

order. How would we be maintaining fidelity with our oath to support the Constitution and laws of the United States if we would not see to it that our law enforcement agencies, like ICE, which perform important and necessary duties along the border and throughout the country, were not there with our support to do the job we have asked them to do?

I know there has been a lot of discussion about this legislation, but at some point, patience ceases to be a virtue, and I expect that at some point there may well be an opportunity for one or more Senators to come to the floor and offer this legislation by unanimous consent. We will see who wants to be a constructive player in this process and who wants to object and obstruct our ability to fix this crisis at the border.

The PRESIDING OFFICER (Mrs. FISCHER). The Senator from Iowa.

FBI

Mr. GRASSLEY. Madam President, as we all know, the Federal Bureau of Investigation is a component of the Department of Justice. It is frequently described as the premier law enforcement agency in the country. The FBI's investigative authority has only grown—and grown tremendously—since its creation almost 100 years ago.

The Bureau now covers everything from kidnapping to counterintelligence, public corruption to bank robbery, and maybe a lot of things in between. Its power is very substantial, and its jurisdiction is far-reaching. It is a very important agency. Because of that, the FBI is subject to a lot of scrutiny.

Lately, we have had a lot of folks around here who seem to be mistaking the word “scrutiny” of the Bureau with the word “attacks” on the Bureau. Oversight of the FBI is not new, and it is a constitutional responsibility of the Congress at least to do oversight of every agency, and the FBI can't be an exception.

Far from being out of bounds, it is essential for the people's elected representatives in the Congress to put the FBI under a microscope. That is doubly true when the FBI gets involved in election controversies. The more power and the more secrecy the FBI claims in order to carry out its responsibilities, the more closely it ought to be watched.

Under our government, where the public's business ought to be public, that statement I just made ought to be common sense to everybody.

In its criminal work, the FBI is held accountable primarily by the court system. When the FBI secretly gathers information for intelligence purposes, the risk of impropriety skyrockets. If the information is never going to be presented in the courts, as in a criminal matter, who is going to be watching to make sure that the power to gather and use it is not being abused?

That is why we need vigorous congressional oversight and strong inspector general scrutiny. Lots of people say

that the FBI should be independent. I disagree. The FBI needs to be objective and nonpartisan. It should be insulated from undue political pressure.

If you want to call that independence, then I will use that word. It cannot be independent of accountability to the people's elected leaders. Civilian control of the military has always been a key safeguard to liberty for the same reason.

Freedom is at risk if the FBI can become a domestic intelligence service with free rein to weaponize information in secret. We have seen the risks of that in the text messages of Peter Strzok and Lisa Page. Their contempt for both the people of this country and, particularly, their elected leaders should disturb everyone.

Abuses of power at the FBI are why we have a term limit for the Director of the FBI. That term limit is not there to protect the FBI's independence; it is there to protect the people from the abuses that J. Edgar Hoover committed because he became too independent. He was accountable to no one. J. Edgar Hoover was feared by Presidents, Senators, and Congressmen. While the Director originally was selected by the Attorney General, in 1968, Congress made the position subject to Presidential appointment and Senate confirmation. In 1976, the Congress established a nonrenewable 10-year term limit for the Director. The Senate Judiciary Committee published a committee report on that bill that limited the 10-year term in 1974. It took a couple of years for the bill to pass the House.

In quoting from that report:

The purpose of the bill is to achieve two complementary objectives. The first is to insulate the Director of the Federal Bureau of Investigation from undue pressure being exerted upon him from superiors in the Executive Branch. The second is to protect against an FBI Director becoming too independent and unresponsive.

At the time, Congress was grappling with the fallout of Watergate and the decades of corruption and civil liberties abuses by that first Director of the FBI, J. Edgar Hoover—hence, the legislation. Congress knew the FBI had to be able to operate free of partisan interference but still be accountable to the duly elected leadership of the country, including all Members of Congress in their constitutional roles of oversight.

Certainly, the FBI Director can't be a politician's stooge, but history tells us that the bigger risk is in the other direction. Hoover abused his power to intimidate politicians and other political leaders. In a democracy, all of our leaders are ultimately accountable to the people. Access to information about what agencies like the FBI are doing is essential to holding them accountable. Transparency brings accountability. Abuses multiply in secret. That is why congressional oversight—Congress's responsibility under the Constitution—is key. The recent

report by the Department of Justice's inspector general is a very good example. It describes behavior having taken place in secret at the FBI that simply cannot be defended when having been brought to light.

First, the inspector general's report identified unacceptable messages that were sent on FBI mobile devices and computer systems by 5 of the 15 FBI employees on the Clinton email investigation. Those messages reeked with political bias. The report found that through such messages, these employees “brought discredit to themselves, sowed doubt about the FBI's handling of the Midyear investigation, and impacted the reputation of the FBI.” One message explicitly suggested a willingness to take official investigative steps for partisan reasons where there should be no partisanship. That message vowed to stop the election of Donald Trump.

Can you imagine an FBI employee in an official capacity, on official devices, taking that approach and then claiming not to be biased?

Because of that message, the IG was unable to conclude that the FBI's inaction on the Clinton email matter, for nearly a month prior to the election, was free from partisan bias.

The IG referred to the Bureau all five employees who had expressed partisan bias in order for the FBI to consider potential disciplinary action. Those messages showed a bureau plagued by arrogance, disrespect for policy and norms, and disgust of democratic accountability.

The report found that Director Comey's actions usurped the Department's authority. It called his decision of publicly announcing that Secretary Clinton would not be prosecuted as “extraordinary” and “insubordinate.” Director Comey acted as if he were accountable to no one except himself.

His subordinates also appeared content to ignore Bureau and Department policy and guidance—some, apparently, for their own personal interests.

The inspector general also recently concluded that the FBI's former Deputy, Andrew McCabe, authorized the disclosure of information to a reporter. That information confirmed the existence of an ongoing investigation. The IG report faulted McCabe for violating longstanding Department and Bureau policy. There is a public interest exception to that policy, but the inspector general found that McCabe authorized the disclosure of the information to make himself, McCabe, look good. Now McCabe claims Comey knew about it, but the FBI will not release information that supposedly supports that claim.

The FBI did little to nothing to address what now appears to be a culture of unauthorized contact with the media. Yet, somehow, every day, you read in the newspapers of the FBI's stiff-arming congressional oversight at every turn. Going to the newspapers is OK. When Congress wants the same information, no.

On the one hand, for example, the FBI stonewalls legitimate requests from the people's elected representatives, whom they "hate," in the words of Agent Strzok. On the other hand, FBI employees are accepting meals, sports tickets, and golf outings from reporters.

Now the Department and the FBI are refusing to comply with congressional subpoenas while lecturing Congress about the need to control access to sensitive information. While FBI agents are breaking the rules by talking to reporters left and right, the Bureau goes after legitimate whistleblowers who expose waste, fraud, and abuse, according to law.

The level of hypocrisy is staggering. The Bureau was investigating Secretary Clinton for her use of private communications to transact public business, but the employees in the Bureau who were handling that very investigation, including the Director, did exactly the same thing. Of course, these employees were not exclusively using a private server that was highly vulnerable to outside attacks. There truly is a difference in the order of magnitude, but the FBI's employees' behavior could help explain their apparent lack of enthusiasm for investigating Clinton's clear alienation of the Federal records. After all, how could they accuse her of violating the Federal Records Act when it appears they may also have been violating the very same law?

These are only some of the examples in the inspector general's latest report that we had a hearing on before my Judiciary Committee a couple of weeks ago.

Former Director Comey said his people "didn't give a rip about politics." We can see clearly now that that is just not true, at least not for five top individuals involved in this very high-profile, very important investigation. They now need to be held accountable for their actions. There is no place in the FBI for the kind of arrogance displayed in those text messages.

There is no place in the FBI for the kind of political timing and calculations made by the former Director. His subordinates openly discussed the enormous pressure they were under to close the Clinton email investigation before the political conventions. That was completely improper. Decisions at the FBI need to be made on merit, not on a political calendar.

The FBI needs to stay out of politics. It needs to submit to oversight. It needs to focus on doing its job to regain its reputation for objectivity. No one in this country is above the law. No one should be independent of accountability, especially not the FBI.

I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The senior assistant legislative clerk proceeded to call the roll.

Mr. MARKEY. Madam President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOMINATION OF BRETT KAVANAUGH

Mr. MARKEY. Madam President, the retirement of Supreme Court Justice Anthony Kennedy has created one of the most consequential vacancies on the High Court that this country has ever seen. There is a reason pundits have often referred to the Supreme Court as the "Kennedy Court." His influence on so many politically salient cases cannot be overstated. During his 30 years on the Supreme Court, Justice Kennedy was often the swing vote in decisions decided 5 to 4 on a divided bench of the Supreme Court. These include some of the most historic cases in our Nation's history: on a woman's right to choose, environmental protections, and same-sex marriage.

In 1992 Justice Kennedy wrote the controlling opinion in *Planned Parenthood v. Casey*, which reaffirmed *Roe v. Wade*'s core holding that the Constitution protects a woman's right to make a fundamental decision about her own healthcare, including a woman's right to choose.

In 2007 Justice Kennedy joined a 5-to-4 opinion in *Massachusetts v. EPA*, which held that greenhouse gas emissions are pollutants under the Clean Air Act and that the EPA must regulate those emissions under that statute, unless it can provide a scientific basis for its refusal to do so.

In 2013 Justice Kennedy wrote the majority opinion in *United States v. Windsor*, striking down as unconstitutional the Defense of Marriage Act because it violated basic due process and equal protection principles by extending certain Federal benefits to opposite-sex married couples but denying those same benefits to same-sex married couples.

In 2015 Justice Kennedy wrote the landmark opinion on same-sex marriage in *Obergefell v. Hodges*, which held that the Constitution guarantees same-sex couples the right to marriage.

In 2016 Justice Kennedy wrote the majority opinion in *Whole Woman's Health v. Hellerstedt*, which struck down a restrictive anti-choice law in Texas because it put an undue burden on women's access to reproductive healthcare services.

All of these decisions were decided by the single vote of a single Supreme Court Justice. That Justice was Anthony Kennedy. The Justice who succeeds Anthony Kennedy on the Supreme Court will have the opportunity to leave a deep and lasting mark on issues of the highest constitutional magnitude—issues that impact the health and freedom of women, the environment, LGBTQ rights, consumer protection, labor protections, affirmative action, criminal justice, gun safety, and more.

There are, without a doubt, important issues that will be decided. These will be the most important decisions of our generation, and this Supreme Court will be in a position to make that history.

Justice Kennedy's retirement handed President Trump the opportunity to fulfill his campaign promise to shift the balance of power on the Supreme Court to the far right on these issues. So the President dusted off a preapproved list of candidates for the High Court—a wish list prepared and presented to him by the ultraconservative Federalist Society. This is the same list of candidates that the Federalist Society assured President Trump would satisfy his litmus test of overturning *Roe v. Wade* and striking down critical healthcare protections. This is the same set of candidates from which the President selected Neil Gorsuch to fill the late Justice Antonin Scalia's seat—the seat that Senate Republicans stole when they violated all norms of Senate procedure by refusing even to hold a hearing on President Obama's nominee, Merrick Garland. In the short time that Justice Gorsuch has been on the Supreme Court, he has proven himself to be every bit of the far-right conservative Justice that the Federalist Society promised he would be.

DC Circuit Court Judge Brett Kavanaugh's name was on that Federalist Society's wish list as well. With the President's nomination of him to the Nation's highest Court, the President has found another Federalist Society-approved jurist whom he believes will pass his litmus test, and that should concern every single American.

Brett Kavanaugh is a judicial conservative's dream come true—a young jurist who will push the Supreme Court to the right for decades to come. His record on issues such as access to healthcare, consumer and environmental protections, and a free and open internet portend a rubberstamp for a conservative, right-wing agenda that would move us backward as a nation.

At the same time, it is very concerning that Judge Kavanaugh, who once served as Ken Starr's top deputy in the White Water and Monica Lewinsky investigations of President Clinton, has said that a sitting President should not be investigated for allegations of wrongdoing, should not be indicted or tried while he is in office, and should not have to participate in civil legal proceedings until he leaves office. This is from a veteran of Ken Starr's staff, leading the investigation against President Clinton throughout the Monica Lewinsky investigation. It is no coincidence that a President who now fears all of these legal actions would nominate a judge who could shield him from those legal actions.

Perhaps the gravest concern that the Kavanaugh nomination raises is the fate of *Roe v. Wade*. For 45 years, *Roe* has not just protected access to safe and legal procedures for women in our country, but it has affirmed the constitutional right to privacy. *Roe* recognizes that all Americans must be able to make their own personal health decisions based on their own beliefs, needs, and circumstances.