel-statute-future>.

discussion the moderator asked the panel, “How many of you believe, as a matter of law, that a sitting President cannot be indicted during the term of office?” In response to this query, your hand went up, along with those of several other members of the panel. Next, the moderator asked you, “What is the implication, Brett, of your point if in fact a sitting President cannot be indicted during a term of office?”⁵ You replied:

The implication is that that Congress has to take responsibility for overseeing the conduct of the President in the first instance. *That’s the role I believe the Framers envisioned*, and that’s the role that makes sense if you just look at the last 20 years. It makes no sense at all to have an independent counsel looking at the conduct of the President.⁶

When I asked you about these statements at the hearing, you said that you would consider these issues “with an open mind.”

- a. In light of these statements, do you still maintain that you have “never taken a position” on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.

RESPONSE: As I explained at the hearing, for 45 years – through Republican and Democratic Administrations – the Department of Justice has taken the position (and still does) that a sitting President may not be indicted while in office. Therefore, unless the Department of Justice changes its position, this issue presumably will never come before a court. In my 2009 Minnesota Law Review article, when President Obama was in office, I made a series of legislative proposals for Congress to consider. However, I have made clear that if a constitutional question came to me, I would have an open mind. I have repeatedly referred to the constitutional question of whether a sitting President can be indicted as an open question. Specifically, in my 1998 Georgetown Law Journal article, I stated that “[w]hether the Constitution *allows* indictment of a sitting President is debatable.” In my 2009 Minnesota Law Review article, I stated that “a serious constitutional question exists regarding whether a President can be criminally indicted and tried while in office.” 2009 Minn. L. Rev. at 1461 n.31.

- b. At a minimum, do these statements—three of which invoke the Constitution, and one of which invokes the intent of the Framers—send a clear signal about where you stand on the constitutionality of criminally investigating or indicting a sitting President? Please explain your answer.

RESPONSE: No.

2. In your 2006 testimony before the Senate Judiciary Committee for your nomination to the D.C. Circuit, you denied that the Bush White House used political filters to put forward candidates for judicial nominations. Senator Schumer asked you whether you ever would use words such as “too liberal or too conservative” as a filter for nominees. You responded by indicating that you would object only on the basis that someone was “too activist.”

⁵ *Id.*

⁶ *Id.* (emphasis added).

You gave similar testimony to this Committee in 2004 as well.⁷

But in an e-mail dated March 9, 2001, a colleague asked you whether a potential judicial nominee was “too liberal to be considered.” You responded, “Far too liberal.”⁸

Do you stand by the statements you gave to this Committee in 2004 and 2006 about ideological filters in the selection process for judicial candidates? Please explain why, in light of your response in this e-mail.

RESPONSE: I disagree with the premise of the question. In neither 2004 nor 2006 did I testify that I had never described judicial nominees as “too conservative” or “too liberal.” In fact, in 2004, I testified that I did not know whether I had ever used those words. In 2006, I likewise made clear that I may have referred to a potential nominee’s tendency or failure to understand the distinction between the role of policymakers and the role of the judiciary—in other words, the tendency of a potential nominee to be “too activist.”

3. The *Washington Post* reported on March 8, 2017, that you had been considered for the job of Solicitor General, one of the top positions at the Justice Department. The *Post* reported that “representatives of the Trump transition approached” you about the job. The article said that “apparently” the discussions “did not advance very far.”⁹
 - a. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about the Solicitor General position? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.

RESPONSE: Yes. I had a conversation with then-Senator Sessions (before he was confirmed to serve as Attorney General) about the position, which was arranged by members of the presidential transition team.

- b. What did you discuss in your conversations with those individuals concerning the Solicitor General position?

RESPONSE: We discussed, among other things, the general responsibilities of the office.

⁷ S. Hrg. 108-878, at 49 (Apr. 27, 2004), <https://www.gpo.gov/fdsys/pkg/CHRG-108shrg24853/pdf/CHRG-108shrg24853.pdf>.

⁸ REV_00269074 (e-mail dated March 9, 2001).

⁹ Robert Barnes, *Trump Nominates D.C. Lawyer Noel Francisco as Solicitor General*, WASH. POST (Mar. 8, 2017), https://www.washingtonpost.com/politics/courts_law/trump-nominates-dc-lawyer-noel-francisco-as-solicitor-general/2017/03/08/c62b0774-040f-11e7-b9fa-ed727b644a0b_story.html.

- c. Did you express interest in the Solicitor General position under President Trump?

RESPONSE: I was uncertain about it, but I was interested in learning more. I ultimately decided that I wanted to remain a judge. I kept my Chief Judge—Chief Judge Garland—apprised about this in real time.

- d. Did you talk with anyone formally or informally affiliated with the Trump campaign, the Trump transition team, or the Trump Administration about any *other* positions in the Executive Branch under President Trump? This includes interviews, applications, formal conversations, or even informal talks, and it includes interactions with any informal advisors or intermediaries to the Trump campaign, Trump transition team, or the Trump Administration.

RESPONSE: I do not remember any such discussions, although it is possible that other positions were informally and briefly mentioned in passing. I decided I would remain a judge.

- e. If so, what other positions in the Executive Branch did you discuss with those individuals?

RESPONSE: Please see my response to Question 3.d.

- f. What did you discuss in your conversations with those individuals concerning any other positions in the Executive Branch?

RESPONSE: Please see my response to Question 3.d.

- g. During any of the conversations referenced above, did you express or imply your personal support for President Trump?

RESPONSE: No.

4. Do you believe it is important that the federal judiciary more accurately reflect the diversity of the United States?

RESPONSE: As I stated during the hearing, I believe my record demonstrates my commitment to addressing the dearth of minority law clerks in the federal judiciary. After hearing Justices Breyer and Thomas speak to Congress in 2010 about the lack of minority law clerks at the courts of appeals, I reached out to Black Law Students Associations at Yale and later Harvard Law Schools to speak to students about why and how to clerk, to provide advice and mentorship, and to demystify the application process. I am proud that, through these efforts, I have helped several African-American students obtain clerkships, including with other judges. I am also proud that more than a quarter of my law clerks have been minorities and that more than half of my law clerks have been women. Finally, I am proud that I have hired far more African-American law clerks than the percentage of African Americans in American law schools.

5. You've spoken often of your own efforts to hire women and racially diverse law clerks. What efforts have you made to ensure that *law schools* are more diverse?

RESPONSE: I am, of course, not a law school dean or admissions officer. My efforts have focused on law clerk hiring, and I believe I have made a big difference. I am very proud of that. Whether I am confirmed or not, I intend to continue those efforts.

6. In a December 12, 2001, draft of a speech to the Federalist Society, you wrote:

I can't leave the topic of judicial nominations without one final observation. This President strongly believes—and I share that belief—that federal judicial nominees should be persons of the highest reputation, having a sound understanding of the limited role of the judiciary and who represent the diversity of America. *I am sure that some will say that this last requirement—diversity—is not appropriate, that quality is determined not by external characteristics but by internal discipline and training. The President—and I—would agree heartily with that premise.* But at the same time, he recognizes that quality can be found in many colors and that those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve.¹⁰

- a. What did you mean when you said “diversity . . . is determined not to by external characteristics but by internal discipline and training”?
- b. What did you mean by “those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve”?

RESPONSE: The above quotes are from a speech given by White House Counsel Alberto Gonzales. Your first quote is from Judge Gonzales describing the apparent views of others. I think the words in the second quote speak for themselves as a reflection of the views of President Bush and Judge Gonzales.

7. You have repeatedly touted the diversity of the law clerks whom you have hired. Do you believe that diversity, including with respect to race and gender, is an important goal in law clerk hiring?

RESPONSE: I hire the best, and the best includes women and minorities. I believe it is important to break down barriers and to encourage and recruit law clerks who might not otherwise apply.

8. I understand that you have actively tried to recruit a wide pool of law clerk *applicants*, including by speaking at Black Law Students Associations and encouraging members to apply. Have you ever used race or gender as a consideration in *hiring* law clerks?

¹⁰ REV_00137649 (document draft dated Dec. 12, 2001) (emphasis added).

RESPONSE: Please see my answer to Question 7.

9. The Bush Administration frequently described the diversity of the individuals the President selected as judicial nominees. To your knowledge, was race or gender ever used as a factor in (1) your and/or other White House staff's initial selection of potential judicial candidates for President Bush's consideration; and/or (2) President Bush's ultimate decisions in nominating judges?

RESPONSE: President Bush wanted diversity in his nominees. During my service in the White House Counsel's Office, I followed the President's directions.

10. During your time in the Bush White House Counsel's office, a colleague e-mailed you to ask about the propriety of including individuals' ethnicity in a database of potential candidates to serve on various presidential boards and commissions.¹¹ You responded that this was permissible, but you said that "in a perfect world, no one would keep track."¹²

- a. Please explain why "in a perfect world, no one would keep track."

RESPONSE: In a perfect world, the legacies of racial discrimination would be fully behind us and no one would be judged or "tracked" by the color of their skin. We are not in that perfect world, and as I have explained repeatedly in my cases and at the hearing, the long march for equality for African-Americans is not over.

- b. Please explain why, in this context, you advocated against keeping track of racial diversity, but the administration kept track of and publicized the diversity of its judicial nominees, and you yourself have referenced and publicized the racial and gender diversity of your law clerks.

RESPONSE: I disagree with the premise of the question. I did not "advocat[e] against keeping track of racial diversity." The Administration kept track of and publicized the diversity of its judicial nominees because the President wanted diversity in his nominees. For my part, I have hired a diverse group of law clerks. I am proud of my record.

- c. Please explain why keeping track of ethnicity in this context is consistent with a view that race should not be used as a factor in personnel decisions.

RESPONSE: Please see my answer to Question 10.b.

11. During your nomination hearing, I quoted from an e-mail in which you stated that the Department of Transportation regulations at issue in *Adarand v. Mineta*¹³ "use a lot of

¹¹ REV_00135177 (e-mail dated Nov. 12, 2001).

¹² REV_00135177 (e-mail dated Nov. 13, 2001):

¹³ 534 U.S. 103 (2001).

legalisms and disguises to mask what in reality is a *naked racial set-aside*.”¹⁴

- a. Do you still believe that efforts to promote minority-owned businesses are “naked racial set-aside[s]”?

RESPONSE: The quote to which you refer arose in the context of my analysis of how the majority of the Supreme Court Justices would likely perceive and rule on the specific facts in a case under Supreme Court precedent. I was concerned that the Supreme Court would not uphold the program.

- b. Do you believe that efforts to promote student body diversity at institutions of higher education are “naked racial set-aside[s]”?

RESPONSE: As discussed during the hearing, the Supreme Court has made clear that higher educational institution may seek to promote diversity in certain ways. *See Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). But the Supreme Court has said that quotas or set-asides are not ordinarily permissible.

12. You said in another of your e-mails about *Adarand* that the Solicitor General should independently come to his own conclusion about whether to defend the constitutionality of Department of Transportation’s program.¹⁵ But you also stated that this arrangement was “admittedly not my ideal of how a unitary executive should work.”¹⁶ Under your “ideal of how a unitary executive should work,” would the President and/or his White House attorneys instruct the Solicitor General about what position(s) to take in cases challenging the constitutionality of federal laws or programs?

RESPONSE: I was talking about the traditional process, and about the perceptions on the outside of that process.

13. During your nomination hearing, I also quoted from an e-mail in which a colleague of yours referred to a “school of thought” within the Bush Administration that “if the use of race renders security measures more effective, then perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as *Korematsu [v. United States]*.”¹⁷ In response, you said you “generally favor effective security measures that are race-neutral.”¹⁸ But you said there was still an “interim question”—with which you and your colleagues “need[ed] to grapple”—of what to do before such a system could be developed.¹⁹ The subject line of these e-mails

¹⁴ REV_0028956 (e-mail dated Aug. 8, 2001) (emphasis added).

¹⁵ REV_00125572 (e-mail dated Mar. 26, 2001).

¹⁶ *Id.*

¹⁷ REV_00328554 (e-mail dated Jan. 17, 2002).

¹⁸ REV_00328552 (e-mail dated Jan. 17, 2002).

¹⁹ *Id.*

was “Racial Profiling.”²⁰

During your time in the White House Counsel’s office, did you ever support—in e-mails, internal memoranda, or internal conversations—the use of racial profiling as a security measure? If records of such support exist, please include them with your response.

RESPONSE: Beyond the email you reference, I have no specific recollection. As your question notes, my email states that I “generally favor effective security measures that are race-neutral.”

14. In the brief that the Bush Administration filed in *Grutter v. Bollinger*, the Solicitor General stated that “[m]easures that ensure diversity, accessibility and opportunity are important components of government’s responsibility to its citizens.”²¹ Do you personally agree with that statement?

RESPONSE: As noted at the hearing, the Supreme Court has held that higher education institutions may seek to promote diversity in certain ways. That was also President Bush’s position. Judicial independence prevents me from weighing in with a thumbs up or thumbs down on specific precedents, especially those that are the subject of ongoing litigation.

15. Do you personally agree that *diversity* is an “important component[] of government’s responsibility to its citizens”?

RESPONSE: Please see my response to Question 14.

16. On February 17, 2001, a colleague of yours at the Bush White House sent you an e-mail about potential candidates for the U.S. Court of Appeals for the Fifth Circuit. Your colleague described one candidate from Louisiana as “pretty good on finally ending all the busing.” From what is available in this document, it appears that you did not respond directly to this comment.²² “Busing” evidently refers to efforts to counter the persistent legacy of segregation in our schools.

- a. What was your reaction to a White House colleague who praised a prospective judicial nominee as “pretty good on finally ending all the busing”?
- b. Why would being “pretty good on finally ending all the busing” be considered a positive attribute for a prospective judicial nominee for the Bush White House?
- c. You’ve indicated that you believe *Brown v. Board of Education* was one of the great moments in the Court’s history. Did you view busing efforts to

²⁰ *Id.*

²¹ Brief for the United States, *Grutter v. Bollinger*, No. 02-241, 2003 WL 176635, at *8 (filed Jan. 17, 2003).

²² REV_00174567 (e-mail dated February 19, 2001).

integrate schools negatively?

RESPONSE: In the email to which you refer, it appears that a colleague forwarded unsolicited advice from an anonymous “acquaintance” who referred to “busing” in connection with a judicial candidate. I did not refer to that candidate in my response to my colleague. I have no specific recollection of that candidate or what my colleague’s anonymous acquaintance was referring to.

17. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.²³ Notably, the same study found that whites are actually *more likely* to sell drugs than blacks.²⁴ These shocking statistics are reflected in our nation’s prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.²⁵ In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.²⁶

- a. Do you believe people of color are disproportionately represented in our nation’s jails and prisons?
- b. What role do you believe the judiciary should play in addressing the racially disparate impact the criminal justice system has in American society?

RESPONSE: The statistics that you cite suggest a troubling disparity. As I stated in my testimony, the long march for racial equality in the United States is not over. I believe it is the responsibility of all participants in the criminal justice system, including judges, to be cognizant of racial disparities and to work diligently to ensure that our criminal justice system treats people fairly and equally.

18. The Eighth Amendment to the Constitution forbids “cruel and unusual punishment.”²⁷

- a. What is the standard for judging whether a punishment is cruel and unusual?
- b. Do you believe placing someone in a pillory is prohibited as “cruel and unusual”

²³ Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), <https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility>.

²⁴ *Id.*

²⁵ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), <http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons>.

²⁶ *Id.* at 8.

²⁷ U.S. CONST. amend. VIII.

pursuant to the Eighth Amendment?

- c. Do you believe branding an individual is “cruel and unusual” punishment proscribed under the Eighth Amendment?
- d. Do you believe placing an individual in solitary confinement is “cruel and unusual” punishment prohibited under the Eighth Amendment?
- e. You are a self-proclaimed originalist. At the time of our nation’s founding, placing someone in a pillory was not considered “cruel or unusual.” How do you square your mode of statutory and constitutional interpretation with a “claim that punishment is excessive is judged not by the standards prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.”?²⁸
- f. On June 20, 2002, you replied to an e-mail with the subject line: “Next Justice Watch.”²⁹ In the e-mail you discussed the *Atkins v. Virginia* decision, which was just handed down. You wrote, “Applying the original meaning of cruel and unusual’ would lead to one of two standards: (i) ‘cruel and unusual’ means ‘cruel and illegal,’ meaning that no statutorily authorized punishment is ‘cruel and unusual’; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality.”³⁰ Do you still believe that applying the original meaning to “cruel and unusual” means “cruel and illegal,” meaning that no statutorily authorized punishment is “cruel and unusual”; or (ii) the clause was meant to proscribe certain modes of punishment, but not to impose any standard of proportionality”?

RESPONSE: The meaning of “cruel and unusual punishments” under the Eighth Amendment is the subject of ongoing litigation and is likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue. I will note that any views expressed in the White House as an attorney 16 years ago do not necessarily reflect by views as a judge now.

19. In capital punishment cases, the race of the criminal defendant and of the victim plays a significant role in whether a defendant ultimately receives the death penalty. According to the American Civil Liberties Association, people of color account for 43 percent of

²⁸ *Atkins v. Virginia*, 536 U.S. 304, 311 (2002).

²⁹ REV_00147341 (e-mail dated June 20, 2002).

³⁰ REV_00147342 (e-mail dated June 20, 2002).

total executions since 1976 and 55 percent of individuals currently awaiting execution.³¹ In our meeting on August 23, 2018, we talked about racial disparities in the use of capital punishment and you spoke about how the jury selection process might partially account for the disproportionate rate of executions of people of color.

- a. Based on current data, do you believe that racial disparities still exist in the application of the death penalty?
- b. In *Gregg v. Georgia*, the Supreme Court said that the use of capital punishment is unconstitutional if it is “inflicted in an arbitrary and capricious manner.”³² Do you believe that the disproportionate application of the death penalty on African Americans is arbitrary and capricious?

RESPONSE: We should always want to know the cause of racial disparities in the criminal justice system. But questions regarding the application of the death penalty are the subject of ongoing litigation and are likely to come before me in some form. As I discussed at the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. In keeping with those principles and the precedent of prior nominees, I cannot provide my views on this issue.

20. According to the Constitution Accountability Center, “the U.S. Chamber of Commerce went 9-1 at the Supreme Court in the 2017-2018 Term, its best record in six years. Since 2006, the Chamber has won more than 70% of its cases at the Supreme Court, compared to 43% and 56% during comparable periods during the Burger and Rehnquist Courts.”³³ Do you believe those statistics damage the American people’s perception of the Supreme Court as a fair arbiter of justice? If not, please explain.

RESPONSE: As I explained at the hearing, “it builds overall confidence . . . in the judiciary to know you are getting a fair shake even when you lose,” and it is to our detriment if people believe cases are decided based on the identity of the parties. As I noted, I am “not a pro-plaintiff or pro-defense judge,” but rather a “pro-law judge” who has “ruled for parties based on whether they have the law on their side.”

21. You dissented in *SeaWorld of Florida v. Perez* arguing that the Department of Labor’s finding was arbitrary and capricious because it departed from longstanding administrative precedent that it not “regulate participants taking part in the normal

³¹ ACLU, Race and the Death Penalty, <https://www.aclu.org/other/race-and-death-penalty> (last visited Sept. 7, 2018).

³² *Gregg v. Georgia*, 428 U.S. 153, 188 (1976).

³³ Brian R. Frazelle, *Corporations and the Supreme Court: A Banner Year for Business as the Supreme Court’s Conservative Majority Is Restored—October Term 2017*, CONST. ACCOUNTABILITY CTR. (July 2018), https://www.theconstitution.org/think_tank/a-banner-year-for-business-as-the-supreme-courts-conservative-majority-is-restored.

activities of sports events or entertainment shows.”³⁴

- a. Is SeaWorld a corporation operating in the entertainment industry?

RESPONSE: Yes.

- b. Does the Department of Labor regulate the entertainment industry?

RESPONSE: Yes, as a general matter, but as I stated in my dissent in *SeaWorld*, “the Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014).

- c. The general duty clause of the Occupational Safety and Health Act provides: “Each employer [] shall furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees.”³⁵ Do you believe that the general duty extends to the entertainment industry?

RESPONSE: As I stated in my dissent in *SeaWorld*, “the Department of Labor, acting with a fair degree of prudence and wisdom, has not traditionally tried to stretch its general authority under the Act to regulate participants taking part in the normal activities of sports events or entertainment shows.” *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2014). Specifically, under the Department’s *Pelron* precedent, *Pelron Corp.*, 12 BNA OSHC 1833 (1986), the Department has followed the rule that “some activities, though dangerous, are among the ‘normal activities’ intrinsic to the industry and therefore cannot be proscribed or penalized under the General Duty Clause.” *SeaWorld* at 1219.

- d. You posed the following question: “When should we as a society paternalistically decide that the participants in these sports and entertainment activities must be protected from themselves—that the risk of significant physical injury is simply too great even for eager and willing participants?”³⁶
- i. Do you believe it is paternalistic for the Department of Labor to regulate the coal mining industry?

RESPONSE: No. The Department of Labor has traditionally regulated coal mining to ensure the safety of miners. These regulations are critically important and as a judge I will of course follow the law. During the hearing, I noted that my *SeaWorld* dissent dealt with a narrow class of employers in the sports and entertainment industries. As I explained in that dissent, “[t]he Department [of Labor] cannot reasonably distinguish close contact with whales at SeaWorld from tackling in the NFL or speeding in NASCAR. The Department’s sole justification for the

³⁴ *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1218 (D.C. Cir. 2004).

³⁵ *Id.* at 1207 (citing 29 U.S.C. § 654(a)(1)).

³⁶ *Id.* at 1217.

distinction is that SeaWorld could modify (and indeed, since the Department's decision, has had to modify) its shows to eliminate close contact with whales without going out of business. But so too, the NFL could ban tackling or punt returns or blocks below the waist. And likewise, NASCAR could impose a speed limit during its races. But the Department has not claimed that it can regulate those activities. So that is not a reasonable way to distinguish sports from SeaWorld. The Department assures us, however, that it would never dictate such outcomes in those sports because 'physical contact between players is intrinsic to professional football, as is high speed driving to professional auto racing.' Br. for Secretary of Labor 52. But that ipse dixit just brings us back to square one: Why isn't close contact between trainers and whales as intrinsic to SeaWorld's aquatic entertainment enterprise as tackling is to football or speeding is to auto racing? The Department offers no answer at all." *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202, 1221 (D.C. Cir. 2014).

- ii. Do you believe it is paternalistic for the Department of Labor to regulate the logging industry?

RESPONSE: See my response to Question 21.d.i.

- iii. Do you believe it is paternalistic for the Department of Labor to regulate the film industry?

RESPONSE: See my response to Question 21.d.i.

- iv. Do you believe it is paternalistic for the Department of Labor to regulate SeaWorld?

RESPONSE: See my response to Question 21.d.i.

- e. You also wrote: "To be fearless, courageous, tough—to perform a sport or activity at the highest levels of human capacity, even in the face of known physical risk—is among the greatest forms of personal achievement for many who take part in these activities."³⁷

- i. Do you believe that fearless, courageous, and tough people do not expect their employer to "furnish to each of [its] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees."? If not, please explain.

RESPONSE: State tort law helps ensure that workplaces are reasonably safe. Congress may also regulate workplace safety, as it has done. And federal agencies may also do so within the limits of the statutes and precedents.

- f. Do you think it is unreasonable for employees—regardless of what industry they work in—to expect to go home safely at night?

³⁷ *Id.* at 1218.

RESPONSE: No.

22. Do you believe it is paternalistic for the government to work to ensure—to the best extent practical and reasonable—that employees work in a safe environment?

RESPONSE: See my response to Question 21.d.i.

23. In *Garza v. Haragn*, you said several times that the government was somehow acting out of an interest to place this young woman in a better environment where she could “make the decision” about whether to have an abortion.³⁸

Putting aside for a moment the fact that the government had been looking for a sponsor for many weeks and could not find one, what is troublesome here is that this young woman had *already made* her decision. She had received a bypass from a judge in Texas against having to obtain parental consent, and she was found to be mature enough to make her own choice. She made her choice, and her pregnancy was advancing each day against her will.

- a. Why did you write your opinion as though she hadn’t decided what to do with her own body?

RESPONSE: I answered this question at the hearing, and my dissent speaks for itself.

- b. You wrote that everyone agreed, for purposes of this case, that Jane Doe had a right under *Roe* and *Casey* to obtain an abortion and that her status as undocumented did not diminish that right.

If this case involved a 17-year-old American citizen who was being held in a juvenile detention facility, and the authorities running the facility imposed multiple obstacles that forced the young woman to wait for several weeks before obtaining an abortion, is there any set of circumstances in which you might have found this was permissible under *Roe* and *Casey*?

RESPONSE: It would be improper for me as a sitting judge and a nominee to comment on hypothetical cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches.

- c. In your dissent in the *SeaWorld* case, you wrote that the Occupational Safety and Health Administration “paternalistically decide[d]” that trainers needed to

³⁸ *Garza v. Haragan*, 874 F.3d 735, 754-55 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting).

“be protected from themselves.”³⁹

When the government seeks to restrict women’s access to health care services—or to bar that access altogether—on the grounds that the restrictions are for the women’s own good, why isn’t that paternalistic?

RESPONSE: The *SeaWorld* cases involved interpretation of a statute and agency precedent. By contrast, the Supreme Court’s undue burden standard governs abortion cases. The two are unrelated.

24. In your dissent in *Garza*, you argued that the en banc majority was establishing “a new right for unlawful immigrant minors in U.S. Government detention to obtain immediate abortion on demand.”⁴⁰ You also stated that “[t]he majority’s decision represents a radical extension of the Supreme Court’s abortion jurisprudence.”⁴¹

- a. However, the Supreme Court’s decision in *Bellotti v. Baird* held that minors may fulfill alternative procedures to bypass a state’s parental consent requirement.⁴² An opinion by one of your D.C. Circuit colleagues made exactly this point⁴³ and countered your assertion that the court was creating “radical” “new right.” You did not cite *Bellotti* in your dissent. Why did you decline to heed or even address the Supreme Court’s precedent in *Bellotti* in your opinion in *Garza*?

RESPONSE: I answered this question at my hearing, and my dissent speaks for itself.

- b. In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court (in an opinion joined by Justice Kennedy) explained that the “correct legal standard” for the undue burden test is to “weigh[] the asserted benefits against the burdens.”⁴⁴ Your dissent in *Garza* does not appear to weigh the potential harms to Jane Doe resulting from a further delay against any claimed benefits from that delay, as *Whole Woman’s Health* requires. Why did you not adhere to precedent in this regard?

RESPONSE: I answered this question at the hearing and my dissent speaks for itself.

25. On several occasions in late 2001 and early 2002, you expressed enthusiasm for John Yoo as a candidate for a judgeship on the United States Court of Appeals for the Ninth

³⁹ *SeaWorld*, 748 F.3d at 1217.

⁴⁰ *Id.* at 752 (Kavanaugh, J., dissenting) (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² 443 U.S. 622, 643 (1979) (“[I]f the State decides to require a pregnant minor to obtain one or both parents’ consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained.” (footnote omitted)).

⁴³ *Id.* at 737 (Millett, J., concurring) (emphasis added).

⁴⁴ 136 S. Ct. 2292, 2310 (2016).

Circuit.⁴⁵

- a. What was the basis of your support for Mr. Yoo?
- b. What insights did you have as to whether he would be a good judge?

RESPONSE: While I do not have specific recollection of all comments that I made during my service in the White House Counsel's Office, I do recall that there was consideration of John Yoo as a potential nominee for the Court of Appeals for the Ninth Circuit. He was a highly respected academic at Boalt Hall and had worked as a respected staff member for the Senate Judiciary Committee. These comments were made in 2001 and early 2002, I believe.

26. Knowing what you know now about Mr. Yoo's role in drafting the infamous August 1, 2002, memorandum for the Office of Legal Counsel authorizing abusive interrogation techniques (as well as his role in drafting other related memoranda), do you still think that Mr. Yoo would have made a good judge?⁴⁶ Please do *not* respond simply by stating that you disagree with the August 1, 2002, memorandum's conclusions

RESPONSE: At this time and in this context, it would not be appropriate for me to opine on whether someone else would or would not make a good judge.

27. You also expressed enthusiasm in early 2002 for the prospect that Mr. Yoo could serve as the General Counsel for the Central Intelligence Agency.⁴⁷ Knowing what you know now about Mr. Yoo, do you think he would have performed that job responsibly?

RESPONSE: At this time and in this context, it would not be appropriate for me to opine on whether someone else would or would not make a good general counsel of the CIA.

28. On September 17, 2001, you wrote an e-mail to Mr. Yoo under the subject line "4A issue." You asked Mr. Yoo if there were "[a]ny results yet on the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence?"⁴⁸

According to a report by the Department of Justice's Inspector General, Mr. Yoo drafted a memorandum that day "evaluating the legality of a 'hypothetical' electronic surveillance program within the United States to monitor communications of potential

⁴⁵ REV_00206814 (e-mail dated Nov. 29, 2001); REV_00210698-99 (e-mails dated Jan. 10, 2002).

⁴⁶ U.S. Dep't of Justice, Office of Legal Counsel, *Standards for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download>.

⁴⁷ REV_00210698 (e-mail dated Jan. 10, 2001).

⁴⁸ REV_00023540 (e-mail dated Sept. 17, 2001).

terrorists.”⁴⁹ Mr. Yoo expanded upon that memorandum on October 4, 2001, and President Bush formally authorized what became known as the “Stellar Wind” program on the same date.⁵⁰ Alberto Gonzales, who was the White House Counsel at this time, subsequently stated that he believed that the September 17 and October 4 memoranda by Mr. Yoo “described as lawful activities that were broader than those carried out under Stellar Wind, and that therefore these opinions ‘covered’ the Stellar Wind program.”⁵¹

During your 2006 testimony before the Senate Judiciary Committee, you had the following exchange with Senator Leahy:

SENATOR LEAHY. What was your reaction—as Staff Secretary, you see virtually every piece of paper that goes to the President; is that correct?

MR. KAVANAUGH. On many issues, yes, Senator. Not everything, but on many issues.

SENATOR LEAHY. Did you see documents relating to the President’s NSA warrantless wiretapping program?

MR. KAVANAUGH. Senator, I learned of that program when there was a *New York Times* story—reports of that program when there was a *New York Times* story that came over the wire, I think on a Thursday night in mid- December of last year.

SENATOR LEAHY. You had not seen anything, or had you heard anything about it prior to the *New York Times* article?

MR. KAVANAUGH. No.

SENATOR LEAHY. Nothing at all? MR. KAVANAUGH. Nothing at all.⁵²

At your hearing last week before the Senate Judiciary Committee, you made similar representations.

⁴⁹ OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, A REVIEW OF THE DEPARTMENT OF JUSTICE’S INVOLVEMENT WITH THE PRESIDENT’S SURVEILLANCE PROGRAM 25 (July 2009), available at https://www.aclu.org/sites/default/files/field_document/71-6._exhibit_e_4.20.16.pdf.

⁵⁰ *Id.* at 25, 28.

⁵¹ *Id.* at 28.

⁵² S. Hrg. No. 109-435, at 42-43 (May 9, 2006), <https://www.congress.gov/109/chrhg/shrg27916/CHRG-109shrg27916.htm>.

- a. What was your understanding of the Bush Administration's activities, or of any proposed or hypothetical activities, that prompted you to write your e-mail on September 17, 2001? (If you are concerned that a response might contain classified information, then please consult with the appropriate classification authorities. Please note, as well, that most aspects of the Stellar Wind program have been declassified.)
- b. Did Mr. Yoo respond to your September 17, 2001, e-mail, either by e-mail or by phone? If he responded by e-mail, please produce that e-mail. If he responded by phone, please summarize what he said.
- c. Did you ever read Mr. Yoo's September 17, 2001, memorandum, his October 4, 2001, memorandum, or any drafts thereof? If so, please provide the dates or dates, to the best of your recollection, on which you read any such memoranda.
- d. Did Mr. Yoo ever describe the contents and/or conclusions of any such memoranda to you? If so, please provide the date or dates, to the best of your recollection, on which this occurred. A statement that you were not "read into" the Stellar Wind program is not a complete answer to the above questions.
- e. In light of the e-mail you sent to Mr. Yoo dated September 17, 2001, do you still stand by your statements to this Committee—both in 2006 and last week—about your knowledge of the warrantless-wiretapping program under President Bush?
- f. If you stand by your previous statements, please explain why your exchange with Mr. Yoo concerning "the [Fourth Amendment] implications of random/constant surveillance of phone and e-mail conversations of non-citizens who are in the United States when the purpose of the surveillance is to prevent terrorist/criminal violence" does not pertain to the warrantless-wiretapping program carried out under President Bush.

RESPONSE: As I explained at the hearing, in the wake of September 11th, it was "all hands on deck" in the White House and in the White House Counsel's Office. The email on September 17, 2001, mere days after the attacks, was sent in that context. Further, as I explained at the hearing last week, I testified accurately in 2006 that I did not learn about the secret Terrorist Surveillance Program, or TSP, until I read about it in a *New York Times* article in December 2005. I was not read into that program. As I understand it, the September 17, 2001, email was not referring to the TSP, which did not exist at that time.

29. In *Klayman v. Obama*, you wrote an opinion concurring in your colleagues' decision to deny rehearing en banc of Mr. Klayman's emergency petition, which sought review of a panel's decision to stay the district court's order pending appeal.⁵³ In your opinion

⁵³ *Klayman v. Obama*, 805 F.3d 1148, 1148-1149 (D.C. Cir. 2015) (Kavanaugh, J., concurring in denial of reh'g en banc).

concurring in the denial of rehearing, you stated that the bulk collection of Americans' telephone records "is entirely consistent with the Fourth Amendment."⁵⁴

Your colleagues' order had already stayed the district's court's partial injunction below, and you agreed that Mr. Klayman's petition should *not* be reheard. Additionally, when you wrote your opinion on November 20, 2015, the program that was the subject of Mr. Klayman's challenge was set to expire in just a matter of days pursuant to the USA FREEDOM Act, Pub. L. No. 114-23 § 109(a).

- a. Given these circumstances, did you find it *necessary* to write a separate opinion defending the constitutionality of this program?

RESPONSE: I answered that question at the hearing.

- b. If writing this opinion was not *necessary*, why did you do it?

RESPONSE: Please see my response to Question 29.a.

30. In your opinion in *Klayman*, you concluded in just one paragraph that, even if the collection of millions of Americans' phone records constituted a "search" for Fourth Amendment purposes, a warrant for such collection would not be required under the so-called "special needs" doctrine. You further stated that "[t]he Government's program for bulk collection of telephony metadata serves a critically important special need— preventing terrorist attacks on the United States." To support this assertion, you cited the entirety of the *9/11 Commission Report*, which is over 500 pages long.⁵⁵

- a. What specific portion of the *9/11 Commission Report* did you rely upon for your assertion that the *bulk* collection of telephony metadata (as distinct from the *targeted* collection of telephony metadata) helps to prevent terrorist attacks?

RESPONSE: The point of citing the *Report* was simply to make the obvious point that preventing terrorist attacks on the United States is a critically important goal. Of course, that goal must be balanced against the intrusion on privacy and liberty. As I said at my confirmation hearing, the Supreme Court's recent decision in *Carpenter* is a game-changer with respect to the latter consideration.

- b. If you did not rely on the *9/11 Commission Report* to support that assertion, what other data, reports, and/or statements by government officials or other parties? Please list the data, reports, and/or statements by government officials or other parties on which you relied.

⁵⁴ *Id.* at 1148.

⁵⁵ *Id.* at 1149; see *The 9/11 Commission Report* (2004).

RESPONSE: Please see my response to Question 30.a.

31. You also authored a concurrence in the denial of rehearing en banc in *Al-Bihani v. Obama*.⁵⁶ Your opinion (in the D.C. Circuit's slip opinion format) was 87 pages long. In it, you argued that international law does not constrain the President's wartime detention authority. However, you agreed with your colleagues on the very first page of your opinion that resolving the question of whether international law constrains the President's detention authority was not necessary to decide the case.⁵⁷ Additionally, the government itself argued that "[t]he authority conferred by the [2001 Authorization for Use of Military Force] is informed by the laws of war," and it repeatedly cited principles of international law in its brief.⁵⁸ Given these circumstances, why did you find it appropriate to write this lengthy opinion arguing that international law should play no role in construing the scope of the President's wartime detention authority?

RESPONSE: I wrote the concurrence to address "two fundamental questions" raised by Al-Bihani's argument that international-law principles prohibited his continued detention: "First, are international-law norms automatically part of domestic U.S. law? Second, even if international-law norms are not automatically part of domestic U.S. law, does the 2001 AUMF incorporate international-law principles as judicially enforceable limits on the President's wartime authority under the AUMF?" *Id.* at 9 -10. These questions raised numerous complex issues that required thorough analysis.

32. Please explain whether you believe that your opinions in *Klayman* and *Al-Bihani* are consistent with principles of judicial restraint.

RESPONSE: I do.

33. When we met in my office, I asked if you would be willing to provide a list of topics on which you authored substantive memoranda while serving as Staff Secretary for President Bush. You said you would take this request under consideration. Please provide a list of all subject areas in which you authored memoranda advising the President for or against any:

- a. Proposed legislation;
- b. Proposed constitutional amendment(s);
- c. Proposed White House policy initiative(s); and/or

⁵⁶ 619 F.3d 1, 9-53 (D.C. Cir. 2010) (Kavanaugh, J., concurring in denial of reh'g en banc).

⁵⁷ *Id.* at 9 ("The premise of Al-Bihani's plea for release is that international-law norms are judicially enforceable limits on the President's war-making authority under the AUMF. Even accepting that premise, Al-Bihani cannot prevail in this case.")

⁵⁸ Brief for Appellees at 22, *Al-Bihani v. Obama*, No. 09-5051, 590 F.3d 866 (filed Sept. 15, 2009); see *id.* at 24-25, 30-31, 40-42.

d. Proposed policy initiative(s) within the Executive Branch.

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk from July 2003 until May 2006—with the exception of a few covert matters—would have crossed my desk on its way to the President. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time. In terms of what work I did, my role was not to replace the President's policy or legal advisors, but to make sure that the President had the benefit of the views of his policy and legal advisors.

34. While serving as Staff Secretary, did you ever provide substantive input with respect to:

- a. President Bush's decision to support a constitutional amendment banning same-sex marriage; and/or
- b. Any speeches that President Bush gave about this subject?

If so, please describe the nature of any such input.

RESPONSE: Please see my answer to Question 33.

35. In his State of the Union address in January 2004, delivered while you were Staff Secretary, President Bush suggested he might support a constitutional amendment banning same-sex marriage.⁵⁹

- a. Were you involved in any way in the drafting of President Bush's 2004 State of the Union address? This includes authoring or editing memoranda, authoring or editing any drafts of the address, and any other relevant input.
- b. Were you involved in any way in the drafting of the line above from that address?
- c. Did you voice any objections internally to this statement?

RESPONSE: Please see my answer to Question 33.

36. In February 2004, shortly after he delivered the State of the Union address, President Bush formally declared his support for a constitutional amendment banning same-sex

⁵⁹ *Transcript of State of the Union*, CNN (Jan. 20, 2004), <http://www.cnn.com/2004/ALLPOLITICS/01/20/sotu.transcript.6/index.html> (“If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process.”).

marriage.⁶⁰

- a. Were you involved in any way in the drafting of any part of this speech? This includes authoring or editing memoranda, authoring or editing any drafts of the speech, and any other relevant input.
- b. Did you voice any objections internally to this decision?

RESPONSE: Please see my answer to Question 33.

37. While serving as Staff Secretary, did you ever provide substantive input with respect to:
 - a. The 2005 Detainee Treatment Act;⁶¹ and/or
 - b. President Bush's signing statement made in connection with that statute?

RESPONSE: As I explained at the hearing, as Staff Secretary, any issue that reached the President's desk, with the exception of a few covert matters, would have crossed my desk. That applies to the President's speeches, public decisions, and policy proposals, among other things. I do not recall all of the matters that crossed my desk during this time, and in terms of what work I did, my role was not to replace the policy or legal advisors, but rather to make sure that the President had the benefit of the views of his policy and legal advisors. As discussed at the hearing, I recall internal debate relating to the President's signing statement made in connection with the 2005 Detainee Treatment Act.

38. You were serving as Staff Secretary to President Bush when Hurricane Katrina hit. You have acknowledged traveling with President Bush to New Orleans and the Gulf Coast in the wake of the storm.⁶²
 - a. When did you become aware of the disproportionate impact that Hurricane Katrina would have, or had had, on communities of color?
 - b. What was your role as Staff Secretary in support President Bush during the Administration's response to Hurricane Katrina?
 - c. From your vantage point as Staff Secretary, did you think the Bush Administration performed adequately in responding to the impact of Hurricane

⁶⁰ *Transcript of Bush Statement*, CNN (Feb. 24, 2004),

<http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.transcript> ("Today, I call upon the Congress to promptly pass and to send to the states for ratification an amendment to our Constitution defining and protecting marriage as a union of a man and woman as husband and wife.").

⁶¹ Pub. L. No. 109-148, div. A, tit. X (2005).

⁶² Brett M. Kavanaugh, *From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist*, AM. ENTER. INST. 5 (Sept. 18, 2017), <https://www.aei.org/wp-content/uploads/2017/12/From-the-Bench.pdf>.

Katrina, particularly with regard to communities of color affected by the storm?

- d. Did you urge Bush Administration officials to take any steps to redress the impact of Hurricane Katrina that were not ultimately taken?
- e. Did you oppose or otherwise disagree with any particular measures regarding the Bush Administration's response to Hurricane Katrina?
- f. As the Bush Administration responded to Hurricane Katrina, did you ever advocate for or against any race-conscious remedy?

RESPONSE: Please see my answer to Question 33.

39. In a report authored by the White House Transition Project, you provided detailed descriptions of the role of the Staff Secretary.⁶³ You described the Staff Secretary as responsible for coordinating a rigorous fact-checking process for speeches by the President, and you stated that you would often personally "take questions back to the President for resolution about the wording of specific proposals or decisions."⁶⁴

On November 7, 2005, as Congress was considering legislation that would ban torture and cruel, inhuman, or degrading treatment of detainees, President Bush gave an address in Panama City in which he stated, "We do not torture."⁶⁵

Please describe what steps you took in order to fact-check that statement.

RESPONSE: I do not recall what specific steps were taken in connection with the specific address you mention from 13 years ago.

⁶³ See generally Kathryn Dunn Tenpas & Karen Hult, White House Transition Project, *The Office of the Staff Secretary* (Report No. 2017-3), <http://whitehousetransitionproject.org/wp-content/uploads/2016/03/WHTP2017-23-Staff-Secretary.pdf>.

⁶⁴ *Id.* at 13.

⁶⁵ Deb Riechmann, *Bush Declares: 'We Do Not Torture,'* WASH. POST (Nov. 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700521.html>.

**Questions for the Record from Senator Kamala D. Harris
Submitted September 10, 2018
For the Nomination of
Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States**

EXECUTIVE POWER

1. On August 15, 1998, when you were working with then-independent counsel Ken Starr to investigate President Clinton, you wrote a memorandum to your colleagues insisting that the President needed to be held accountable because you believed he had (1) “lied to the American people” and (2) tried to taint the independent counsel’s work with “a sustained propaganda campaign that would make Nixon blush.”¹
 - a. Do you still agree that it is a problem for a President to lie to the American people?
 - b. Do you continue to agree that it is a problem for a President to undermine the work and reputation of an independent counsel or a special counsel?

RESPONSE: To the extent this question pertains to current political events, I stated during the hearing that one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies.

- c. Do you have any reservations about accepting a nomination from a President who many people believe is untruthful to the public?
- d. Do you have any reservations about accepting a nomination from a President who has sought to undermine the work and reputation of a special counsel?

RESPONSE: As I stated at the announcement of my nomination and in my testimony before the Committee, I am deeply grateful to President Trump for nominating me, and I appreciate the careful attention that he devoted to the nomination process.

2. Multiple members of this Committee, along with many members of the public, have questioned whether you could impartially decide cases relating to special counsel Mueller’s investigation or other matters that could place President Trump in personal legal jeopardy. These questions derive from the views you have previously expressed on presidential investigations and liability, coupled with the fact that the President was presumably aware of these views when he chose to nominate you at a time when he is the subject of the special counsel’s investigation and faces other legal jeopardy. Are those who harbor such concerns about your impartiality being unreasonable?

RESPONSE: As I stated in the hearing, I am an independent judge, and I would decide all cases according to the Constitution and laws of the United States.

¹ Memorandum from Brett M. Kavanaugh to Judge Starr, *Slack for the President?* (Aug. 15, 1998), available at <https://www.politico.com/f?id=00000165-5810-d47f-a5f5-5a3c9a020001>.

LGBTQ RIGHTS / ANTI-DISCRIMINATION LAWS

3. Does the Constitution permit a state to pass a law saying stores cannot put a “whites only” sign in their windows?

RESPONSE: The Supreme Court has made clear on numerous occasions that discrimination against African Americans violates the Constitution and laws. The Supreme Court has also made clear that the government has a compelling interest in eradicating racial discrimination.

4. If a store owner does not want to comply with that law and wants to put up a whites only sign, can the store owner say his whites only sign is free speech and so he gets to keep it in his window?

RESPONSE: Please see my response to Question 3.

5. If a store owner claims his religious beliefs do not allow him to serve black customers, can the state still make him take down the whites only sign, or does he have a constitutional right to discriminate against black customers?

RESPONSE: Please see my response to Question 3.

6. What if a state has a law saying a store cannot put up a “heterosexuals only” sign in the window. Could the store owner say the sign is free speech and so he gets to keep it up?

RESPONSE: As I said in the hearing, the Supreme Court made clear in *Masterpiece Cakeshop* that the days of treating gay and lesbian Americans or gay and lesbian couples as second-class citizens or inferior in dignity and worth are over. As I discussed at the hearing, and in keeping with nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

7. Under your view of the Constitution, could the store refuse to serve gay and lesbian customers because of the store owner’s religious beliefs?

RESPONSE: Please see my response to Question 6.

8. Does the right to marry include ensuring that those who have that right may exercise it equally?
- a. So, if a county or state makes it harder for same-sex couples to marry than for heterosexual couples to marry, are those additional hurdles constitutional?

- b. If a county or state makes it harder for same-sex couples to adopt children, are those additional hurdles constitutional?

RESPONSE: Please see my response to Question 6.

9. In deciding how closely to look at discriminatory laws, there are two things the Supreme Court often considers: (1) is the group being discriminated against defined by immutable characteristics, and (2) has the group faced discrimination in the past. If a group satisfies those two characteristics, the Court has said it should be more suspicious of laws that harm them.

- a. Is being gay or lesbian an immutable characteristic?

RESPONSE: In *Obergefell v. Hodges*, Justice Kennedy noted that “[o]nly in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015).

- b. Have gay and lesbian Americans been subject to discrimination in the past?

RESPONSE: Yes, as well as in the present.

- c. Is being transgender an immutable characteristic?

RESPONSE: I would want to study that question in more depth before giving a definitive answer.

- d. Have transgender Americans been subject to discrimination in the past?

RESPONSE: Yes, as well as in the present.

- e. Given that LGBTQ Americans have faced discrimination in the past, do you believe they should be protected by federal antidiscrimination laws?

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

10. During your hearing, you stated that “[a]ll roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test” for substantive due process.

- a. How do you square that statement with the Supreme Court’s statement in *Obergefell* that, while *Glucksberg*’s approach “may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy”?
- b. During a speech last year, you stated that “*Glucksberg*’s approach to unenumerated rights was not consistent with the approach of the [Court’s earlier] abortion cases such as *Roe* [and] *Casey*.” Does that remain your view?

RESPONSE: In her 2010 confirmation hearing, Justice Kagan stated that “the best statement of the approach that the Court has used is actually Chief Justice Rehnquist’s statement in the *Glucksberg* case.” Justice Kagan also noted that “I particularly think of the *Glucksberg* case which does talk about that way the Court looks to traditions, looks to the way traditions can change over time, but makes sure—makes very clear that the Court should operate with real caution in this area, that the Court should understand that the liberty clause of the Fourteenth Amendment does not provide clear signposts, should make sure that the Court is not interfering inappropriately with the decisions that really ought to belong to the American people.” And, in her response to Questions for the Record, Justice Kagan stated that the *Glucksberg* test “would be the starting point for any consideration of a due process liberty claim.”

JUDGE KOZINSKI

11. Have you ever recommended any individual to clerk for Judge Kozinski? If so, how many individuals have you recommended and at what times did you make those recommendations?

RESPONSE: In my capacity as a law professor, it is possible that I talked to students who had applied or were interested in applying to clerk for Judge Kozinski and assisted them.

12. In the fall of 2017, at least 15 women came forward to accuse Judge Kozinski of sexual harassment and other workplace misconduct.² You clerked for Judge Kozinski. You worked with him for years on Justice Kennedy’s law clerk hiring process. You worked with him for several years on a book about judicial precedent. And in 2006, you even chose to have him introduce you at your D.C. Circuit confirmation hearing. Yet you said in our one-on-one meeting and again in your testimony before this Committee that you were “surprised to the point of shock” and felt “gut-punched” when you learned about the fall 2017 allegations against him.

² Matt Zapotosky, *Prominent appeals court Judge Alex Kozinski accused of sexual misconduct*, Wash. Post (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066fa1731ef_story.html?utm_term=.7d32190767bd; Matt Zapotosky, *Nine more women say judge subjected them to inappropriate behavior, including four who say he touched or kissed them*, Wash. Post (Dec. 15, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779e_story.html?utm_term=.0113ed27f8c9.

- a. One of the charges against Judge Kozinski was that he showed pornography to his law clerks.
 - i. Has Judge Kozinski ever shared pornography with you? If so, on what occasion(s) did he do so?

RESPONSE: No.

- ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski sharing pornography with friends, colleagues, or law clerks?

RESPONSE: I believe that I first became aware of these allegations when they became public and led to the 2008 – 2009 judicial misconduct investigation. I was unaware of any allegation that Judge Kozinski shared pornography with law clerks until I read the story in the news in late 2017.

- iii. Are you aware that in 2008, sexually explicit images that Judge Kozinski had maintained on a private server and shared with friends were inadvertently made public, resulting in a judicial misconduct investigation?³ If so, when did you become aware?

RESPONSE: I believe that I first became aware of this website when news of the website broke publicly in news outlets, which led to the 2008 – 2009 judicial misconduct investigation.

- b. One of the charges against Judge Kozinski was that he made inappropriate sexual comments to his law clerks.
 - i. Has Judge Kozinski ever made comments about sexual matters to you, either in jest or otherwise? If so, on what occasion(s) did he do so?

RESPONSE: I do not remember any such comments.

- ii. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski making inappropriate sexual comments to his law clerks?

RESPONSE: No.

- iii. Are you aware of a 2008 L.A. Times story reporting that Judge Kozinski had made inappropriate sexual comments to friends and associates, including his law clerks, over an e-mail listserv?⁴ If so, when did you become aware of the reports?

³ Scott Glover, *9th Circuit's chief judge posted sexually explicit matter on his website*, L.A. Times (June 11, 2008), <http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html>.

⁴ Scott Glover, *Judge e-mailed jokes to 'gag list'*, L.A. Times (Dec. 8, 2008), <http://articles.latimes.com/2008/dec/08/local/me-gaglist8>.

RESPONSE: I believe that I first became aware of this website when news of the website broke publicly in news outlets, which led to the 2008 – 2009 judicial misconduct investigation.

- c. One of the charges against Judge Kozinski was that he inappropriately kissed, touched, or fondled female law clerks and colleagues.
 - i. Prior to the fall of 2017, did you have any knowledge of Judge Kozinski inappropriately kissing, touching, or fondling anyone?

RESPONSE: No.

- ii. Prior to the fall of 2017, had you ever seen video—which has long been available on YouTube—of Alex Kozinski’s appearance on the game show, *The Dating Game*?⁵

RESPONSE: I believe that I have seen that video.

- iii. In the game show appearance, he forcibly kisses a woman on the mouth without her consent. Was that appropriate?

RESPONSE: I do not think that it was appropriate.

- d. The Judicial Council investigation into Judge Kozinski’s alleged misconduct was terminated when Judge Kozinski announced his resignation from the bench. Do you believe that the allegations against Judge Kozinski should be fully investigated by the federal government?

RESPONSE: That is an issue for the Judicial Conference and others to decide. Those bodies have the authority and responsibility for making such decisions.

LEON HOLMES’ NOMINATION

13. Publicly available information indicates that, while you worked in the White House Counsel’s Office, you were involved with the nomination of J. Leon Holmes. He was subsequently confirmed by a 51-46 vote of the U.S. Senate, and he now serves as a Senior United States District Judge of the United States District Court for the District of Arkansas. Holmes was a divisive nominee. Among other things, while Holmes’s nomination was pending, the press reported that Holmes had compared the abortion rights movement to the Nazis, writing: “The pro-abortionists counsel us to respond to [societal] problems by abandoning what little morality our society still recognizes. ... This was attempted by one highly sophisticated, historically Christian nation in our century—Nazi Germany.”⁶ While his nomination was pending, it also came to light that

⁵ Kozinski on the Dating Game (and Squiggy, too!), YouTube (posted Nov. 2, 2006), <https://www.youtube.com/watch?v=QdjCdbGueCU>.

⁶ Jennifer 8. Lee, *Attack on Judicial Nominee Leads Panel to Delay Vote*, N.Y. Times (Apr. 11, 2003), <https://www.nytimes.com/2003/04/11/us/attack-on-judicial-nominee-leads-panel-to-delay-vote.html>.

he had previously made a false and highly problematic statement about rape, saying: "Concern for rape victims is a red herring, because conceptions from rape occur with the same frequency as snow in Miami." On April 11, 2003, you received an email forwarding an article describing Holmes's statement about rape. The email flagged that Senator Pryor had said he would still vote to confirm Holmes, to which you responded "excellent."

- a. While Holmes's nomination was pending, were you aware of his statement comparing pro-choice advocates to Nazis?

RESPONSE: As I explained in response to questions for the record after my 2004 hearing, primary responsibility for judicial nomination was divided among eight associate counsels in the White House Counsel's Office. Each associate counsel was responsible for district court nominations from certain states. Judge Holmes's nomination was not one of the nominations I was primarily assigned during my service in the White House Counsel's Office. Nonetheless, and as I noted in responses to questions for the record in 2004, "[i]t is fair to say that all of the attorneys in the White House Counsel's office who worked on judges (usually ten lawyers) participated in discussions and meetings concerning all of the President's judicial nominations."

While I do not have specific recollection of all of the circumstances surrounding Judge Holmes's nomination, I believe I was aware of his prior comments at some point during the pendency of his nomination.

- b. Can rape lead to pregnancy?

RESPONSE: Yes.

- c. While working in the White House, did you ever recommend that Holmes's nomination be withdrawn?
 - i. If yes, why?
 - ii. If no, did you have any concerns about pressing forward with Holmes's nomination after you became aware of his false and offensive statement about rape? Did you convey those concerns to anyone in the White House? Did you have any concerns about pressing forward with Holmes's nomination after you became aware of his statement about pro-choice advocates? Did you convey those concerns to anyone in the White House?

RESPONSE: See my response to Question 13.a above.

DISABILITY RIGHTS

14. Senator Duckworth recently wrote an op-ed about how thankful she is that the Americans with Disabilities Act is in place to safeguard the basic rights she relies on to lead a full

life. During your confirmation hearing, you agreed with Chief Justice Roberts that you had no basis for viewing Section 2 of the Voting Rights Act as constitutionally suspect. Do you have any basis for questioning the constitutionality of the Americans with Disabilities Act?

RESPONSE: I have no basis for questioning the constitutional validity of the Americans with Disabilities Act.

15. In *Tarlow v. District of Columbia*, three adult women with intellectual disabilities who received medical services from the District of Columbia brought suit alleging that the District illegally authorized elective medical procedures to be performed on them in violation of their procedural and substantive due process rights guaranteed by the Fifth Amendment. The District, without considering the women’s wishes, forced two of them to have their pregnancies involuntarily aborted, and the third to undergo eye surgery. You ruled that consideration of the wishes of patients who are not and “have never had the mental capacity to make medical decisions for themselves” is not required by due process. In *Buck v. Bell* (1927), the Supreme Court upheld a statute permitting compulsory sterilization of a woman believed to have an intellectual disability—rather than “waiting to execute degenerate offspring for crime,” the Court said, “society can prevent those who are manifestly unfit from continuing their kind.”

- a. Is *Buck* still good law?
- b. Was *Buck* correctly decided? On what basis?

RESPONSE: As I said during the confirmation hearing, *Buck v. Bell* is a disgrace.

16. Just last year, the Supreme Court issued a unanimous opinion in *Endrew F. v. Douglas County School District*, a case about what kind of “educational benefits” the Individuals with Disabilities Education Act (IDEA) requires public schools to provide to students with disabilities. The Court settled the issue by rejecting the Tenth Circuit’s rule (previously applied by Justice Gorsuch) that schools need only provide barely more than *de minimis* benefits, and holding instead that, “[t]o meet its substantive obligation under the IDEA, a school must offer an individualized education program (IEP)] reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” The Court emphasized that schools must provide an IEP that is “appropriately ambitious in the light of” the student’s circumstances, and that while “[t]he goals may differ, . . . every child should have the chance to meet challenging objectives.”

- a. Do you believe this decision was a proper application of prior Supreme Court precedent on the Individuals with Disabilities Education Act?
- b. Do you believe that schools must proactively provide every child with a disability an IEP that rejects the “merely more than *de minimis*” standard and offer every

child the chance to meet challenging state academic objectives?

- c. In your view, should the Supreme Court have gone further and adopted the standard urged by Andrew's parents (i.e., one that would provide a child with a disability "opportunities to achieve academic success ... substantially equal to the opportunities afforded children without disabilities")?

RESPONSE: *Andrew F.* is a precedent of the Supreme Court entitled to respect under the law of precedent. Because the scope of that precedent is the subject of pending litigation that could come before me, I cannot provide a view on the additional questions asked above.

REPRODUCTIVE RIGHTS

17. You have given speeches that praise Chief Justice Rehnquist and Justice Scalia and comment favorably on their dissenting opinions in *Roe v. Wade* and *Planned Parenthood v. Casey*. Have you given a speech or published a writing that praises the majority in *Roe*, the controlling opinion in *Casey*, or the opinions of Justices Stevens or Blackmun in *Casey*? If yes, please provide the relevant passage(s).

RESPONSE: As we discussed at the hearing, both of the cases are precedents of the Supreme Court entitled to respect under the law of precedent, which is rooted in Article III. Importantly, *Roe* has been reaffirmed many times over the past 45 years, including in *Casey*, which specifically analyzed the *stare decisis* factors at great length and is itself a precedent on precedent. And lastly, I also praised Justice Kennedy at the hearing, calling him a "hero."

SPECIAL COUNSEL DISCUSSIONS

18. Between your work for independent counsel Ken Starr and your own research and writing, you have a wealth of knowledge about presidential investigations and related subjects. This is a time when your expertise is especially relevant and perhaps sought after.
- a. Have you had any contact with Robert Mueller or any members of his special counsel team—including through an intermediary—since March 1, 2017? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: Not to my knowledge. I may have seen or said hello to members of his team when passing them in the courthouse. I have had no inappropriate discussions.

- b. Since November 8, 2016, have you communicated with Attorney General Sessions, Deputy Attorney General Rosenstein, or anyone else in the U.S. Department of Justice—including through an intermediary—about Robert Mueller's investigation, special counsel investigations generally, recusals, or any other matters related to President Trump or the 2016 election? If yes, please

describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: To the best of my knowledge and recollection, I have not had inappropriate communications with the people identified on the subjects referenced in your question.

- c. Since November 8, 2016, have you communicated with anyone who represents or advises (or has represented or advised) President Trump or the White House—including through an intermediary—about Robert Mueller’s investigation; about any other investigations or legal matters that may implicate President Trump personally; or about presidential investigations, liability, or pardons generally? If yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: To the best of my knowledge and recollection, I have not had inappropriate communications with the people identified on the subjects referenced in your question.

NOMINATION PROCESS

- 19. Has President Trump, Don McGahn, or anyone else involved in the decision to nominate you, communicated with you about any of the following subjects since November 8, 2016:

- a. Your views on government regulation and administrative law?

RESPONSE: Consistent with the practice of past nominees, I prepared for this process through meetings and discussions with a number of people including Senators, Administration personnel, former law clerks, and friends. In preparation for the hearing and for meetings with individual Senators, I was asked questions similar to those posed by Senators in both settings. I have given no previews or hints on particular cases, and I have made no commitments on particular cases.

- b. Robert Mueller and his investigation, any other investigations related to the President, or any other legal matters that may implicate the President personally?

RESPONSE: Please see my answer to Question 19.a.

- c. The President’s pardon power?

RESPONSE: Please see my answer to Question 19.a.

- d. Recusals?

RESPONSE: Please see my answer to Question 19.a.

- e. For all subjects where your answer is yes, please describe the nature of the contact, including the identity of the person(s) you communicated with and the timing and substance of the communications.

RESPONSE: Please see my answer to Question 19.a.

20. On how many occasions have you and President Trump communicated with one another? (Note: This question encompasses communications in any form and at any time, including prior to his election and up to the present.) Please describe the nature of the contact, including the timing and substance of the communications.

RESPONSE: As discussed in my Senate Judiciary Committee Questionnaire, I interviewed with President Trump on Monday, July 2. I spoke to President Trump by phone on the morning of Sunday, July 8. On the evening of Sunday, July 8, I met with President Trump and Mrs. Trump at the White House. I also met and talked with the President on July 9 when he announced his intent to nominate me to the Supreme Court. Since my nomination, he has called me two times to offer words of encouragement. At no time did he ask for any promise or representation as to how I would rule in any case, and at no time did I offer any commitments.

21. Has anyone offered you advice or assistance in responding to the Questions for the Record? If yes, please identify all such individuals by name and affiliation.

RESPONSE: I drafted answers to these questions in conjunction with members of the Office of Legal Policy at the U.S. Department of Justice, others at the Department of Justice, the White House Counsel's Office, and my former clerks. My answers to each question are my own.

DIVERSITY

22. As a practical matter, do you believe that educational institutions are likely to be able to achieve meaningful racial diversity without recognizing and taking account of race?

RESPONSE: The extent to which educational institutions can take into account race and racial diversity is the subject of ongoing litigation in the courts. As I explained during the hearing, principles of judicial independence prevent me from providing hints, forecasts, or previews on issues that may come before me.

VOTING RIGHTS

23. More than fifty years ago (in *Reynolds v. Sims*), the Supreme Court wrote: "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." Do you agree?

RESPONSE: As I wrote in my unanimous opinion for the court in *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012), "[t]he Voting Rights Act of 1965 is among the most

significant and effective pieces of legislation in American history.” I noted that the Act’s “simple and direct legal prohibition of racial discrimination in voting laws and practices has dramatically improved the Nation, and brought America closer to fulfilling the promise of equality espoused in the Declaration of Independence and the Fourteenth and Fifteenth Amendments.”

24. The Supreme Court has long held that Section 2 of the Voting Rights Act, as amended in 1982, prohibits states from drawing voting districts that dilute the votes of minorities. Do you accept that interpretation of Section 2 as a matter of statutory *stare decisis*?

RESPONSE: As I explained at the hearing, principles of judicial independence make it inappropriate for me to give, as Justice Kagan described it at her confirmation hearing, a thumbs up or thumbs down on particular opinions. That said, I explained at the hearing that “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is not mere policy, but rather “part of the proper mode of constitutional interpretation.” If confirmed, I would respect the rules of *stare decisis* given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

25. At your confirmation hearing, Senator Klobuchar asked you whether you believe there is evidence of voter fraud. You refused to answer her question, saying you would only want to answer it based on the record in a particular case. You have previously presided over a case involving the constitutionality of South Carolina’s voter ID law, which was purportedly enacted based on concerns about voter fraud. Based on your experience as a judge, how prevalent is voter fraud?

RESPONSE: Judges are constrained by Article III to decide only cases or controversies. As I explained to Senator Klobuchar, I would want to see a record before me of the facts, circumstances, and evidence relating to any particular law or locality before issuing judgment. I discussed at the hearing how process protects us; having the briefs, the arguments of the parties, the record and appendices, and the deliberative process are essential elements of judicial impartiality.

26. As you know, states that have enacted voter-ID laws have argued that the laws are appropriate because they help combat voter fraud. We have seen sensationalized assertions, including from the President, suggesting that voter fraud is rampant, to the point that elections are being “rigged.” The President has claimed that he won the popular vote for the presidency if you deduct the “millions of people who voted illegally.” The claim is not supported by any verifiable facts. Rather, independent analyses by the non-partisan Brennan Center, leading scholars, and other credible sources have found virtually no confirmed cases of voter fraud in the 2016 election, let alone millions of them. More broadly, every credible study of the issue indicates that voter fraud—and particularly the sort of in-person voter impersonation fraud that photo-ID laws purport to address—is incredibly rare. By one count, between 2000-2014, there were just 31 credible instances of impersonation fraud nationwide out of more than a billion ballots cast. In fact, the President’s claims of massive fraud were contradicted by his own legal team, which argued in response to a recount request filed by Green Party

Candidate Jill Stein: “On what basis does Stein seek to disenfranchise Michigan citizens? None really, save for speculation. All available evidence suggests that the 2016 general election was *not* tainted by fraud or mistake.”

- a. Are you aware of any credible evidence indicating that “millions of people” voted illegally in 2016?

RESPONSE: As I stated during the hearing, principles of judicial independence compel me, as a sitting judge and nominee, to refrain from commenting on current events and political controversies.

- b. Is it appropriate for the President of the United States to make unsubstantiated, false allegations about the integrity of our electoral system?

RESPONSE: Please see my response to Question 26.a.

EDUCATION

27. Are charter schools fundamentally public schools that must uphold all federal education and civil rights laws as well as state sunshine laws? Please provide a YES/NO response followed by an explanation.

RESPONSE: It is my understanding that this issue is currently the subject of litigation in federal courts. As I discussed at the hearing, and in keeping with the nominee precedent, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this case/issue.

ACCESS TO JUSTICE

28. Do you believe there is a “justice gap” that results in low income Americans having a lack of access to justice?

RESPONSE: Ensuring that all Americans have equal access to justice is an important public policy goal. Although such policy goals are generally the purview of the elected branches of government, the Judiciary should do all that is appropriate to ensure that the words written on the façade of the Supreme Court—“Equal Justice Under Law”—are fulfilled. As a judge, I have always tried to ensure that my decisions are based on the law and the facts, and that I “do equal right to the poor and to the rich.”

29. What have you done in your career as a judge and as an attorney to help reduce this “justice gap”?

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, most notably Adat Shalom synagogue and Elian Gonzalez's American relatives.

Although I have spent the majority of my career in public service in a variety of capacities—many of which (including particularly my service on the D.C. Circuit) have limited my opportunities to engage in traditional pro bono legal work—I have sought, and will continue to seek, other avenues by which I can live up to the professional obligation of an attorney to help the less fortunate.

30. Have you ever represented or litigated a case on behalf of indigent clients? If so, please describe the circumstances of the case and client.

RESPONSE: As a lawyer in private practice, I represented several clients pro bono, without regard to their ability to pay, although I do not know that any of them ever qualified as indigent.

Specifically, I represented Adat Shalom, a synagogue in Bethesda, Maryland, in the United States District Court for the District of Maryland before Judge Andre Davis. The district court decided the case in 2000.

Plaintiffs sued Montgomery County and Adat Shalom, arguing that Montgomery County's zoning ordinance violated the Establishment Clause by granting religious entities an exemption from the county's special exception zoning process. Adat Shalom argued that the ordinance was neutral between religious and non-religious entities and thus constitutional. In particular, Adat Shalom contended that the ordinance exempted several non-religious entities in addition to religious entities and therefore did not reflect a preference for religion. Judge Davis ruled in favor of Adat Shalom and the county. The court found that the ordinance was neutral toward religion and consistent with the Establishment Clause.

I represented the American relatives of Elian Gonzalez in their petition for rehearing en banc in the U.S. Court of Appeals for the Eleventh Circuit, application for a stay in the Supreme Court of the United States, and petition for a writ of certiorari in the Supreme Court. The case came into my law firm through a contact made to an associate in the firm. The associate then asked me if I would be willing to work on the petition for rehearing en banc, stay application, and petition for a writ of certiorari. I agreed to do so.

The American relatives of Elian Gonzalez argued that the INS's decision to deny an asylum hearing or interview to Elian Gonzalez contravened both the Due Process Clause and the Refugee Act of 1980. The case also raised an important question about the appropriate amount of judicial deference that should be accorded to decisions of administrative agencies.

The Eleventh Circuit initially had granted an injunction pending appeal on the ground that the Gonzalez family had made a compelling case that the Refugee Act of 1980 requires a hearing for alien children who may apply for asylum. The Eleventh Circuit's subsequent decision on the merits (Judges Edmondson, Dubina, and Wilson) held, however, that the INS's contrary interpretation of the statute was entitled to deference from the courts. The Gonzalez family filed a petition for rehearing en banc, arguing, in essence, that the court's original decision granting an

injunction pending appeal had analyzed the issues correctly and that deference to the INS was not warranted. The Eleventh Circuit denied the petition for rehearing en banc. The Gonzalez family then filed an application for stay and petition for writ of certiorari in the Supreme Court. The Supreme Court denied both the application and the petition.

In 2000, I briefly represented a pro bono criminal defendant on appeal to the Fourth Circuit. The defendant had been convicted of conspiracy to harbor an alien and harboring an alien. I filed an appearance in the Fourth Circuit on behalf of the defendant but withdrew from the case before any briefs were filed. I withdrew because I had taken a new job at the White House in January 2001.

31. Many employers require their workers to give up the right to file lawsuits against their employer in court, as a condition of their getting the job. These kinds of agreements are known as forced arbitration clauses. More than 60 million American workers are bound by these kinds of agreements. Unlike a court proceeding, arbitration is hidden from public scrutiny and usually cannot be reviewed by a court. This means that arbitration keeps the public from learning about employers who violate the law by discriminating against workers, sexually harassing them, or cheating them out of wages. Do you have any concerns that the existence of such arbitration clauses may deny individuals access to the courts to enforce their rights under employment laws?

RESPONSE: Issues regarding arbitration clauses are frequently litigated before the Supreme Court. As I discussed at the confirmation hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on issues that might come before me. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on such issues.

QUALIFIED IMMUNITY

32. What is the basis for the qualified immunity doctrine? Is it statutorily or constitutionally based?

RESPONSE: It has been described as statutory, meaning that Congress could alter it. The qualified immunity doctrine is a legal issue that is currently the subject of litigation and may come before me. As I explained during the hearing, and in keeping with the practice of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me.

33. What is the common law basis for the doctrine, if any?

RESPONSE: Please see my response to Question 32.

34. Would you agree that it is a judicially created doctrine?

RESPONSE: Please see my response to Question 32.

35. Do you have any concerns that the current state of the qualified immunity doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their peers?

RESPONSE: Please see my response to Question 32.

36. Have you reviewed any studies or academic literature on the qualified immunity doctrine to determine whether the doctrine may be improperly barring too many plaintiffs from presenting their cases to a jury of their peers? If so, please indicate the studies or academic literature and provide a brief description.

RESPONSE: Yes. Also, please see my response to Question 32.

37. Do you have any concerns that the qualified immunity doctrine over-insulates state actors from consequences of unconstitutional conduct and therefore incentivizes further unconstitutional conduct? Is that a concern that a Supreme Court justice should take into consideration?

RESPONSE: Please see my response to Question 32.

38. According to a law review article by Will Baude, the Supreme Court rules more often for police officers in cases where they assert qualified immunity than for plaintiffs asserting constitutional violations? See Will Baude, *Is Qualified Immunity Unlawful*, 106 Cal. L. Rev. 45, 82–83 (2018). The article states that “nearly all of the Supreme Court’s qualified immunity cases come out the same way—by finding immunity for the officials.” Baude notes that of the thirty cases applying the standard since it was fully articulated in 1982, only two of them ruled for the plaintiffs. Based on your experience as a judge, what do you believe drives this disparity?

RESPONSE: Please see my response to Question 32.

39. Does the Court have a role in addressing issues of police brutality? If so, what is that role?

RESPONSE: No one should be subjected to police brutality. As a judge, I have twice reversed jury verdicts in cases where the jury had ruled for police officers where an officer killed someone. As a starting point, the role of the Court is to adhere to the judicial oath we all take to administer justice without respect to persons, do equal right to the poor and to the rich, and to faithfully and impartially discharge and perform all the duties incumbent upon judges under the Constitution and the laws of the United States.

TEXAS v. JOHNSON

40. At the hearing, you spoke with Senator Cruz about how important our First Amendment is. And you repeatedly lauded Justice Kennedy's opinion in *Texas v. Johnson*, calling it "one of his greatest opinions." In *Johnson*, which held Americans have a right to burn the flag under the First Amendment, Kennedy wrote "[i]t is poignant but fundamental that the flag protects those who hold it in contempt." Do you agree with Justice Kennedy?

RESPONSE: As I explained at the hearing, Justice Kennedy's opinion in *Texas v. Johnson* is a powerful example of judicial independence. He explained that, for judges, "[t]he hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result." 491 U.S. 397, 420–21 (1989). As to the specific legal issue resolved in *Texas v. Johnson*, that decision is a precedent of the Supreme Court entitled to the respect due under the law of precedent.

41. For a third straight season, NFL players have been demonstrating during the national anthem, kneeling in protest over police brutality and other forms of institutional racism. Do you believe that the First Amendment prevents Congress from passing a law requiring athletes to stand during the national anthem?

RESPONSE: As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain on commenting on current events and political controversies. It would likewise be improper for me as a sitting judge and a nominee to comment on cases or issues that could potentially come before me. Accordingly, I cannot provide my views on this issue.

42. In 1940, the Supreme Court in *Gobitis* upheld a Pennsylvania law requiring school children to stand and salute the flag at school. Three years later, in *West Virginia v. Barnette*, the Court overruled *Gobitis*—holding that people in the United States have a First Amendment right to refrain from saluting the flag. Justice Jackson wrote: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

President Trump said about the NFL players' peaceful protest "You have to stand proudly for the national anthem or you shouldn't be playing, you shouldn't be there, maybe you shouldn't be in the country." Do you think it is appropriate for the President to suggest an American citizen should be deported because he or she chose to speak out about racial injustice in our country? Can an American citizen be deported because he or she spoke out about racial injustice?

RESPONSE: Please see my response to Question 41.

ENVIRONMENT

43. In 2017, you dissented from the denial of rehearing en banc in *U.S. Telecom Association v. Federal Communications Commission*, a case about the FCC's net neutrality rule. A

three-judge panel of your court had upheld the rule. You contended that the panel's decision was wrong, and you unsuccessfully sought to have its ruling reconsidered by the entire D.C. Circuit.

- a. You first argued that the net neutrality rule was a so-called "major rule," and that agencies cannot adopt major rules without clear statutory authorization. What is your understanding of the "major rules" or "major questions" doctrine?

RESPONSE: As I discussed during the hearing, the major rules doctrine, or major questions doctrine, is rooted in Supreme Court precedent. The "godfather" of the major rules doctrine is Justice Breyer, who wrote about it in the 1980s as a way to apply *Chevron*. The Supreme Court adopted the doctrine in *FDA v. Brown & Williamson Tobacco Corp.* and applied it in *Utility Air Regulatory Group v. EPA* ("UARG"). *UARG* indicates that Congress may delegate various matters to the executive agencies to create rules, but on major questions of major economic or social significance, the Court expects Congress to speak clearly before such a delegation.

- b. As a practical matter, the "major questions" doctrine shifts power from administrative agencies to courts. It means that the court does not give the agency any flexibility to construe ambiguous statutes, which can make it impossible for agencies to regulate effectively in an effort to advance statutory goals. Do you acknowledge that the scope—and even the existence of—this doctrine is a matter of controversy among jurists?

RESPONSE: As I explained in my opinion in *United States Telecom Association v. FCC*, "[t]he key reason for the doctrine . . . is the strong presumption of continuity for major policies unless and until Congress has deliberated about and enacted a change in those major policies Because a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation—this kind of continuity is consistent with democratic values." 855 F.3d 381, 422 (D.C. Cir. 2017).

- c. Given your position in *U.S. Telecom*, is it fair to say that you have a more expansive view of the "major questions" doctrine than many of your colleagues? If not, why not? Please provide evidence.

RESPONSE: In my opinion in *United States Telecom Association*, I explained at length the history and purpose of the major rules doctrine, and its validity pursuant to Supreme Court precedent and supported by legal scholarship. See *United States Telecom Association*, 855 F.3d at 418–422.

- d. Since the New Deal, the Supreme Court has given Congress significant leeway to delegate regulatory decisions to expert agencies. Would you agree that your views of the "major questions" doctrine would make it a lot more difficult for agencies to take action and issue regulations?

RESPONSE: As I said in my response to Question 43.c and explained at length in my opinion in *United States Telecom Association*, my view of the major rules doctrine is rooted in Supreme

Court precedent and supported by legal scholarship. See *United States Telecom Association*, 855 F.3d at 418–422.

44. You also asserted in *U.S. Telecom* that net neutrality violates the First Amendment rights of internet service providers by preventing them from exercising editorial control over the content that passes through their networks. Commentators have described your position as one that embraces a very broad and activist conception of corporate speech rights.

- a. Do you believe it is within a judge’s role to take an issue like net neutrality out of the political process? Is this not an economic policy matter that is primarily the domain of the political branches, not courts?

RESPONSE: As I said at the hearing, I applied Supreme Court precedent in my opinion in *United States Telecom Association v. FCC*. As I explained in that case, “[t]he Supreme Court’s landmark decisions in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, (1994), and *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner Broadcasting II*), established that those foundational First Amendment principles apply to editors and speakers in the modern communications marketplace in much the same way that the principles apply to the newspapers, magazines, pamphleteers, publishers, bookstores, and newsstands traditionally protected by the First Amendment.” 855 F.3d 381, 427 (D.C. Cir. 2017). As I explained in my opinion, I believed that the regulation of internet service providers was subject to First Amendment limitations for the same reasons that the Supreme Court concluded that regulation of cable operators was subject to First Amendment limitations in the *Turner Broadcasting* cases.

- b. Given that you have already staked out such a clear position on the unconstitutionality of net neutrality, will you commit to recusing yourself from a case if the Supreme Court were to consider a future First Amendment challenge to net neutrality?

RESPONSE: As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on cases or issues that might come before me, including a possible recusal. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on a potential recusal.

SECOND AMENDMENT

45. In your *Heller II* dissent, you argued that judges must ignore public safety in evaluating gun safety laws under the Second Amendment.

- a. Does your position prioritize the rights of gun owners and gun carriers over the rights of the millions of Americans who live under constant threat of gun violence, including in schools, churches, and in the line of duty?

RESPONSE: I wrote in *Heller II* that “D.C.’s public safety motivation in enacting these laws is worthy of great respect.” 670 F.3d 1244, 1271 (D.C. Cir. 2011). I concluded that binding Supreme Court precedent did not allow the District of Columbia to enforce its ban on semi-automatic rifles or its handgun-registration program. Regardless, your question asks me to weigh in on a political or policy question. As I stated during the hearing, one of the central principles of judicial independence is that sitting judges and judicial nominees should refrain from commenting on current events and political controversies. To do so would lead the people to view judges as politicians instead of fair and impartial arbiters of the law.

- b. Can a judge ever consider the public safety justifications animating a gun safety law when evaluating the law’s constitutionality? If so, when?

RESPONSE: Please see my response to Question 45.a.

- c. Are judges ever permitted to consider the public safety justifications underlying other public safety laws when evaluating their constitutionality? If so, when?

RESPONSE: Please see my response to Question 45.a. Additionally, these questions asks me to present my views on cases that may come before me. As I discussed at the hearing, and in keeping with the nominee precedent of previous nominees, it would be improper for me as a sitting judge and a nominee to comment on such issues. Litigants in future cases are entitled to a fair and impartial judge who has an open mind and has not committed to rule on their cases in a particular way. Likewise, judicial independence requires that nominees refrain from making commitments to members of the political branches. In keeping with those principles and the precedent of prior nominees, I therefore cannot provide my views on this issue.

DISSENTS

46. You have the highest dissent rate on your circuit, and one of the highest dissent rates in the federal judiciary. During your tenure on the D.C. Circuit, you have dissented about sixty times. Over the same period, Chief Judge Garland, who is widely regarded as a model of judicial restraint and moderation, has dissented only six times. In other words, your colleagues think you reach the wrong result about ten times as often as Judge Garland. Given that cases and panels on the D.C. Circuit are basically assigned at random, what do you think accounts for this stark disparity?

RESPONSE: I cannot speculate about what causes different judges to write or join dissents at different rates. As I said in the confirmation hearing, Chief Judge Garland is a careful, hardworking, and great judge, and he and I have found common ground in the vast majority of cases.

47. You have dissented, for example, in ten cases involving labor and employment issues. And in all ten of those cases, you would have ruled against workers or labor, splitting with the majority of your colleagues, who ruled the other way. Can you identify

any instance in which your colleagues ruled against workers or labor and you wrote a dissent concluding that the position taken by workers or labor should prevail?

RESPONSE: As I explained at the hearing, I have tried as a judge always to rule for the party who has the best argument on the merits. That has included workers in some cases, businesses in others; coal miners in some cases, environmentalists in others; unions in some cases, the employer in others; criminal defendants in some cases, the prosecution in others. And I have a long line of labor cases ruling for the employees. *See, e.g., Veritas Health Services, Inc. v. NLRB*, 671 F.3d 1267 (D.C. Cir. 2012); *Raymond F. Kravis Center for Performing Arts, Inc. v. NLRB*, 550 F.3d 1183 (D.C. Cir. 2008); *United Food & Commercial Workers, AFL-CIO v. NLRB*, 519 F.3d 490 (D.C. Cir. 2008); *E.I. du Pont de Nemours v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007); *Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016).

48. You have dissented in ten cases involving environmental issues, and in all ten of those cases, you would have rejected the position favored by environmental groups, splitting with the majority of your colleagues, who took the pro-environmental position. Can you identify *any* instance in which your colleagues ruled against environmental interests and you wrote a dissent concluding that the environmentalists should prevail?

RESPONSE: As I explained at the hearing, I have ruled for environmental interests in some cases, and I have rule against environmental interests in other cases. In each case, I have followed the law.

49. Four more of your dissents involved issues relating to consumer protection. And again, in all four, you chose industry over consumers, splitting from the majority of your colleagues, who would have gone the other way. Can you identify *any* instance in which your colleagues ruled against consumer protection and you wrote a dissent endorsing the pro-consumer, anti-industry view?

RESPONSE: As I discussed at the hearing, I am an independent and pro-law judge. As a judge, I have ruled for the party who has the best argument on the merits regardless of whether some would characterize my view as pro-consumer or anti-industry. *See, e.g., Fort Dearborn Co. v. NLRB*, 827 F.3d 1067 (D.C. Cir. 2016); *Utility Air Regulatory Group v. EPA*, 744 F.3d 741 (D.C. Cir. 2014).

50. Ten of your dissents involved criminal law and procedure. And in nine of them, you would have ruled for the government or against the defendant, splitting from the majority of your colleagues, who would have gone the other way. The only exception was a case in which your pro-defendant position also happened to be the pro-gun position. Can you identify *any* other instance where your colleagues ruled for the government or against the defendant and you wrote a dissent concluding the defendant should prevail?

RESPONSE: With respect, that is not a fair way to describe my opinions. I point you to the testimony of Federal Public Defender AJ Kramer. I have written numerous opinions ruling in favor of criminal defendants on issues unrelated to firearms—and in a number of those cases, my colleagues would have ruled in favor of the government. *See, e.g., United States v. Nwoye*,

824 F.3d 1129 (D.C. Cir. 2016); *United States v. Williams*, 836 F.3d 1, 19 (D.C. Cir. 2016) (Kavanaugh, J., concurring); *United States v. Moore*, 651 F.3d 30 (D.C. Cir. 2011); *Valdes v. United States*, 475 F.3d 1319, 1330 (D.C. Cir. 2007) (en banc) (Kavanaugh, J., concurring). My opinion in *United States v. Jones*, 625 F.3d 766 (D.C. Cir. 2010) is also relevant to your question. In *Jones*, I wrote a dissent stating that the D.C. Circuit should grant rehearing to consider “the defendant’s alternative submission” that the installation of a GPS device on his vehicle by police constituted a physical encroachment that would be considered a search under Fourth Amendment precedent. *Id.* at 770. I observed that “[o]ne circuit judge has concluded that the Fourth Amendment does apply to installation of a GPS device.” *Id.* at 771. I also stated that “[w]ithout full briefing and argument, I do not yet know whether I agree with that conclusion.” *Id.* The Supreme Court subsequently granted certiorari to review the case. The defendant’s brief in the Supreme Court repeatedly cited my opinion, and the Court’s majority opinion ultimately adopted reasoning similar to the argument that I discussed in my dissent. See *United States v. Jones*, 565 U.S. 400 (2012).

STARE DECISIS

51. When you describe a decision of the Supreme Court as “precedent,” “important precedent,” or “precedent on precedent,” are you making a commitment not to overrule that decision?

RESPONSE: As discussed at the hearing, “the judicial power clause of Article III” and “Federalist 78” make clear that respect for precedent is “part of the proper mode of constitutional interpretation.” If confirmed, I would commit to respecting the rules of stare decisis given its centrality to stability, predictability, impartiality, and public confidence in the rule of law.

52. Justice Thomas testified at his Supreme Court confirmation hearing about the importance of stare decisis, stating, among other things: “There are some cases that you may not agree with that should not be overruled. Stare decisis provides continuity to our system, it provides predictability, and in our process of case-by-case decisionmaking, I think it is a very important and critical concept, and I think that a judge has the burden. A judge that wants to reconsider a case and certainly one who wants to overrule a case has the burden of demonstrating that not only is the case [incorrect], but that it would be appropriate, in view of stare decisis, to make that additional step of overruling that case.” Once on the Supreme Court, however, Justice Thomas has repeatedly suggested—in opinions and in public fora—that a constitutional precedent should be overruled when it is wrong, without giving stare decisis any weight. Which of these two competing approaches do you intend to adopt, if you are confirmed to the Supreme Court?

RESPONSE: Please see my response to Question 51.

ADMINISTRATIVE AGENCIES

53. The Supreme Court has long held that courts should defer to reasonable agency interpretations of ambiguous statutory provisions. You seem skeptical of that doctrine (the *Chevron* doctrine). For instance, you have said that you prefer not to acknowledge

that a statute is ambiguous even when the proper interpretation is a close question. You once suggested that, if you find a statute “60/40 clear,” you regard it as unambiguous. Why not leave those close calls to the expert agencies that have been tasked by Congress with implementing the particular statutes at issue?

RESPONSE: As I explained at the hearing, I have applied the *Chevron* doctrine in many D.C. Circuit cases over the last 12 years.

54. In a speech last year, you also said that when evaluating an agency rule, a judge should determine what the “best reading” of the underlying statute is—rather than determining whether the statute is ambiguous and deferring to the agency under *Chevron*.

- a. What prevents a judge from imposing his or her own policy preferences in determining the “best reading” of an ambiguous statute?

RESPONSE: As the Court explained in *Chevron*, the “judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.” *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). In reading a statute, a court must employ “traditional tools of statutory construction,” not a judge’s own policy preferences. *Id.*

- b. Why should the judge’s view of what is “best” be preferable to the view of the agency charged by Congress with implementing the statute?

RESPONSE: Please see my response to Question 54.a.

OTHER

55. In the period since you began your service on the U.S. Court of Appeals for the D.C. Circuit until the present, has any person, organization, corporation, or institution made any gift, loan, promise, or commitment of any kind (financial or otherwise) to you, to your spouse, or to your children in relation to the reduction or elimination of any debt owed by you or by your spouse or your children, including but not limited to credit card debt?

RESPONSE: Please see my response to Senator Whitehouse’s Question 11.

**Senator Chuck Grassley
Questions for the Record**

**John W. Dean
Former White House Counsel, President Richard M. Nixon**

1. You testified at length that, in your view, appointing Judge Kavanaugh to the Supreme Court would make “the most pro-presidential powers Supreme Court in the modern era.” Please identify all of the legal scholarship on which you relied to reach this conclusion.

ANSWER: The conclusion is mine, and I reached it based on my own years of study. Allow, me however, to correct the basis of your question. I would have liked to have “testified at length” about how Judge Kavanaugh’s appointment will result in “the most pro-presidential powers Supreme Court in the modern era;” in fact, I merely made a passing reference to this fact in my oral and written statements, when lamenting that conservatives no longer seek to restrain presidential powers. More specifically, I testified:

First, if Judge Kavanaugh joins the High Court, it will be the most presidential powers friendly Supreme Court of the modern era. Republicans and conservatives only a few year ago fought the expansion of presidential and executive powers. That is no longer true.

That report was drawn from the more complete statement which I submitted as part of my written testimony to the committee:

If Judge Kavanaugh is confirmed, I submit we will have the most pro-presidential powers Supreme Court in the modern era. I am old enough to remember when conservative orthodoxy fought the expansion of presidential and executive powers. The so-called Imperial Presidency was considered undemocratic. But conservatives have slowly done a one-hundred and eighty degree turn and concocted from whole-cloth what they call “a unitary executive theory,” using the sparse language of Article II of the Constitution to give presidents authority over the entirety of the Executive Branch, including supposedly independent regulatory agencies created by Congress and placed with the Executive Branch. With Judge Kavanaugh on the Court, we should anticipate a majority that will find it increasingly difficult to discover any presidential actions which they do not approve.

Since graduate school (before law school), I have been studying the American presidency – thus, about sixty years. I have an estimated 250 to 300 (if not more) books in my library directly and indirectly addressing presidential powers and I have read hundreds more. When researching the books and articles I have written, many addressing presidential powers, I have read countless law journals and legal opinions on the subject. To prepare my testimony I read news and magazine reports about Judge Kavanaugh, including a few dozen of his legal opinions, and approximately a half dozen speeches and articles he has published, to understand the nature of his thinking. I recall reading an August 21, 2018 *CRS Study*: “Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court,” because I took issue with a couple of items.* The *CRS* report acknowledges the judge leans toward executive power, although not as strongly as some scholars, e.g., Jen Kirby, “7 legal experts on how Kavanaugh views executive power,” *Vox* (Jul 11, 2018),** which I also read, and it is consistent with my views. One of the legal scholars on our panel, Peter Shane, also stated he concurred with my conclusion, which is obvious.

* <https://fas.org/sgp/crs/misc/R45293.pdf>

** <https://www.vox.com/policy-and-politics/2018/7/11/17551648/kavanaugh-mueller-trump-executive-power-legal>

**Senator Chuck Grassley
Questions for the Record**

**Lisa Heinzerling
Professor of Law, Georgetown University Law Center**

1. In response to questioning from Senator Coons about Judge Kavanaugh's opinion in *PHH Corp. v. Consumer Financial Protection Bureau*, you stated, "He would have struck down a major federal statute that was very new that set up the Consumer Financial Protection Bureau in which Congress had made a judgment about the degree of dependence and the structure of the agency" If a majority of the D.C. Circuit had agreed, would Judge Kavanaugh's opinion have led to the invalidation of the entire Consumer Financial Protection Bureau? Or the entire Dodd-Frank Wall Street Reform and Consumer Protection Act?

Heinzerling Response:

Judge Kavanaugh's opinion would have led to the invalidation of the provision of Dodd-Frank that made the Director of the Consumer Financial Protection Bureau subject to removal by the president only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(e)(3).

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September 24, 2018

Senator Charles Grassley
Chairman, United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Dear Senator Grassley,

I am writing in response to your letter of September 10, 2018, regarding written questions in connection with my testimony at the hearing on the nomination of Judge Brett Kavanaugh to be an Associate Justice of the Supreme Court. The answers to the questions are set forth below.

1. Accompanying this letter are the Procedures Governing The Appointment of Federal Public Defenders for the D.C. Circuit.
2. I was last reappointed as Federal Public Defender on September 24, 2018.
3. The term on which I was just reappointed expires on September 23, 2022—I have no idea if I will be considered for reappointment then.
4. a. Judge Kavanaugh did not sit on the Criminal Justice Act Panel Committee that considered my last reappointment.
 - b. See a.
 - c. See a.

I assume from questions 1-4, however, that they may relate to my reappointment as Federal Public Defender on September 24, 2014, the term prior to my most recent reappointment. Judge Kavanaugh was a member of The Criminal Justice Act Committee at that time. It never occurred to me to put that in my testimony, both because I did not remember that, and because it had nothing to do with any of the topics I discussed. I have no concern that there could be any appearance of a conflict of interest, because it is irrelevant.

5. I have seen Judge Kavanaugh at a number of courthouse events and occasionally on the street, and I believe that he has also on occasion attended our office holiday party. When I see him, we chat about our families, sports, and he always asks how our office is doing. I have not engaged in any sporting activities with him, nor have we attended any sporting events together.

6. I perhaps should have worded my written testimony more carefully to make clearer that the statement that "Judge Kavanaugh treats all litigants fairly" is my opinion. That opinion is based upon my personal experience in criminal cases and my observations of him at oral argument in both civil and criminal cases.

7. Again, I could have worded my written testimony more carefully to make clearer that the statements in the referenced paragraph are my opinions.

a. Those statements are my opinions.

b. Again, those statements are my opinions.

c. Again, those statements are my opinions.

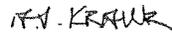
8. The only official resources I used was my work computer—no personnel were involved.

9. Sean Mirski assisted me in preparing my written testimony, but the substance of it is mine.

10. I gave Sean Mirski my written testimony to review before I submitted it.

Please just let me know if you have any more questions or need any more information.

Very truly yours,



A. J. Kramer
Federal Public Defender

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

P R O C E D U R E S
GOVERNING THE APPOINTMENT OF FEDERAL PUBLIC DEFENDERS

September 12, 1989

As Amended October 6, 1989

And As Further Amended September 1994

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- C. possess the ability to administer a Federal Public Defender's office effectively;
- D. possess, and have a reputation for:
 - 1. integrity and good character;
 - 2. the physical and mental health necessary to perform the responsibilities of the office;
 - 3. commitment to equal justice under law and vigorous representation of his or her client;
 - 4. outstanding legal ability and competence (evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, familiarity with courts and court processes);
- E. have a commitment to the vigorous representation of those unable to afford counsel; and
- F. not be related by blood or marriage to a judge of the United States Court of Appeals for the District of Columbia Circuit or to a judge of the District Court for the District of Columbia, within the degrees specified in section 458 of Title 28, United States Code at the time of the initial appointment.

The Criminal Justice Committee will resolve any questions regarding the qualifications of applicants.

CHAPTER 3. APPOINTMENTS ARE TO FOUR-YEAR TERMS

Section 3.01 - Applications by Federal Public Defender for Additional Four-Year Terms

Section 3006A provides that the Court of Appeals shall appoint a person to serve as Federal Public Defender to a four-year term. The statute does not prohibit appointment

The public requirements set forth in Section 4.01 shall advise all applicants that the United States Court of Appeals for the District of Columbia Circuit encourages applications from all qualified persons including women, members of minority groups, and individuals with non-interfering handicaps and that the Merit Screening Committee is searching for the best qualified person currently available for this position. If the Federal Public Defender has applied for an additional four-year term, the notice shall also state that the Federal Public Defender has applied for reappointment.

CHAPTER 4. PUBLIC RECRUITMENT FOR THE
OFFICE OF THE FEDERAL PUBLIC DEFENDER

During the last six months of each four-year term or when a vacancy occurs due to the resignation, removal, or incapacity of the Federal Public Defender, a public notice shall be issued announcing that applications are being accepted for a four-year term for the position of Federal Public Defender. The Criminal Justice Committee will seek qualified applicants who reflect the make-up of all such persons in the relevant national labor market and will use adequate means to publicize the existence of a vacancy to all segments of the relevant national labor market.

Section 4.01 - Public Notice

A. The Criminal Justice Committee shall publish a notice that applications are being accepted for a four-year term as Federal Public Defender in a national publication for the legal profession.

B. Whenever possible, the Criminal Justice Committee should advertise in publications from each of the following categories:

Section 4.04 - Submission of Applications

Applications must be received by the Criminal Justice Committee by the posted deadline.

Section 4.05 - Initial Consideration of Completed Applications

After the closing date for receipt of applications, the Criminal Justice Committee shall review copies of all timely applications. If the incumbent has applied for an additional term, the Criminal Justice Act Committee shall then recommend in writing to the Court of Appeals whether a Merits Screening Committee should be appointed pursuant to Sections 5.01 and 5.02 of these procedures. A recommendation not to appoint a Merits Screening Committee shall be supported by the results of the evaluation of the Federal Public Defender as set out in Section 7.01 and after evaluating the applications received in response to the recruitment efforts. If the evaluation demonstrates that the incumbent is held in high regard for the quality of his or her performance as the Federal Public Defender, and that there are no new applicants of similar caliber, the Criminal Justice Committee may recommend that the reappointment process proceed without the appointing of a Merits Screening Committee. In the event the Court of Appeals votes by a majority not to appoint a Merits Screening Committee, the Criminal Justice Act Committee shall proceed to seek the recommendation of the District Court pursuant to Section 6.01 of these procedures.

CHAPTER 5. MERIT SCREENING COMMITTEES

Section 5.01 - Appointment of Merit Screening Committees

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A. The Merit Screening Committee shall examine all applications and evaluate all qualified candidates, without regard to race, color, age, gender, religion, handicap, or national origin.

B. If a Federal Public Defender has applied for an additional four-year term, the Merit Screening Committee shall consider a summary of the results of the survey conducted pursuant to Section 7.01 A. of these procedures in its evaluation of the Federal Public Defender's application.

C. The Merit Screening Committee shall determine which applicants meet the standards set forth in Chapter 2 of these procedures. The Merit Screening Committee shall interview qualified applicants.

D. Upon completion of its duties set forth in Section 5.03 A., B., and C. of these procedures, the Merit Screening Committee shall submit a report to the Chief Judge of the Court of Appeals and to the members of the Criminal Justice Committee. This report shall constitute its recommendations concerning the appointment of the Federal Public Defender in that district, and shall include the following.

1. a description of actions taken pursuant to Chapter 4 of these procedures regarding a notice of the position;
2. a brief description of the professional background of members of the Merit Screening Committee;
3. the names of all persons who submitted applications and the names of those deemed by the Merit Screening Committee to be best qualified for appointment pursuant to Chapter 2 of these procedures;

by the Chair of the Criminal Justice Committee upon application by the Chief Judge of the District Court.

Section 6.02 - Suggested Procedures for the District Court

A. The Chief Judge of the District Court may circulate to the judges of the District Court copies of the Merit Screening Committee's report, or the recommendation of the Criminal Justice Act Committee required in Section 4.05, and the summary of the results of the survey if the Federal Public Defender has applied for an additional four-year term.

B. The District Court may wish to consider the Merit Screening Committee's report, or the Criminal Justice Committee's recommendation, and the summary of the results of the survey in arriving at its recommendation. The District Court may, in its discretion, conduct its own investigations and, if a Merits Screening Committee was appointed, interview any of the applicants who have met the qualifications set forth in Chapters 2 and 4 of these procedures. Within 30 days of receipt of the summary and report and recommendation, the District Court may either:

1. submit its written recommendation(s) to the Chief Judge of the Court of Appeals and to the Chair of the Criminal Justice Committee; or
2. notify the Chief Judge of the Court of Appeals and Chair of the Criminal Justice Committee that the District Court declines to make a recommendation.

C. If the District Court decides to submit a recommendation, its report should include, as relevant:

1. a written statement of the District Court's endorsement of the

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1. The identity of a respondent to the request for public comment shall not be divulged without prior consent.

B. The Criminal Justice Committee shall also conduct a written survey of the administration of the Office of the Federal Public Defender.

1. The survey should be distributed to District Court Judges and Magistrates, the Defender Services Division of the Administrative Office of the United States Courts, and other persons whose employment places them in a position to observe the performance of the Federal Public Defender, the quality of representation, the level of commitment to vigorous representation and service to clients, and administrative efficiency of the Office of the Federal Public Defender.

2. The identity of a respondent to the survey shall not be divulged without prior consent.

C. The Criminal Justice Committee may make such additional inquiry as it considers appropriate concerning the quality of services provided by the Office of the Federal Public Defender.

1. With the approval of the Chief Judge of the Court of Appeals, the Criminal Justice Committee may appoint consultants to assist it in its evaluation of the administration of the Federal Public Defender's office.

D. The Federal Public Defender shall be afforded an opportunity to review and respond to a statistical summary of the survey and a narrative summary of the responses to the request for public comment.

E. The Criminal Justice Committee should meet with the Federal Public Defender

of Investigation background investigation, unless the nominee is the current Federal Public Defender.

A. The Criminal Justice Committee's recommendations on the nomination to a vacancy, together with the recommendations received from the Merit Screening Committee, if one was appointed, and the District Court pursuant to Section 6.01 of these procedures, shall be presented at a regularly scheduled court meeting of the full Court of Appeals.

B. If the Criminal Justice Committee's recommendation is in accord with that submitted by the District Court, a vote of the Judges of the Court of Appeals may be conducted by mail or telephone. If any Judge of the Court of Appeals indicates a desire to discuss the appointment at a court meeting prior to voting, the vote will be conducted at a meeting of the Court of Appeals.

C. After voting to nominate a candidate to fill a vacancy,

1. the name of the nominee shall be submitted by the Chief Judge of the Court of Appeals to the Director of the Administrative Office of the United States Courts for a Federal Bureau of Investigation background investigation pursuant to United States Judicial Conference Regulations, Guidelines to Judiciary Policies and Procedures, Volume VII, Section A, Chapter 4, 4.02A, unless the nominee is the current Federal Public Defender.

2. The Administrative Office of the United States Courts shall send the completed Federal Bureau of Investigation report to the Chief Judge of the Court of Appeals, who shall refer the report to the Criminal Justice Committee on Federal

C. Should the Criminal Justice Committee, with the consent of the Chief Judge, decide to appoint consultants pursuant to Section 7.01 B. 1. of these procedures to assist it in considering the appointment of a Federal public Defender, it may provide any confidential information to the consultants, as it considers necessary or appropriate.

Section 8.02 - Appointment to a One-Year Term

28 U.S.C. § 3006A permits the Court of Appeals to allow a Federal Public Defender whose four-year term of office has expired to continue to perform the duties of his or her office until a successor is chosen or until one year passes, whichever is earlier.

A. Extension of the Federal Public Defender's term of office must be approved by a majority of the Judges of the Court of Appeals.

B. The expiration date of the term is defined in Section 3.01 B.

**Nomination of Judge Brett Kavanaugh, of Maryland, to be an Associate Justice of the
United States Supreme Court Questions for the Record**

**Questions for Professor Peter Shane, Professor Law Moritz College of Law, Ohio State
University**

Submitted September 10, 2018

QUESTIONS FROM SENATOR SHELDON WHITEHOUSE

1. If a sitting president is immune from criminal investigation, what potential issues would this raise with respect to the preservation of evidence, either documentary or testimonial?

The delay in any investigation of a potential criminal offense inevitably jeopardizes the recovery of evidence. It prolongs the opportunity for potential defendants to destroy inculpatory documents or electronic records. Delay makes it more likely that, even without corrupt intent, relevant material will be lost, memories will fade, and witnesses will become unavailable. In his opinion letter for Independent Counsel Kenneth Starr advising that incumbent presidents may be indicted, the late Professor Ronald Rotunda wrote: "As veteran prosecutors know, if a trial is delayed, then the memories of witnesses will fade, documents may be destroyed. It is an axiom that delaying a criminal trial - especially delaying for years - may result in, or be tantamount to creating, a de facto immunity." Letter from Professor Ronald D. Rotunda to the Honorable Kenneth W. Starr re: Indictability of the President (May 13, 1998), at 35, <http://digitalcommons.unl.edu/usjusticemats/32/>. These problems exist alongside the possibility, also noted by Professor Rotunda, that statutes of limitations, if not tolled, could prevent prosecution.

It is worth noting, however, that even the arguments raised for immunity from indictment do not support immunity from investigation. Indeed, in its opinion disputing the indictability of an incumbent President, the Justice Department's Office of Legal Counsel conceded the permissibility of a criminal investigation while the President is in office: "A grand jury could continue to gather evidence throughout the period of immunity, even passing this task down to subsequently empaneled grand juries if necessary." A Sitting President's Amenability to Indictment & Criminal Prosecution, 2000 WL 33711291, at *29 n. 36 (O.L.C. Oct. 16, 2000).

Thus, any immunity an incumbent President might have from investigation would be a *practical* immunity, but not a *legal* immunity. As a practical matter, a President could immunize himself from investigation if he were treated as having the constitutional power to control the discretion of federal prosecutors. This is one of the reasons why the "unitary executive" interpretation of Article II to which Judge Kavanaugh adheres is so dangerous. If upheld, it would allow an incumbent President to control the actions of any federal prosecutor, including a special counsel. (The president's lawyers have also implicitly relied on this theory of presidential discretion to argue that a president's official act in firing the FBI Director can never be the basis of an obstruction of justice charge—an unsound proposition, but one that no court has yet confronted.)

For this reason, I would like to reiterate the point made in my full testimony that Justice Scalia's solo dissent in *Morrison v. Olson*, 487 U.S. 654 (1988), while rhetorically powerful, is historically wrong. The founding generation did not understand Article II as giving the chief executive the power to control every exercise of discretionary legal authority vested in subordinate executive branch functionaries. This is especially true for criminal prosecutors. As

then-Judge Ginsburg noted in her dissent from the Court of Appeals decision that *Morrison* reversed:

Prosecution was decentralized during the federalist period, see L. White, *The Federalists: A Study in Administrative History* 408 (1948), and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis. *Id.* at 406–08. I cannot conclude that the framers, or the Congress that enacted the Judiciary Act of 1789, would have considered prosecution a function that must remain, sans exception, with the President and his men.

In re Sealed Case, 838 F.2d 476, 526–27 (D.C. Cir.), (Ginsburg, J., dissenting), *rev'd sub nom. Morrison v. Olson*, 487 U.S. 654 (1988).

I sought to amplify this point in my prepared testimony as follows:

The influential writings of John Locke a century earlier had made no distinction between executive and judicial power. In England, criminal prosecution was still largely a private function. A number of the early states authorized the legislative appointment of their Attorneys General or the judicial appointment of prosecutors. Connecticut is especially instructive. Its 1818 Constitution not only vested the executive power in the governor, but—like the federal Constitution—required the governor to take care that the laws be faithfully executed and gave the governor the equivalent of Opinions Clause authority. Yet Connecticut courts appointed prosecutors at least until 1854. Other early state constitutions explicitly gave their legislatures significant power over the selection of officers to perform what would usually be considered executive duties, again suggesting that the vesting of executive power did not entail that the executive branch be, in every respect, unitary. In its *Siebold* decision, the Court pointed to U.S. Marshals as officials who could be sensibly viewed as officers of either the executive or the judiciary; the same ambiguity surrounds prosecutors.

I hope this helps you and the Committee in your review of Judge Kavanaugh's nomination. Thank you for the opportunity to share my views on these questions.